16 SHOTS AND A COVER-UP: LEGAL REMEDIES FOR OFFICER-INVOLVED CONSPIRACIES

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When insular silence becomes cultural, corruption becomes endemic. Though not unique to law enforcement, the harm that results when local police departments protect their own at the expense of society is immense. Too often the "blue wall of silence" stymies justice for citizens harmed by those sworn to serve and protect. This Note argues that certain steps are urgently needed to shatter conspiracies of silence within police departments. Specifically, legislatures should codify a modified version of civil conspiracy liability, prohibit secret settlements, and require that police misconduct settlements come from the local police budget. Further, police departments should adopt proactive ethical policing policies and actively reward officers who intervene against police misconduct. Absent a massive change in the internal cultural dynamics of police departments, misconduct will run rampant as officers are incentivized to remain silent rather than be deemed a rat. A modified version of civil conspiracy liability would be a powerful tool in the hands of citizens to ensure that the police serve and protect the whole community.

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* J.D. Candidate, University of Illinois College of Law. My sincerest thanks to the many kind and supportive humans who have enabled me to write this Note. Thank you to my wife, daughter, and family for your loving patience. Thank you to the beautiful community that is the South Side of Chicago whose loving embrace of my family transformed the way I see the world. Thank you to the talented editors of the University of Illinois Law Review for your support, advice, and friendship. May we continually press towards justice, accountability, and human flourishing. Black Lives Matter.

[W]here you see wrong or inequality or injustice speak out, because this is your country. This is your democracy—make it—protect it—pass it on. You are ready. Go to it.[1]

I. INTRODUCTION

Once. Twice. Again, and again, and again. Chicago teenager Laquan McDonald was shot sixteen times by Chicago police officer Jason Van Dyke on October 20, 2014.[2] But it was not until mid-November 2015—more than a year later—that the haunting video of the shooting was released to the public.[3]

Officer Van Dyke claimed that McDonald lunged at him with a knife, prompting Van Dyke to shoot and kill McDonald out of fear for his life.[4] Van Dyke's report was corroborated by other officers who were on-scene; they claimed McDonald "attack[ed] with a weapon."[5] Despite the narrative put forth by the officers, there were some who remained skeptical and initiated a thirteen-month dual-front battle that was fought in the court of public opinion and in a court of law.[6] The City of Chicago fought to keep the most visceral evidence of the shooting from public view: the dashcam video.[7] The City eventually lost in court[8] and braced for a backlash.[9]

The video went off like a bomb.[10] It completely belied the officers' reports; it showed McDonald walking away when he was shot, not attacking officer Van

1. Thurgood Marshall, Justice, U.S. Supreme Court, Commencement Address at the University of Virginia 12 (May 21, 1978) (transcript available at https://news.virginia.edu/sites/default/files/photos/Marshall.pdf [https://perma.cc/6NP7-D844]).

2. Michelle Garcia, *Chicago PD Finally Releases Video of Laquan McDonald's Shooting a Year After His Death*, VOX (Nov. 24, 2015, 7:30 PM), https://www.vox.com/2015/11/24/9795854/chicago-pd-finally-releases-video-of-laquan-mcdonald-s-shooting-a [https://perma.cc/T6CW-W9M8].

3. *Id.*

4. P.R. Lockhart, *Did Chicago Police Cover Up the Laquan McDonald Shooting? A Judge is About to Decide*, VOX (Jan. 17, 2019, 6:00 AM), https://www.vox.com/2019/1/17/18184158/chicago-police-conspiracy-trial-verdict-mcdonald-van-dyke.

5. *Id.*

6. *Id.*; *see also* Garcia, *supra* note 2.

7. *City Will Not Fight Release of Laquan McDonald Police Shooting Video*, ABC7 CHI. (Nov. 19, 2015), https://abc7chicago.com/news/laquan-mcdonald-police-shooting-video-ordered-to-be-released/1091677/ [https://perma.cc/88NH-D9YV].

8. *Id.*

9. Michelle Gallardo, *Community Leaders Calling for Calm Ahead of Laquan McDonald Video Release*, ABC7 (Nov. 21, 2015), https://abc7chicago.com/news/community-leaders-calling-for-calm-ahead-of-laquan-mcdonald-video-release/1094449/ [https://perma.cc/93BW-V5W4]; Jessica Glenza, *Chicago Officials Delayed Release of Laquan McDonald Shooting Video*, GUARDIAN (Jan. 1, 2016, 1:35 PM), https://www.theguardian.com/us-news/2016/jan/01/chicago-officials-delayed-release-laquan-mcdonald-shooting-video [https://perma.cc/X9UB-3JY8].

10. Jamie Kalven, *Chicago's Police Accountability Office Fails a Major Test*, INTERCEPT (May 29, 2019, 11:27 AM), https://theintercept.com/2019/05/29/chicago-police-civilian-oversight-police-shooting-ricky-hayes/ [https://perma.cc/HJP9-A5HJ].

Dyke as claimed.[11] McDonald's body can be seen laying on the ground, twitching as bullets continue to pierce his body until Van Dyke's gun is empty.[12] The backlash was swift and sustained: protests erupted,[13] the Department of Justice was called in to investigate,[14] City leaders were fired and lost re-election,[15] a civilian police oversight department was created,[16] and the mayor chose not to seek re-election[17] The most widely known consequence was the indictment[18] and conviction of officer Van Dyke on charges of murder and aggravated battery.[19] Perhaps the most underappreciated aspect of the entire saga, however, was the trial of three officers who were charged with—although ultimately acquitted of—criminal conspiracy for their role in corroborating Van Dyke's false account.[20]

While the actions of officer Van Dyke have understandably been the focus of much scrutiny,[21] his actions arose in a broader organizational and cultural

11. Lockhart, *supra* note 4.

12. *See id.*; Garcia, *supra* note 2; Chuck Goudie, Craig Wall, Liz Nagy, Ross Weidner & Christine Tressel, *Inspector General: Chicago Police Supervisors Pushed 'False Narrative' in Laquan McDonald Shooting*, ABC7 CHI. (Oct. 9, 2019), https://abc7chicago.com/ig-reports-on-laquan-mcdonald-shooting-released-by-city/5606100/ [https://perma.cc/L68S-EAWE].

13. *Michigan Avenue Protests in Aftermath of Laquan McDonald Video Release*, CHI. TRIB. (Nov. 28, 2015, 12:17 PM), https://www.chicagotribune.com/news/85173992-132.html [https://perma.cc/B34Q-NULR]. For transparency, the author notes his personal involvement in these protests.

14. *DOJ to Investigate Chicago Police Department*, WNYC STUDIOS (Dec. 7, 2015), https://www.wnycstudios.org/podcasts/takeaway/segments/doj-investigate-chicago-police-department [https://perma.cc/8BBB-YFR9]; *see also* Press Release, *Justice Department Announces Findings of Investigation into Chicago Police*, DEP'T JUSTICE (Jan. 13, 2017), https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-chicago-police-department [https://perma.cc/F3AC-CUMQ].

15. David A. Graham, *The Firing of Chicago Police Chief Garry McCarthy*, ATLANTIC (Dec. 1, 2015), https://www.theatlantic.com/national/archive/2015/12/garry-mccarthy-fired-chicago/418203/ [https://perma.cc/74QK-CZKC]; Stephanie Lulay & Erica Demarest, *Anita Alvarez Loses, Concedes State's Attorney's Race to Kim Foxx*, DNA INFO (Mar. 15, 2016, 11:10 PM), https://www.dnainfo.com/chicago/20160315/little-village/anita-alvarez-faces-tough-primary-fight-from-kim-foxx-after-laquan-shooting/ [https://perma.cc/W7D5-VAQJ].

16. Annie Sweeney, *Civilian Office of Police Accountability to Launch in September, Replace Long-Criticized IPRA*, CHI. TRIB. (Apr. 12, 2017, 8:38 PM), https://www.chicagotribune.com/news/breaking/ct-copa-start-date-met-20170412-story.html [https://perma.cc/VE6T-SX3C]. To be clear, a prior version of the oversight department already existed, and the Civilian Office of Police Accountability ("COPA") was created to replace that earlier version. *Id.* As will be detailed below, the Independent Police Review Authority ("IPRA") was a deeply flawed agency. Whether COPA is substantially better is still up for debate.

17. Dahleen Glanton, *Laquan McDonald Was Shot Down by Police, and He Took the Mayor's Career Down with Him*, CHI. TRIB. (Sept. 6, 2018, 5:00 AM), https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-rahm-emanuel-dahleen-glanton-laquan-mcdonald-20180905-story.html.

18. Anne Swaney, *Chicago Police Officer Jason Van Dyke Charged with 1st Degree Murder in Laquan McDonald Shooting*, ABC7 CHI. (Nov. 24, 2015), https://abc7chicago.com/news/cop-charged-with-1st-degree-murder-in-laquan-mcdonald-shooting/1097312/ [https://perma.cc/F7KP-UL88].

19. Aamer Madhani, *Chicago Cop Jason Van Dyke Sentenced to More Than 6 Years for Murder of Laquan McDonald*, USA TODAY (Jan. 18, 2019, 6:53 AM), https://www.usatoday.com/story/news/2019/01/18/laquan-mcdonald-jason-van-dyke-sentencing/2602213002/ [https://perma.cc/3SCC-UPL4].

20. Lockhart, *supra* note 4; Leah Hope, Liz Nagy & Alexis McAdams, *3 CPD Officers Accused of Cover-Up in Van Dyke Case Acquitted on All Counts*, ABC7 CHI. (Jan. 18, 2019), https://abc7chicago.com/3-cpd-officers-acquitted-in-laquan-mcdonald-shooting-cover-up-case/5092364/ [https://perma.cc/48WM-XWU6].

21. *See*, *e.g.*, Goudie et al., *supra* note 12.

context.[22] Like many others across the country,[23] the Chicago Police Department has been accused of harboring a "code of silence."[24] That code of silence was acknowledged by then Mayor Rahm Emanuel[25] but has remained under-examined. Given the importance of legitimacy to police work,[26] it is odd that there has not been a similar degree of attentiveness to the role of peer officers whose action (or inaction) enables wrongdoing.

Although there are several paths toward accountability for police officers who actively engage in wrongdoing,[27] there is limited recourse against officers whose actions enable that wrongdoing.[28] Civil conspiracy liability presents a promising alternative for those occasions where the wrongdoing of one or more officers is obscured by the actions of other officers. This Note argues that States generally, and Illinois in particular, should codify an altered version of civil conspiracy tort liability against individual officers and their departments when officers engage in behavior that obscures the wrongdoing of a fellow officer. Further, states should enact a slate of reforms to improve the efficacy of such a cause of action. A model statute is provided in the appendix below.

Part II of this Note examines the history of civil conspiracy liability, various attempts at police reform with the potential to address conspiracies of silence, and specific acts which demonstrate the existence of a broader culture of silence and obstruction within the Chicago Police Department ("CPD"). Part III analyzes attempts at rooting out obstructive tendencies within the CPD and illustrates the potential benefits and pitfalls of using civil conspiracy liability to accomplish these ends using specific examples of prior police involved cover-ups. Although this Note is primarily focused on Illinois law and uses the Chicago Police Department as a case study, the lessons that can be drawn are transferrable to other

22. For an in-depth analysis of how organizational culture relates to police misconduct, see generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

23. *Id.* at 454 (describing how police department solidarity leads to a "code of silence" in the face of misbehavior by follow officers).

24. Monica Davey, *Police 'Code of Silence' Is on Trial After Murder by Chicago Officer*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/us/chicago-police-code-of-silence.html [https://perma.cc/WE88-92YH].

25. Casey Toner, *Emanuel Decries Police Code of Silence. But City-Paid Expert Says It Doesn't Exist*, BETTER GOV'T ASS'N. (Sept. 24, 2018, 10:00 PM), https://www.bettergov.org/news/emanuel-decries-police-code-of-silence-but-city-paid-expert-says-it-doesnt-exist/ [https://perma.cc/8PS8-KNS8].

26. Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL FORUM 579, 579–85 (2016) (describing the importance of police legitimacy to the goals and authority of police as well as cooperation and compliance with police by members of the public); *Race, Trust and Police Legitimacy*, NAT'L INST. JUST. (Jan. 9, 2013), https://nij.ojp.gov/topics/articles/race-trust-and-police-legitimacy [https://perma.cc/8XJF-43SK].

27. *See*, *e.g.*, Armacost, *supra* note 22, at 467–69 (describing the practical difficulties plaintiffs face when suing the police); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775–76 (2004) (describing sealed settlements of police misconduct); Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9 (2016) (describing federal civil rights litigation as an instrument of combating police misconduct).

28. *See* Elliott Riebman, *How and Why a Code of Silence Between State's Attorneys and Police Officers Resulted in Unprosecuted Torture*, 9 DEPAUL J. FOR SOC. JUST. 1, 4 (2016).

cities and states. Part IV recommends the use of civil conspiracy liability as a tool for eradicating the culture of silence that exists in the Chicago Police Department and elsewhere.

II. BACKGROUND

For the powerful it is often self-evident that "[e]quity will not suffer a wrong to be without a remedy."[29] Yet, for too many, such a proposition is the opposite of their lived experience; indeed, it is the central complaint implicit in the activists' cry: no justice, no peace.[30] Civil conspiracy liability, if it is to be an answer to such a charge, must be capable of delivering a remedy to an unrighted wrong. This Part provides the backdrop to the subsequent analysis[31] by describing the history of civil conspiracy, its elements, and how civil and criminal conspiracy differ in key aspects.[32] Next, this Part describes officer-involved conspiracies in Chicago to demonstrate that such conspiracies are problematic enough—both in terms of frequency and ferocity—to warrant new solutions.[33] This Part concludes by describing historic and ongoing efforts aimed at police reform.[34]

A. Civil Conspiracy Liability

The concept of conspiracy has its roots in thirteenth and fourteenth century English common law; it was not until the eighteenth century, however, that the concept of civil conspiracy was widely accepted.[35] Originally, conspiracy was a criminal charge and "focused on combinations to obstruct justice or falsely indict or acquit an accused."[36] At early common law, *criminal* conspiracy quickly outgrew its original focus on obstruction of justice and false indictment or acquittal.[37] It was not until the second half of the eighteenth century, however, that conspiracy was widely understood to include *civil* conspiracy.[38] Because American conspiracy law "borrowed heavily" from its English common law counterpart, it is useful to understand the context of common law conspiracy.[39]

29. Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 273 (1991).

30. *Demonstrators Protest Laquan McDonald Shooting*, CNN, https://www.cnn.com/videos/us/2015/11/26/laquan-mcdonald-chicago-protests-young-pkg-newday.cnn/video/playlists/chicago-protests/ (last visited Aug. 23, 2021) [https://perma.cc/SG4K-2FS3]. The popular rallying cry "no justice, no peace" can be heard momentarily. *Id.*

31. *See infra* Part III.

32. *See infra* Section II.A.

33. *See infra* Section II.B.

34. *See infra* Section II.C.

35. Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1, 6 (2005) (providing background on civil conspiracy law).

36. *Id.*

37. Brand L. Cooper, *Civil Conspiracy and Interference with Contractual Relations*, 8 LOY. L.A. L. REV. 302, 305 (1975); Pritikin, *supra* note 35, at 6–8.

38. Cooper, *supra* note 37, at 305. Civil conspiracy is described *infra* at Section II.A.2.

39. Pritikin, *supra* note 35, at 6.

1. Evolution of the Doctrine

Under early common law, criminal conspiracy was an independently actionable crime.[40] That is, criminal conspiracy was (and remains) an inchoate offense that could be punished in addition to an underlying offense and regardless of whether the underlying offense was successfully committed.[41] A broad definition of common law criminal conspiracy was (and is) two or more people who agree—a meeting of the minds—on either an unlawful object or course of action, or agree on a lawful object or course of action to be accomplished by unlawful means.[42] No overt act was required; to establish guilt, it was sufficient to show combination for an illegal purpose.[43] In fact, "[a]t common law, the acts themselves were considered to be merely evidentiary and were used only to prove the conspiracy" because "[t]he unlawful combination is . . . the gist of the crime."[44]

The first conspiracy statute was passed during the reign of Edward I in 1293, but lacked a formal definition of conspiracy.[45] The Definition of Conspirators was the first attempt at defining conspiracy and "codified pre-existing principles of common law relating to unlawful combinations" and provided the basis for the development of conspiracy as a doctrine, including civil conspiracy, during the next several hundred years.[46] As defects in the cause of action emerged the judiciary responded by developing new remedies, such as malicious prosecution.[47] These developments eventually led to the view that malice and damages were the primary elements for a malicious prosecution claim as opposed to a simple combination for criminal conspiracy.[48] Today, English law recognizes both criminal and civil conspiracy, but imposes different requirements for each.[49] Notably, criminal conspiracy requires only an agreement to act unlawfully, whereas the tort of civil conspiracy requires damage result from the agreement.[50]

2. Modern Elements of Civil Conspiracy

The American legal system follows the broad "outlines of English law on the subject of civil conspiracy."[51] Considering that "American tort law is a direct descendent of English tort law concepts[,]" this is unsurprising.[52] As in the English system, civil conspiracy requires a tort that results in damages in order to be actionable.[53] In other words, "there is no recovery for conspiracy alone without

40. *Id.* at 7.
41. *Id.*
42. Cooper, *supra* note 37, at 305; *cf.* Pinkerton v. United States, 145 F.2d 252, 254 (5th Cir. 1944).
43. Cooper, *supra* note 37, at 305. Unless changed by statute, this is still the law. *Id.*
44. *Id.* at 306.
45. Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 6 (1999).
46. *Id.* at 6–7.
47. *Id.* at 7.
48. *Id.* at 8.
49. *Id.* at 8–9.
50. *Id.*
51. *Id.* at 9.
52. *Id.*
53. *Id.*

a completed, underlying tort."[54] The damage requirement was imported directly from *Savile v. Roberts* [55] in *Adler v. Fenton*.[56] Citing *Adler*, Judge Learned Hand later noted that "it is well settled that the civil liability does not depend upon the confederation . . . but upon the acts committed in realization of the common purpose."[57]

The elements of civil conspiracy, generally, are as follows: "(1) two or more persons; (2) an unlawful object or a lawful object to be accomplished by unlawful means; (3) an agreement or meeting of the minds on the object or course of action; (4) one or more wrongful acts; and (5) damage resulting therefrom."[58] Thus, civil conspiracy is not, in and of itself, a tort. It is widely accepted in the American system "that the essence of an action for civil conspiracy is not the combination but the acts and damage resulting therefrom"[59] Indeed, civil conspiracy has been called a "non-tort."[60]

If not a tort, what is civil conspiracy? Martin H. Pritikin argues that "it is a theory of vicarious liability that renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he or she was a direct actor and regardless of the degree of his or her activity."[61] Because the acts of one co-conspirator are considered to be the acts of each co-conspirator, plaintiffs can sue every co-conspirator, thereby enlarging the pool of defendants for potential recovery.[62] Other benefits that plaintiffs may reap against co-conspirators include an exception to the hearsay rule,[63] potential exercise of long-arm jurisdiction,[64] or, possibly, tolling of applicable statutes of limitations.[65] These have been described as the "*procedural* features of civil conspiracy."[66] The "*substantive* feature of civil conspiracy," argues Pritikin, is "the ability of a plaintiff to hold co-conspirators jointly liable."[67]

54. *Id.*

55. 91 Eng. Rep. 1147 (1698).

56. 65 U.S. (24 How.) 407, 410 (1860) ("To enable the plaintiffs to sustain an action on the case like the present, it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong.").

57. Lewis Invisible Stich Mach. Co. v. Columbia Blindstich Mach. Mfg. Corp., 80 F.2d 862, 864 (2d Cir. 1936).

58. Pritikin, *supra* note 35, at 7–8. Under the American system, however, courts have been much more reticent to broadly construe the second half of the second element (a lawful object to be accomplished by unlawful means). *See* Leach, *supra* note 45, at 9–10. The jurisdictions that have construed this more broadly typically term it "true conspiracy" rather than the English "conspiracy to injury." *Id.* at 10–11. Those jurisdictions are Colorado, Florida, Massachusetts, Michigan, Missouri, New York, Oregon, and Tennessee. *Id.*

59. Cooper, *supra* note 37, at 307.

60. Pritikin, *supra* note 35, at 9.

61. *Id.* (citing Mox, Inc. v. Woods, 262 P. 302, 303 (Cal. 1927)); Miller v. John, 70 N.E. 27, 29 n.32 (Ill. 1904); Cohen v. Nathaniel Fisher & Co., 120 N.Y.S. 546, 547 (N.Y. App. Div. 1909); White v. White, 111 N.W. 1116, 1119 (Wis. 1907)).

62. Pritkin, *supra* note 35, at 9.

63. FED. R. EVID. 801(d)(2)(E); ILL. R. EVID. 801(d)(2)(E).

64. *See generally* Stuart M. Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of* In Personam *Jurisdiction*, 84 COLUM. L. REV. 506 (1984).

65. Pritikin, *supra* note 35, at 9 (noting that because the statutory period is tolled under criminal conspiracy there is an argument that civil conspiracy should also toll the statute of limitations).

66. *Id.* at 10. (emphasis added).

67. *Id.* (emphasis added).

3. Differences Between Civil and Criminal Conspiracy

Although the concepts are closely related—indeed, civil conspiracy grew out of criminal conspiracy—they are also fundamentally different.[68] The differences are typically described in the following terms: "[t]he gist of the crime of conspiracy is the *agreement* to commit the unlawful act whereas the gist of the tort is the *damage* resulting to the plaintiff from an overt act or acts committed pursuant to the common design."[69] This description is, however, inaccurate insofar as although conspiracy is a crime, it is not (usually) a tort.[70]

A curious reader may ask why conspiracy is a crime but not a tort. The answer lies in the difference between the rationale for criminal conspiracy and the rationale for tort law more generally.[71] Tort law is concerned with making injured parties whole,[72] whereas criminal law proscribes behavior that harms the general welfare.[73] There are, typically, two reasons given to punish conspiracy as an independent criminal offense. First, by criminalizing conspiracy, police intervention is allowed at an earlier stage than under attempt law.[74] Second, "two [or more] people united to commit a crime are more dangerous than one or both of them separately planning to commit the same offense."[75] Combining these two rationales explains why conspiracy does not merge into the underlying offense after the offense has been completed.[76] The nature of conspiracy, it is believed, increases co-conspirators' ability to complete more complex criminal acts, makes it more likely they will succeed in accomplishing the object of their conspiracy, and increases the chances that they will commit additional criminal acts.[77]

Both the tort system and the criminal system seek to deter socially undesirable conduct, but they do so in different ways.[78] Criminal law works to proscribe "acts that endanger the general safety and welfare."[79] Tort law, on the other hand, "promotes deterrence only when it simultaneously promotes compensation to an identifiable individual."[80] In the criminal system proscribing inchoate crimes serves to prohibit "acts that endanger the general safety and welfare."[81] Because tort law seeks to remedy an injured plaintiff—to make that plaintiff whole—there

68. Leach, *supra* note 45, at 8–9.

69. Michael R. v. Jeffrey B., 205 Cal. App. 3d 1059, 1069 (Cal. Ct. App. 1995); Pritikin, *supra* note 35, at 8 (citing 15A C.J.S. *Conspiracy* § 100 (2004)) (emphasis added).

70. Pritikin, *supra* note 35, at 8.

71. *Id.* at 10–12.

72. *Id.* at 11.

73. *Id.*

74. *Id.* at 10. Recall that conspiracy does not typically require an overt act. Cooper, *supra* note 37, at 305; Leach, *supra* note 45, at 16.

75. Pritikin, *supra* note 35, at 10 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 425 (3d ed. 2001)); *see also* People v. Morante, 975 P.2d 1071, 1080 n.5 (Cal. 1999).

76. Pritikin, *supra* note 35, at 10.

77. *Id.* at 10–11

78. *Id.* at 11.

79. *Id.*

80. *Id.*

81. *Id.*

is no analogous inchoate tort regime.[82] Thus, since attempt occurs after conspiracy, if there is no remedy for an "attempted tort" it follows that there is generally no remedy for conspiracy to commit a tort.[83]

B. Officer-Involved Conspiracies

Professor Myriam Gilles has argued that "police abuse continues to exist primarily because of the code of silence."[84] Perhaps more than any other city, Chicago has a long and sordid history when it comes to police corruption.[85] Such corruption is often enabled by the so-called "blue wall of silence,"[86] but research also demonstrates that corruption clusters around a comparatively small subset of officers.[87] That subset, nevertheless, has an unfortunately corrupting influence on the officers in their orbit.[88] For example, one analysis demonstrated a group of officers with low overall complaint rates in 2008 could be split into two groups that would then predict whether their complaint rates would escalate over the following decade.[89] Group A included 863 officers who were co-named in a complaint with an officer who was central to a network of misconduct while Group B included 12,815 officers who were not.[90] Group A's complaint rates over the subsequent decade were nine times higher than those for Group B.[91] The study illustrates just how important internal, interpersonal dynamics are when it comes to disrupting conspiracies of silence.[92] What follows is a selection of high-profile incidents that have brought such police-involved corruption, enabled by conspiracies of silence, to the fore. The following is illustrative, not exhaustive.[93]

82. *Id.*

83. *See id.* at 8. *But see* Leach, *supra* note 45, at 10 n.64 (listing States that have acknowledged the tort of "conspiracy to injure" or "true conspiracy").

84. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 67 (2000).

85. *See, e.g.*, Rob Arthur, *Bad Chicago Cops Spread Their Misconduct Like A Disease*, INTERCEPT (Aug. 16, 2018, 8:03 AM), https://theintercept.com/2018/08/16/chicago-police-misconduct-social-network/ [https://perma.cc/EX84-RQSB].

86. For a curated selection of articles implicating the blue wall of silence, see *Blue Wall of Silence*, MARSHALL PROJECT (Jan. 16, 2021, 2:01 PM), https://www.themarshallproject.org/records/605-blue-wall-of-silence [https://perma.cc/M4TC-X6WT].

87. Arthur, *supra* note 85.

88. *Id.*; *see also* Robert E. Worden, *The "Causes of Police Brutality: Theory and Evidence on Police Use of Force*, *in* CRIMINAL JUSTICE THEORY: EXPLAINING THE NATURE AND BEHAVIOR OF CRIMINAL JUSTICE 149 (Edward Maguire & David Duffee eds., 2d ed. 2015) (exploring how theories of police behavior connect to empirical evidence of police use of force).

89. Arthur, *supra* note 85.

90. *Id.*

91. *Id.*

92. *See id.*

93. *See Settling for Misconduct: Police Lawsuits in Chicago*, CHI. REP., http://projects.chicagoreporter.com/settlements (last visited Aug. 23, 2021) [https://perma.cc/Q49F-BSJR] (compiling a database of misconduct settlement suits between 2011–2017 with a total cost exceeding $312 million); *see also* Zipporah Osei, Mollie Simon, Moiz Syed, & Lucas Waldron, *We Are Tracking What Happens to Police After They Use Force on Protesters*, PROPUBLICA, https://projects.propublica.org/protest-police-videos/ (Dec. 14, 2020) [https://perma.cc/2GLK-SLUA].

1. Laquan McDonald

The murder of Laquan McDonald by Chicago police officer Jason Van Dyke in 2014 was the latest in a string of police killings of unarmed black men across the country,[94] but it was distinctive for the conspiracy of silence that it so directly implicated.[95] The highly publicized trial of Van Dyke was notable for being the first time in nearly fifty years that an on-duty Chicago police officer was convicted of murder.[96] Van Dyke was ultimately sentenced to eighty-one months in prison, a sentence that left activists and family members heartbroken because "the sentence was far too short."[97] Yet, the sentence came only a day after three officers—Thomas Gaffney, Joseph Walsh, and David March—were acquitted of criminal conspiracy and attempting to cover up Van Dyke's crime through obstruction of justice and official misconduct.[98] Despite the "code of silence" that the second trial implicated,[99] it received notably less attention.

The Inspector General's ("IG") report of Van Dyke was damning: it concluded that Van Dyke "violated CPD Rules and Regulations" by making "numerous false statements and material omissions," filing "a false Tactical Response Report . . . and a false Officer's Battery Report."[100] But what of the other officers involved in the subsequent internal investigation and cover-up? The IG report recommended the firing of eleven individuals for their involvement, though only four were actually fired.[101] For example, the report recommended the firing of "David McNaughton, a Chicago Police Department (CPD) Deputy

94. During 2014 alone, the high-profile killings of unarmed black men (and boys—Tamir Rice was only twelve years old) by police included Laquan McDonald, Eric Garner, Michael Brown, Ezell Ford, Tamir Rice, and Akai Gurley. *See* Carimah Townes & Dylan Petrohilos, *Who Police Killed In 2014*, THINK PROGRESS (Dec. 12, 2014, 4:40 PM), https://thinkprogress.org/who-police-killed-in-2014-44e56b4037a1/ [https://perma.cc/23G6-Q7L3]. This does not include many less publicized slayings. *Id.*

95. OFF. OF INSPECTOR GEN., SUMMARY REPORT OF INVESTIGATION: CASE # 15-0564 (OFFICER JASON VAN DYKE) 1 (2016), https://www.scribd.com/document/429534198/15-0564-Van-Dyke-Summary-Report-FINAL#fullscreen&from_embed [https://perma.cc/D3XR-K8HQ] [hereinafter OIG REPORT: CASE # 15-0564]; *see also Read the Inspector General Reports on the Fatal Police Shooting of Laquan McDonald, Including Transcripts of Officer Interviews*, CBS CHI. (Oct. 9, 2019, 5:34 PM), https://chicago.cbslocal.com/2019/10/09/laquan-mcdonald-documents-inspector-general-joseph-ferguson-investigation-jason-van-dyke/ [https://perma.cc/UH3E-7VEQ] (publishing the individual Inspector General Reports for each involved officer); *Biggest Takeaways from the Inspector General's Report on Laquan McDonald's Fatal Shooting*, NBC5 CHI., https://www.nbcchicago.com/investigations/laquan-mcdonald-jason-van-dyke-inspector-general-report-562642661.html (Oct. 10, 2019, 8:55 AM) [https://perma.cc/94PH-QHJF] [hereinafter *Biggest Takeaways*].

96. Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), https://www.nytimes.com/2019/01/18/us/jason-van-dyke-sentencing.html [https://perma.cc/WF2H-CYUM].

97. *Id.* Note that "Van Dyke's potential sentence . . . rang[ed] from probation to 96 or more years in prison." P.R. Lockhart, *Chicago Police Officers Found Not Guilty of Covering Up the Laquan McDonald Shooting*, VOX, https://www.vox.com/2019/1/17/18187043/laquan-mcdonald-chicago-conspiracy-trial-not-guilty-verdict (Jan. 17, 2019, 4:10 PM) [https://perma.cc/A65C-UMA5].

98. Smith & Bosman, *supra* note 96; Lockhart, *supra* note 97.

99. Lockhart, *supra* note 97.

100. OIG REPORT: CASE # 15-0564, *supra* note 95, at 1.

101. *Biggest Takeaways*, *supra* note 95. In a cruel twist of irony, at least sixteen officers were engaged in the coverup. Emma Ockerman, *Here's How Chicago Cops Really Covered Up the Murder of Laquan McDonald*, VICE (Oct. 10, 2019, 11:09 AM), https://www.vice.com/en/article/xwe784/heres-how-chicago-cops-really-covered-up-the-murder-of-laquan-mcdonald [https://perma.cc/Y2AW-MSNC].

Chief" because he "creat[ed] and endorse[d] . . . false statements, despite objective evidence to the contrary, [that] all served to establish a false narrative that McDonald initiated an attack on Officers Walsh and Van Dyke."[102] The IG report also concluded that former CPD officer Anthony Wojcik "brought discredit upon CPD by overseeing and participating in an untruthful, improperly documented, and unprofessional investigation of the shooting and by improperly disposing of material evidence during that investigation."[103]

A consistent theme developed throughout the IG summary reports of its investigations into various officers, a theme that was laid out in stark terms in the Summary Report of Investigation of Sergeant Daniel Gallagher: "Gallagher made false statements and misleading characterizations in CPD reports related to the shooting, which served to exaggerate the threat McDonald posed."[104] In the end, the report—which was 6,510 pages long—was released only after the City of Chicago changed an ordinance because such reports were legally required to be kept confidential.[105]

2. Jon Burge

In a decades-long scandal documented in exquisite and excruciating detail by G. Flint Taylor, former Chicago police commander Jon Burge oversaw the literal torture of at least 110 African American suspects.[106] Beginning in the 1970s, Burge "spearheaded a torture ring" that was run out of Area 2 detective headquarters.[107] The torture was regarded as an open secret in Area 2 – one detective who witnessed torture firsthand reported it to a supervisor and "was told to mind his business" before being transferred out of the office.[108] Burge's tor-

102. OFF. OF INSPECTOR GEN., SUMMARY REPORT OF INVESTIGATION: OFFICE OF INSPECTOR GENERAL CASE # 15-0564 (DEPUTY CHIEF DAVID MCNAUGHTON) 1 (2016), https://www.scribd.com/document/429536352/15-0564-McNaughton-Summary-Report-FINAL#fullscreen&from_embed [https://perma.cc/3H7Q-E57R].

103. CITY OF CHI. OFF. OF INSPECTOR GEN., SUMMARY REPORT OF INVESTIGATION: CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL CASE # 15-0564 (LIEUTENANT ANTHONY WOJCIK) 1 (Dec. 29, 2017), https://www.scribd.com/document/429537770/15-0564-Wojcik-Summary-Report-FINAL#fullscreen&from_embed [https://perma.cc/W2SM-ZL9D].

104. OFFICE OF INSPECTOR GEN., SUMMARY REPORT OF INVESTIGATION: CASE #15-0564 (SERGEANT DANIEL GALLAGHER) 1 (2016), https://www.scribd.com/document/429535470/15-0564-Gallagher-Summary-Report#fullscreen&from_embed [https://perma.cc/W5Y4-8YL2].

105. *See Read the Full IG Report on the Laquan McDonald Shooting*, NBC5 CHI., https://www.nbcchicago.com/news/local/Read-the-Full-IG-Report-on-the-Laquan-McDonald-Shooting-562640671.html (Oct. 10, 2019, 8:57 AM) [https://perma.cc/973N-8QXP]; *see also* CHI., ILL., MUN. CODE § 2-56-110 (2016) ("Files and reports confidential—Public statements authorized when").

106. *See* FLINT TAYLOR, THE TORTURE MACHINE: RACISM AND POLICE VIOLENCE IN CHICAGO 2 (2019); G. Flint. Taylor, *A Long and Winding Road: The Struggle for Justice in the Chicago Police Torture Cases*, 17 LOY. PUB. INT. L. REP. 178, 179 (2012) [hereinafter Taylor, *A Long and Winding Road*]. The torture included the use of "electric shock, a tactic [Burge] most likely learned while serving . . . during the Vietnam War" and "bags and bolt cutters." *Id.* at 180.

107. Taylor, *A Long and Winding Road, supra* note 106, at 180.

108. *Id.*

ture ring was never exposed by any Area 2 officer; indeed, "assistant state's attorneys participated in the interrogations, took the tortured confessions and used the confessions to prosecute and convict."[109]

Absent the participation of numerous entities and individuals, it is doubtful the scandal could have continued as long as it did. During a February 1982 manhunt overseen by Burge, the primary suspect was tortured at length, and approximately 200 other police misconduct complaints were lodged against those involved in the manhunt.[110] Most of the complaints were lost by the police department's disciplinary agency.[111] As the torture ring continued unabated, Burge's behavior was "condone[d]" by State's Attorney and future Mayor, Richard M. Daley who "specifically approved his assistants' seeking of the death penalty in several torture cases."[112] During a 1989 civil rights trial stemming from the torture of Andrew Wilson—the primary suspect in the aforementioned manhunt—an anonymous police source identified a number of Burge's "asskickers" and implicated Daley and then-Mayor Jane Byrne.[113]

In 1991, an investigation by the Chicago Police Department Office of Professional Standards resulted in parallel reports.[114] The first report recommended the firing of Burge and others for their role in torturing Wilson nearly a decade prior.[115] The second report was suppressed after finding that "[Area 2] command members were aware of the systematic abuse" and encouraged it by "actively participating" or failing to take action to stop it.[116] It was not until the People's Law Office released the report, after acquiring it by court order, that the contents of the report were publicly known.[117] The Office of Professional Standards also reopened nine other investigations in the early 1990s and found that detectives had tortured suspects but "the cases languished and no one was disciplined."[118] Another report in this saga was authored by special prosecutors and released in July 2006.[119] This report "singled out former Police Superintendent [Richard] Brzeczek for his failure to investigate or fire Burge."[120] This report was deemed "unfair, misleading, and disingenuous" by community members and spawned a

109. *Id.*
110. *Id.* at 180–81.
111. *Id.* at 181.
112. *Id.* at 182.
113. *Id.*
114. *Id.* at 184.
115. *Id.*
116. *Id.*; GAYLE SHINES & MICHAEL GOLDSTON, OFF. OF PRO. STANDARDS, SPECIAL PROJECT CONCLUSION REPORTS (THE BURGE INVESTIGATION) 3 (1990), https://peopleslawoffice.com/wp-content/uploads/2012/02/Goldston-Report-with-11.2.90-Coversheet.pdf [https://perma.cc/F3SP-ZVSX] ("Particular command members were aware of the systematic abuse and perpetuated it either by actively participating in same [sic] or failing to take any action to bring it to an end.").
117. Taylor, *A Long and Winding Road*, *supra* note 106, at 184.
118. Steve Mills, *Brutality Probe Haunts City*, CHI. TRIB. (Feb. 23, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-02-23-9902230074-story.html [https://perma.cc/FST5-7V6K].
119. Taylor, *A Long and Winding Road*, *supra* note 106, at 190.
120. *Id.*

"shadow report" that alleged the special prosecutors failed to "fairly investigate *systemic* police torture in Chicago."[121]

Meanwhile, lawsuits brought by torture survivors uncovered "five retired African American detectives who revealed that they periodically heard screams, saw the torture box and knew that torture by Burge and Byrne's midnight crew was an 'open secret' at Area 2 during the 1980s."[122] When deposed for the suits, dozens of detectives pleaded the Fifth Amendment rather than answer questions about the pattern and practice of torture at Area 2.[123] Decades after the torture took place, Judge Joan Lefkow would refer obliquely to "a dismal failure of leadership in the department" before sentencing Burge to fifty-four months—an above-guidelines sentence—for his conviction on charges of perjury and obstruction of justice.[124]

3. Ronald Watts

In a case that threatened "to show extraordinarily serious retaliatory misconduct by officers at nearly all levels of the CPD hierarchy," two whistleblowers within the Chicago Police Department settled a lawsuit for $2 million.[125] Officers Shannon Spalding and Danny Echeverria worked undercover as a part of a "joint FBI-CPD internal affairs investigation that uncovered a massive criminal enterprise within the department" led by Sergeant Ronald Watts.[126] Watts extorted drug dealers for "a tax" in exchange for protection from investigations and targeting of the dealers' competition.[127] Allegedly, before Spalding and Echeverria could conclude the case, "a high-ranking official outed them as 'rats'" while other officials "ordered officers under their command to retaliate against Spalding and Echeverria for violating the code of silence."[128] Spalding and Echeverria alleged that Commander James O'Grady learned of their involvement with the FBI investigation and "began a campaign of harassment and retaliation" against them, saying "God help them if they ever need help on the street, it ain't coming" because they were "rats."[129]

121. A REPORT ON THE FAILURE OF SPECIAL PROSECUTORS EDWARD J. EGAN AND ROBERT D. BOYLE TO FAIRLY INVESTIGATE SYSTEMIC POLICE TORTURE IN CHICAGO 1, 2 (2007), https://peopleslawoffice.com/wp-content/uploads/2012/02/5.8.07.Final-Corrected-Version-of-Report.pdf [https://perma.cc/NHZ9-VWWB] (emphasis added).

122. Taylor, *A Long and Winding Road*, *supra* note 106, at 189. The torture box was some sort of electric shock-inducing device that appears to have been the result of tactics learned while "serving as a military police sergeant in a prisoner-of-war camp in South Vietnam." *Id.* at 180.

123. *Id.* at 189.

124. Excerpt of Transcript of Proceedings–Sentencing–Judge's Ruling Before the Honorable Joan Humphrey Lefkow at 10–11, United States v. Burge, 2014 WL 201833 (N.D. Ill. 2014) (No. 08-cr-846).

125. Jamie Kalven, *Operation Smoke and Mirrors*, INTERCEPT (Oct. 6, 2016, 8:00 AM), https://theintercept.com/2016/10/06/in-the-chicago-police-department-if-the-bosses-say-it-didnt-happen-it-didnt-happen/ [https://perma.cc/FG2C-VPM3]; *see* Spalding v. City of Chicago, 24 F. Supp. 3d 765, 769–70 (N.D. Ill. 2014).

126. Kalven, *supra* note 125.

127. *Id.*

128. *Id.*; *see Spalding*, 24 F. Supp. 3d at 771.

129. Second Amended Complaint, ¶¶ 29, 31, 33, 36, 37, Spalding v. City of Chicago, 186 F. Supp. 3d 884, 913–15 (N.D. Ill. 2016) (No. 12-8777).

The officials named in the whistleblower suit denied these allegations.[130] After the trial court denied the defendants' Motion to Dismiss[131] and Motion for Summary Judgement,[132].the suit was settled on the eve of trial.[133] In a recent opinion, Chief Justice Peter Birnbaum of the Illinois Court of Claims described the extortion scheme run by Sergeant Ronald Watts as "one of the most staggering cases of police corruption in the history of the City of Chicago."[134]

4. Tip of Iceberg

Although the aforementioned examples tend toward the extreme end of corruption and silence, there are many more examples which range from the comparatively mundane to the equally striking. For example, officers Xavier Elizondo and David Salgado were indicted on conspiracy charges related to theft, embezzlement and more.[135] According to Assistant U.S. Attorney Sean Franzblau, they were "corrupt Chicago police officers who betrayed their badges and used their police power to lie, cheat and steal."[136] Both officers were found guilty.[137]

According to a disturbing report recently released by the Civilian Office of Police Accountability ("COPA"),[138] Chicago police officer Patrick Kelly shot a friend in the head.[139] The shooting occurred after a night of drinking, and Kelly reported the shooting as an attempted suicide.[140] The investigating officers, how-

130. Kalven, *supra* note 125.

131. *Spalding*, 24 F. Supp. 3d at 782.

132. *Spalding*, 186 F. Supp. 3d at 919–21. Interestingly, Spalding and Echeverria alleged a civil conspiracy under 18 U.S.C. §1983 against the defendants, and this claim partially survived summary judgement. *Id.* at 913–15.

133. John Byrne, *$2M Settlement in Whistleblower Case That Allowed Mayor To Skip Testimony*, CHI. TRIB. (Nov. 1, 2016, 5:00 AM), https://www.chicagotribune.com/politics/ct-emanuel-whistleblower-police-settlement-met-20161031-story.html [https://perma.cc/ZG7X-X5EQ].

134. Phil Rogers, *State Court Rips CPD Corruption*, NBC5 CHI., https://www.nbcchicago.com/news/local/State-Court-Rips-CPD-Corruption-504321371.html (Jan. 14, 2019, 11:56 AM) [https://perma.cc/6BS8-6L2C].

135. *Trial for 2 CPD Officers Accused of Stealing Drugs, Cash Begins Today*, WGN9 (Oct. 7, 2019, 10:57 AM), https://wgntv.com/2019/10/07/trial-for-2-cpd-officers-accused-of-stealing-drugs-cash-begins-today/ [https://perma.cc/6EEE-R7P3].

136. Jon Seidel, *Jury Finds Two Chicago Cops Guilty in Corruption Case*, CHI. SUN TIMES (Oct. 22, 2019, 3:08 PM), https://chicago.suntimes.com/crime/2019/10/22/20927460/two-chicago-cops-guilty-corruption-case [https://perma.cc/8CJ4-NDTS].

137. *Id.*

138. *See infra* Section III.A1.ii.

139. CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, SUPPLEMENTARY SUMMARY REPORT OF INVESTIGATION: LOG# 1033096, 13 (2018), https://www.scribd.com/document/425015353/COPA-Summary-Findings-On-Officer-Patrick-Kelly#fullscreen&from_embed (last visited Aug. 23, 2021) [https://perma.cc/J64M-MGJ7] [hereinafter COPA REPORT: LOG# 1033096]; Dave Savini, *COPA Report Concludes CPD Officer Patrick Kelly Shot Friend Michael LaPorta, Lied About It for Nearly 10 Years*, CBS2 CHI. (Sept. 9, 2019, 10:36 PM), https://chicago.cbslocal.com/2019/09/09/copa-report-officer-patrick-kelly/ [https://perma.cc/3R3N-57ZR].

140. Savini, *supra* note 139.

ever, did not initially investigate the shooting as a possible crime, instead allegedly pressuring witnesses to corroborate the victim's suicidal ideation.[141] Although the shooting occurred in 2010, Kelly remained on the force through at least 2019.[142] COPA recommended Kelly's firing and eventually Chicago Police Superintendent Eddie Johnson agreed, sending the recommendation to the Chicago Police Board.[143]

In 2011, Officer Jerome Finnigan was sentenced to twelve years in prison for his role in leading a group of police who "shook down alleged drug dealers, stole hundreds of thousands of dollars, and lied in bogus reports."[144] Part of an "elite city-wide unit," Finnigan was assigned to the Special Operations Section and used that position to engage in a multi-year conspiracy that also included discussions about "paying someone to kill Chicago Police Officer 2" because Officer 2 "would likely be a witness."[145] Speaking to the judge in the case, Finnigan said "[m]y bosses knew what I was doing out there. It was not an exception. It was the rule. You did what you had to."[146] Despite this inculpatory testimony, prosecutors declined to bring charges against anyone higher up the chain of command.[147]

C. Police Reform Mechanisms in Chicago

Of course, the history of corruption and culture of silence within the Chicago Police Department has not been entirely met unanswered. Legal responses to police misconduct have typically taken three forms: (1) State and Federal constitutional restraints imposed via the exclusionary rule; (2) tort claims; and (3) internal or external review mechanisms.[148] Historic and current reform efforts have been attempted with varying degrees of success,[149] with the most recent wide scale reform effort imposed via consent decree.[150]

141. COPA REPORT: LOG# 1033096, *supra* note 139, at 6; Savini, *supra* note 139.

142. Savini, *supra* note 139.

143. Megan Hickey, *In Reversal, Supt. Eddie Johnson Now Says Cop Who Shot Friend Should Be Fired*, CBS2 CHI. (Oct. 21, 2019, 10:15 PM), https://chicago.cbslocal.com/2019/10/21/in-reversal-supt-eddie-johnson-now-says-cop-who-shot-friend-should-be-fired/ [perma.cc/C6BA-R89W].

144. *Ex-Cop Sentenced to 12 Years in SOS Probe*, ABC7 (Sept. 8, 2011), https://abc7chicago.com/archive/8346447/ [https://perma.cc/X9RY-8GCD].

145. Charging Document at 1, 9, United States v. Finnigan & Herrera, Case No. 07 CR 634 (N.D. Ill.), https://www.justice.gov/archive/usao/iln/chicago/2011/pr0407_02b.pdf (last visited Aug. 23, 2021) [https://perma.cc/G8JH-DEYC]; *see also* Salcedo v. City of Chicago, No. 09-cv-05354, 2010 WL 2721864 at *1 (N.D. Ill. July 8, 2010).

146. *Ex-Cop Sentenced to 12 Years in SOS Probe*, *supra* note 144.

147. *Id.*

148. Miller & Wright, *supra* note 27, at 758.

149. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHI. POLICE DEP'T 18–20 (2017) [hereinafter DOJ REPORT].

150. *See* Illinois v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 at *1 (N.D. Ill. Jan. 31, 2019); *see also* CHICAGO POLICE CONSENT DECREE, http://chicagopoliceconsentdecree.org/wp-content/uploads/2019/02/FINAL-CONSENT-DECREE-SIGNED-BY-JUDGE-DOW.pdf (last visited Aug. 23, 2021) [https://perma.cc/WP5R-8VAS].

1. Department of Justice Investigation

The United States Department of Justice ("DOJ") began an investigation of the Chicago Police Department and the Independent Police Review Authority ("IPRA") on December 7, 2015.[151] The investigation was focused on whether the CPD was "engaging in a pattern or practice of unlawful conduct and, if so, what systemic deficiencies or practices within CPD, IPRA, and the City might be facilitating or causing this pattern or practice."[152] The investigation was initiated shortly after the video of Laquan McDonald's death was released to the public.[153] Indeed, the report was necessary in part because the video's release was a flashpoint that ignited long-standing "profound mistrust between many Chicago communities and [the] CPD."[154]

The report found, among other things, that "Chicago must undergo broad, fundamental reform" to restore trust between Chicago's neighborhoods and the department that polices them.[155] That reform, the report concluded, was sorely needed across a wide spectrum. The review concluded that CPD officers routinely engage in a pattern or practice of using unreasonable (sometimes deadly) force, and that these practices unnecessarily endanger CPD officers and others.[156] That pattern of unlawful conduct was "due in part to deficiencies in CPD's training and supervision."[157] Internal review mechanisms within the CPD exacerbated these issues through "numerous entrenched, systemic policies and practices that undermine police accountability."[158] The report also determined that "CPD officers need greater support from the City and CPD leadership" in order to combat the stress that officers endure because that stress "impacts how . . . officer[s] interact[] with the public."[159]

A consistent theme in the report is the general lack of transparency within CPD, extending to such areas as data collection, investigation of misconduct, and internal promotion practices.[160] In addition to the necessary reactive steps to cure identified deficiencies, the report also recommended that CPD take proactive community policing steps.[161] Community policing has not been "a true CPD value" for some time, "and past attempts to restore it have not been successful."[162] Instead, "CPD has tolerated racially discriminatory conduct that not only undermines police legitimacy, but also contributes to the pattern of unreasonable

151. DOJ REPORT, *supra* note 149, at 1.
152. *Id.*
153. *Id.*
154. *Illinois*, 2019 WL 398703 at *1.
155. DOJ REPORT, *supra* note 149, at 4.
156. *Id.* at 5.
157. *Id.* at 10.
158. *Id.* at 8.
159. *Id.* at 11–12.
160. *Id.* at 12–13.
161. *Id.* at 14.
162. *Id.*

force."[163] The report concluded that the CPD was not likely to be successful in implementing reforms absent a consent decree with independent monitoring.[164]

The recommendation for a consent decree with independent monitoring was soon the focus of litigation as the State of Illinois sued the City of Chicago over the report's findings.[165] The consent decree was the subject of extensive negotiations which incorporated input from attorneys, experts, and the public.[166] Despite opposition to the consent decree from the Fraternal Order of Police and, oddly, the DOJ,[167] Judge Robert M. Dow Jr., entered the consent decree and appointed an independent monitor.[168] The consent decree was described as imperfect[169] but "an important first step toward needed reforms."[170] Despite community concerns that the consent decree did not go far enough,[171] it does address key concerns from the DOJ report related to community policing, use of force, training, supervision, accountability, and transparency.[172] Recognizing that the consent decree merely identified systemic problems but could not address them immediately, Judge Dow ended his opinion on a prescient—or perhaps cryptic—note: "[t]he court is under no illusion that this will be an easy process. . . . Let us begin."[173]

Several years into the consent decree, the situation is still tenuous. In the first year, the Chicago Police Department failed to meet more than two-thirds of the consent decree's deadlines.[174] The City of Chicago and the Fraternal Order of Police have not reached an agreement on a new contract, and one does not seem to be imminent.[175] Various groups, including the Coalition for Police Contracts Accountability ("CPCA") have laid out various community demands for

163. *Id.* at 15.

164. *Id.* at 16.

165. *See* Illinois v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 at *1 (N.D. Ill. Jan. 31, 2019).

166. *Id.* *2. The public input consisted of more than 7,600 comments along with fourteen community roundtables. *Id.* The police union was invited to participate but declined. *Id.* at *3. Instead, the union filed a motion to intervene in the lawsuit; the motion was denied by the court and affirmed on appeal. *Id.*

167. It seems possible that the change of presidential administrations overseeing the Department of Justice played a role in the reversal in this case as in others. *See* Sam Levine, *DOJ Reverses Position in Big Voting Case Before Supreme Court*, HUFFPOST: POLITICS (Aug. 8, 2017, 11:39 AM), https://bit.ly/2vFgYhd [https://perma.cc/H3EP-GUFM]; Christen Linke Young, *The Trump DOJ Has Taken an Unexpected and Unworkable Position on the ACA*, BROOKINGS (Sept. 18, 2019), https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2019/09/18/the-trump-doj-has-taken-an-unexpected-and-unworkable-position-on-the-aca/ [https://perma.cc/7Z2E-M9DS].

168. *Illinois*, 2019 WL 398703 at *4.

169. The court noted that it must determine whether the proposed consent decree was "lawful, fair, reasonable, and adequate." *Id.* (quoting E.E.O.C. v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985)).

170. *Id.*

171. *Id.* at *5.

172. *FAQ*, CHICAGO POLICE CONSENT DECREE, http://chicagopoliceconsentdecree.org/faq/ (last visited Aug. 23, 2021) [https://perma.cc/DAS5-CCRU].

173. *Illinois*, 2019 WL 398703 at *8.

174. Shelby Bremer, *Chicago Police Missed More Than 70% of Deadlines in First Year of Consent Decree*, NBC5 CHI. (June 19, 2020, 11:18 AM), https://www.nbcchicago.com/news/local/chicago-politics/chicago-police-missed-more-than-70-of-deadlines-in-first-year-of-consent-decree-report-says/2292222/ [https://perma.cc/V99G-Q75J].

175. *See, e.g.*, Fran Spielman, *Lightfoot: 'Lack of Urgency' From Police Union Standing in Way of New Contract,* CHI. SUN TIMES (Jan. 21, 2021, 1:29 PM), https://chicago.suntimes.com/city-hall/

the forthcoming contract.[176] The CPCA has identified five areas of the current contract that it believes the City must address.[177] Because the contract between the City of Chicago and the Police Union substantially affects the conditions for accountability, or nonaccountability, the ongoing contract negotiations are essential for ensuring internal accountability.[178]

2. Civilian Office of Police Accountability

On October 5, 2016 the Chicago City Council established the Civilian Office of Police Accountability, or COPA.[179] This office was created to replace the Independent Police Review Authority, or IPRA,[180] a much-maligned agency.[181] IPRA was criticized for "routinely obscur[ing] its findings and misle[ading] the public about how its investigations played out."[182] The DOJ Report concluded that IPRA was "broadly ineffective at deterring or detecting misconduct, and at holding officers accountable when they violate the law or CPD policy."[183] Even in the rare cases where complaints of misconduct were sustained, IPRA meted out discipline in an inconsistent and unpredictable manner that did little to deter misconduct.[184]

The creation of COPA was identified by the DOJ Report as one of the most significant developments by the City to address its longstanding oversight and accountability deficiencies.[185] COPA improved on IPRA in at least five key ways: "1) expanded investigative authority, 2) a guaranteed budget floor, 3) authority to hire independent counsel, 4) a five-year ban on former police officers

2021/1/21/22242817/chicago-police-contract-talks-lightfoot-catanzara-back-pay-reform-bill [https://perma.cc/J8LU-R6ES]. As of July 2021, the contract between the City of Chicago and the police union has been expired for four years.

176. COALITION FOR POLICE CONTRACTS ACCOUNTABILITY, RECOMMENDATIONS FOR THE CITY OF CHICAGO & LAW ENFORCEMENT UNIONS CONTRACT 1–9 (2016), https://static1.squarespace.com/static/59495d7f4c8b0371ef0e472d/t/594c292be3df280efbf554c0/1498163501106/Police+Contract+Community+Recommendations+Narrative.pdf [https://perma.cc/4652-R2D6].

177. *Id.* Specifically, they identify that (1) "[t]he contracts make it too hard to identify police misconduct;" (2) "[t]he contracts make it too easy for officers to lie about misconduct;" (3) "[t]he contracts require officials to ignore and destroy evidence of misconduct;" (4) "[t]he contracts make it too hard to investigate and be transparent about police misconduct;" and (5) "[r]epeat abusers cost the taxpayers money and should pay." *Id.*

178. *See, e.g.*, DOJ REPORT, *supra* note 149, at 75.

179. *Municipal Ordinance*, CIVILIAN OFF. POLICE ACCOUNTABILITY, http://copadev.wpengine.com/about-copa/ordinance/ (last visited Aug. 23, 2021) [https://perma.cc/VPH2-H3F9]; *see* CHI., ILL., MUN. CODE § 2-78-105 (2016).

180. Paris Schutz, *IPRA To Be Replaced with New Agency COPA*, WTTW (Aug. 29, 2016, 6:43 PM), https://news.wttw.com/2016/08/29/ipra-be-replaced-new-agency-copa [https://perma.cc/96GP-WSYH].

181. *See generally* RYAN WALLACE, CMTY. RENEWAL SOC'Y, WHO WATCHES THE WATCHMEN?: POLICE OVERSIGHT IN CHICAGO (2016), https://static1.squarespace.com/static/5bc5f527aadd3408382d70cf/t/5be7db944d7a9c5e1eec1761/1541921690156/Who_Watches_the_Watchmen_Full_Report.pdf [https://perma.cc/XF4H-J9ND]. This report was largely corroborated by the DOJ Report. *See generally* DOJ REPORT, *supra* note 149.

182. Jodi S. Cohen, Dan Hinkel & Jennifer Smith Richards, *In Oversight of Chicago Police, IPRA Gives Victims False Sense of Justice*, CHI. TRIB. (June 17, 2016, 2:33 PM), https://www.chicagotribune.com/investigations/ct-chicago-police-ipra-mediation-met-20160616-story.html [https://perma.cc/4JSH-ZQGU].

183. DOJ REPORT, *supra* note 149, at 47.

184. *Id.*

185. *Id.* at 3.

serving as investigators, and 5) a modified mediation program."[186] These changes however, "[did] not directly address the many problems" that the report identified with IPRA's "deeply flawed investigative system."[187] Further, COPA's success, the report concluded, would depend on its perceived legitimacy.[188]

3. Civil Rights Litigation

Both of the preceding mechanisms of police reform required action by the government. But these measures often do not provide victims with much recourse against individual officers.[189] Thus, parties subject to police misbehavior or violence often turn to civil rights litigation, typically through § 1983 suits.[190] There are questions about the efficacy of federal tort suits in regulating police misconduct, but scholars occasionally propose a more prominent role for such suits as a regulatory mechanism.[191] These proposals have been critiqued for their naiveté: such proposals, the argument goes, overlook the litigation realities that prevent tort suits from being able to reliably regulate police misconduct.[192] Nevertheless, there can be little doubt that such suits are commonplace, despite extremely high barriers to winning a tort suit against the police.[193]

Although winning a tort suit outright may be quite difficult, an examination of newspaper reports demonstrates that civil settlements between litigants and police department for abuse claims are perhaps more frequent than critics of the tort regime believe.[194] The difficulty in the area of tort suits is that the details of settlements are often hidden by secrecy mechanisms such as nondisclosure agreements ("NDAs") or sealed judgments and thus it is difficult to parse the actual effect of such suits.[195]

The barriers to recovery facing abused litigants are immense.[196] Officers benefit from qualified immunity[197] while state police departments are protected

186. *Id.* at 92.

187. *Id.*

188. *See id.* at 93.

189. Miller & Wright, *supra* note 27, at 759.

190. *See* 42 U.S.C. § 1983 (1996).

191. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 157 (1997); Miller & Wright, *supra* note 27, at 758; Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49–58.

192. *See*, *e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 114 (2003).

193. Miller & Wright, *supra* note 27, at 759–60.

194. *See id.*; *see also* Jonah Newman, *Chicago Spent More Than $113 Million On Police Misconduct Lawsuits In 2018*, CHI. REP. (Mar. 7, 2019), https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/ [https://perma.cc/TY3B-52DA]. The Chicago Reporter has also compiled a database that examines police misconduct suits and is searchable by officer. *Settling for Misconduct*, *supra* note 93.

195. Miller & Wright, *supra* note 27, at 760.

196. *Id.* at 762.

197. *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Hope v. Pelzer, 536 U.S. 730, 731 (2002). *See generally* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995).

by the sovereign immunity doctrine unless the state voluntarily waives such protection.[198] Additionally, suits against local police departments in federal court must prove an unlawful police policy or custom; a single incident of wrongdoing is insufficient, nor are municipalities responsible on a *respondeat superior* theory of liability.[199] There is also the obvious challenge of convincing a jury to believe a person originally suspected of a crime over the police officer subjected to the suit.[200] Nevertheless, the fact remains that governments pay out sums, sometimes significant sums, to survivors of police abuse.[201] These settlements, however, typically include binding agreements that prevent the parties from discussing the details of the settlement, or the abuse that led to it.[202]

III. ANALYSIS

The Chicago Police Department ("CPD") has a long and difficult relationship with many of the communities it polices.[203] In the wake of the murder of Laquan McDonald, an ongoing reckoning has been taking place as Chicago grapples with a history of corruption within the CPD. The Department of Justice's report ("DOJ Report")[204] laid bare what many in the community already knew: the CPD routinely violates the constitutional rights of Chicago residents.[205] The cover-up of the murder[206] of Laquan McDonald, for example, involved not merely silence, but active complicity from officers, detectives, sergeants, lieutenants, the chief of detectives, and a deputy chief of the CPD.[207]

A. Police Reform Mechanisms

The contours of various reform efforts are analyzed in this Section. The focus of this Note, however, is not primarily on the many violations uncovered by the DOJ Report but rather on the way that internal cultural dynamics encourage conspiracies of silence, active complicity, and nonaccountability. Once those cultural dynamics are brought into view, the Analysis considers the best way to effect change.

198. Miller & Wright, *supra* note 27, at 762.

199. *Id.*; Police departments are not liable in federal court under a theory of *respondeat superior* for tortfeasor officers. *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

200. Miller & Wright, *supra* note 27, at 762.

201. *Id.* at 774.

202. *Id.* at 775. Since proving a "pattern or practice" is an essential element to a successful suit in federal courts, it is unsurprising that police departments would want the details of abuse kept secret. *Id.* at 783.

203. DOJ REPORT, *supra* note 149, at 18–20; Stephen A. Crockett Jr., *Feds Confirm: Chicago Police Department Is as Corrupt as You Thought It Was*, ROOT (Jan. 13, 2017, 1:42 PM), https://www.theroot.com/feds-confirm-that-the-chicago-police-dept-is-as-corrup-1791173264 [https://perma.cc/TP9G-WW79].

204. *See generally* DOJ REPORT, *supra* note 149.

205. Crockett Jr., *supra* note 203.

206. Jason Van Dyke was convicted of the second-degree murder of Laquan McDonald. Aamer Madhani, *Chicago Cop Jason Van Dyke Sentenced to More than 6 Years for Murder of Laquan McDonald*, USA TODAY (Jan. 18, 2019, 6:53 AM), https://www.usatoday.com/story/news/2019/01/18/laquan-mcdonald-jason-van-dyke-sentencing/2602213002/ [https://perma.cc/5YWN-AWJY].

207. *See Biggest Takeaways*, *supra* note 95.

1. The DOJ Report Uncovered Astonishing Nonaccountability

The investigation of the CPD initiated after the murder of Laquan McDonald "ignit[ed] longstanding concerns about CPD officers' use of force" and a lack of accountability for the unlawful use of force.[208] The DOJ Report was based on a review of "thousands of pages of documents," a randomized and representative sample pulled from "the City's entire misconduct complaint database," as well as "over 300 person-days" in Chicago meeting with CPD officials, union leadership, and members of the broader Chicago community.[209] What the DOJ Report uncovered was staggering.[210]

It found that CPD officers engage in an unreasonable pattern or practice of using force (including deadly force) while also unnecessarily endangering themselves and others, resulting in "unnecessary and avoidable shootings and other uses of force."[211] In the aftermath of these unnecessary shootings, CPD fails to hold officers accountable.[212] Collectively, the investigation determined that the CPD "engages in a pattern or practice of force in violation of the Constitution."[213] To remedy the deficiencies in CPD use of force practices, cultural change is ultimately needed.[214]

There can be no doubt that "countless CPD officers" have engaged in "diligent efforts and brave actions" fighting against Chicago's violence.[215] Nevertheless, as both the City of Chicago and the CPD recognize, "it is imperative that the City rebuild trust between CPD and the people it serves," especially the communities hardest hit by gun violence.[216] In order to understand how that trust can be rebuilt, it is of course necessary to understand how the trust was broken. According to the report, "[i]t has been broken by systems that have allowed CPD officers who violate the law to escape accountability."[217] This requires "broad, fundamental reform to restore . . . trust" in Chicago's communities.[218]

i. Cultural Change

While serving his sentence for the corruption described previously,[219] a photo of Officer Jerome Finnigan, along with Chicago police officer Timothy McDermott, emerged that depicted the two officers holding hunting rifles while

208. DOJ REPORT, *supra* note 149, at 1.

209. *Id.* at 2.

210. Although beyond the scope of this Note, one of the more troubling findings of the DOJ investigation was that CPD has a homicide clearance rate of only 29%, less than half the national rate. *Id.* at 4.

211. *Id.* at 5.

212. *Id.*

213. *Id.*; *see* Graham v. Connor, 490 U.S. 386, 394 (1989); Flournoy v. City of Chicago, 829 F.3d 869, 874 (7th Cir. 2016).

214. DOJ REPORT, *supra* note 149, at 5.

215. *Id.* at 1.

216. *Id.*

217. *Id.* Notably, those systems that prevent accountability for police officers perpetuate the CPD's inability to effectively solve crimes. *Id.* at 1–2.

218. *Id.* at 4.

219. *See supra* Section II.B.4.

kneeling over a young black man with deer antlers taped to his head.[220] Officer McDermott was rightly fired, but his response is instructive: "I . . . was trying to fit in."[221] It is deeply concerning that such a photo could be taken inside a police station and, absent a federal investigation, likely never become public.[222] Yet beyond the immediate and obvious concern, such incidents demonstrate not only the existence of the blue wall of silence but also implicate the harm that this sort of cultural environment can perpetuate.

Cultural change is needed, and one place ripe for change is the CPD's investigatory practices in the aftermath of officers' use of force. Although officers are required by CPD policy to report their use of force, "most officer force is not reviewed or investigated."[223] Hardly any incidents were investigated, and the investigations that took place are nominal and low quality.[224] As a result, "there is no meaningful, systemic accountability for officers who use force in violation of the law or CPD policy."[225] This has led to a culture wherein officers expect they can use force and not be questioned.[226]

Because of "numerous entrenched, systemic policies and practices[,]" accountability in CPD is undermined and ineffective.[227] In the five years before the DOJ investigation began, Chicago received more than "30,000 complaints of police misconduct," yet more than 98% resulted in no discipline whatsoever.[228] In the less than 2% of cases that were investigated, "serious investigative flaws . . . obstruct[ed] objective fact finding."[229] These flaws included not only a process heavily biased in favor of the accused officer[230] but a code of silence perpetuated by police officers that included "lying and affirmative efforts to conceal evidence."[231] Rather than treating that conspiratorial behavior as significant, the agencies tasked with investigating police misconduct "treat[ed] such efforts to

220. German Lopez, *2 White Chicago Cops Posed for a Picture Depicting a Black Detainee as a Hunted Animal*, VOX (May 27, 2015, 6:20 PM), https://www.vox.com/2015/5/27/8673183/chicago-police-racist-photograph [https://perma.cc/PWP7-K8WW].

221. *Id.*

222. Kim Janssen, *I Saw Chicago Cops Take Racist 'Hunting' Photos of Nephew, Uncle Says*, CHI. SUN TIMES (June 11, 2015, 8:59 PM), https://chicago.suntimes.com/2015/6/11/18447043/i-saw-chicago-cops-take-racist-hunting-photos-of-nephew-uncle-says [https://perma.cc/KG3P-FJLF].

223. DOJ REPORT, *supra* note 149, at 41.

224. *Id.* at 7.

225. *Id.*

226. *Id.* The report also notes that the City undertook to revise their polices in this area but such changes would need to be accompanied by institutional enforcement – it is unclear whether any such changes have been effective. *Id.*

227. *Id.* at 8.

228. *Id.* at 7. In an understated characterization of this data, the report noted that "[t]his is a low sustained rate." *Id.*

229. *Id.* at 8.

230. This bias includes: not interviewing witnesses or the accused officer; a system that builds potential for coordination, collusion, and coaching of witnesses; questioning that instead of seeking the truth, seeks to elicit favorable statements to justify the officer's actions; a routine failure to incorporate probative evidence from parallel proceedings; and "summary reports are often drafted in a manner favorable to the officer by omitting conflicts . . . or by exaggerating evidence favorable to the officer." *Id.*

231. *Id.*

hide evidence as ancillary and unexceptional misconduct, and often d[id] not investigate it."[232] It is not surprising, then, that officers "believe there is not much to lose if they lie to cover up misconduct."[233] When it comes to the rare sustained complaint of misconduct, the discipline officers received was "haphazard and unpredictable" and "[did] little to deter misconduct."[234] It is currently too early to determine what effect, if any, the consent decree governing the CPD has had on these antecedent realities.[235] As noted above, however, the results have not been especially promising.[236]

ii. Accountability Systems

The primary formal accountability systems for CPD officers are the Bureau of Internal Affairs ("Internal Affairs") and the Civilian Office of Police Accountability ("COPA"), previously the Independent Police Review Authority ("IPRA").[237] Most misconduct complaints are within the jurisdiction of Internal Affairs rather than COPA.[238] Thus, although COPA received 4,181 complaints and notifications in 2018, it referred 2,765 complaints and 209 notifications to Internal Affairs.[239] COPA's jurisdiction, broader than IPRA's was, includes complaints of (1) excessive force, (2) domestic violence, (3) coercion, (4) verbal abuse, (5) unlawful search or seizure, and (6) unlawful denial of counsel.[240] And, COPA receives notifications of (1) "[a]ll officer involved firearm discharges," (2) "[a]ll officer-involved deaths and custodial deaths," (3) "[t]aser discharges resulting in serious injury or death," and (4) "[a]ny incident involving an officer that results in serious bodily injury or death."[241]

Notwithstanding its duties to investigate, IPRA often was part of the system that shielded officers from accountability. This succinct narrative is emblematic:

> [A] CPD officer fatally shot a fleeing, unarmed suspect in the back. The officer told investigators the suspect had turned around to point a black object. This account did not square with the location of the shooting victim's gunshot wounds and appeared contrary to video footage that showed

232. *Id.* at 9.

233. *Id.*

234. *Id.*

235. *See* Consent Decree, Illinois v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 at *1 (N.D. Ill. Jan. 31, 2019); *see also* CHICAGO POLICE CONSENT DECREE, http://chicagopoliceconsentdecree.org (last visited Aug. 23, 2021) [https://perma.cc/W7TC-Y9SW].

236. *See* Bremer, *supra* note 174.

237. DOJ REPORT, *supra* note 149, at 18. The alphabet soup of police oversight boards probably does not aid in creating transparent systems of accountability.

238. *Id.* COPA officially opened, thereby replacing IPRA, on September 15, 2017. *General FAQS*, CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, https://www.chicagocopa.org/faqs/ (last visited Aug. 23, 2021) [https://perma.cc/54RJ-BET8].

239. SYDNEY R. ROBERTS, CIVILIAN OFF. POLICE ACCOUNTABILITY, ANNUAL REPORT 17 (2018).

240. *Id.* at 1–2.

241. *Id.* at 2.

> the suspect running away from the officer. Again, IPRA accepted the officer's account, despite the conflicting evidence. IPRA's final report of the incident did not mention the existence of the video.[242]

In account after account, IPRA appears to have taken the story of the officer at face value despite evidence to the contrary, often omitting contrary evidence from its official findings.[243] Indeed, "[i]n many of these cases, IPRA generally accepted the officer's version of events, which were later undercut by video evidence. The Laquan McDonald shooting is one such incident; our review found many others."[244]

Another interesting tactic, apparently used to evade accountability, was the use of boilerplate language to justify officers' use of force.[245] Vague language like "actively resisted" and "attempted to defeat arrest" was often unaccompanied by detail and later investigation rarely requested additional information.[246] Despite contradictory video footage relayed to IPRA by outsiders, unlawful force often went undisciplined and was even deemed justified.[247] Indeed, supervisors also routinely incorporated boilerplate language as they approved officers' use of force only minutes after reports were submitted.[248] Supervisors almost never asked for more information from the officer, let alone referred an officer's use of force for outside investigation.[249]

Since 2004, Chicago has paid out more than $500 million in settlements and judgments stemming from police misconduct cases.[250] In more than half of those cases no investigation occurred, and fewer than 4% of investigations recommended discipline for the officers involved.[251] As is suggested by the data, the current CPD accountability systems for deterring and detecting misconduct may be seriously ineffective.[252] Complaints investigated by IPRA and Internal Affairs were consistently, egregiously deficient and included biased dynamics that had not been seen elsewhere.[253]

2. COPA's Successes and Failings

As the DOJ report pointed out, COPA's success is contingent on how the public perceives COPA's credibility, particularly in the wake of the failure of IPRA.[254] The success of the new agency requires that the city do more than

242. DOJ REPORT, *supra* note 149, at 26.
243. *See id.* at 26–29.
244. *Id.* at 36.
245. *Id.* at 32.
246. *Id.*
247. *Id.* at 37. "During our investigation we reviewed numerous use-of-force incidents captured on video. In many of these incidents, the use of force was facially unreasonable and the videos undercut the officers' descriptions of the incidents." *Id.* at 36.
248. *Id.* at 44–45.
249. *Id.* at 45.
250. *Id.* at 46.
251. *Id.*
252. *Id.*
253. *Id.* at 47.
254. *Id.* at 93.

merely change the name of the agency charged with oversight: merely "rebranding" is insufficient, particularly since IPRA was itself a rebrand of a predecessor oversight body, the OPS.[255] Although COPA appears to be a clear improvement over IPRA,[256] it has not been an unmitigated success.[257]

At the outset, COPA was criticized by the DOJ Report for failing to address the key concerns identified, particularly the flawed investigative system.[258] Specifically, the DOJ Report questioned whether the increased budget would be sufficient to deal with existing investigatory obligations, let alone the increased investigatory powers bestowed upon COPA by the new ordinance.[259] Next, it questioned the extent to which COPA would continue "IPRA's inappropriate use of mediation" as well as the sufficiency of its independence from the Chicago Police Department.[260] Finally, the report notes that unless the "defective investigative practices" are rectified, COPA's expanded authority would worsen the identified investigative problems.[261] Although the report identified these issues, it also identified specific action steps to address them.[262]

To some degree, the identified concerns have proved prescient. COPA is certainly foundational to the ongoing police oversight project in Chicago, but the "prognosis is not encouraging."[263] For example, in August 2017, a developmentally and intellectually disabled nineteen-year-old, Ricardo Hayes, was shot by Sergeant Kahlil Muhammad in questionable circumstances.[264] Afterward, Sergeant Isaac Lambert refused to follow orders allegedly given by his superiors to support Muhammad's report.[265] Lambert has since filed a whistleblower suit against the City in Cook County Circuit Court alleging that he was demoted from detective to patrol in retaliation for his refusal to file a false report.[266] If Lambert's allegations are true, they clearly demonstrate the distance the internal culture of silence within the Chicago Police Department has yet to go.[267]

That distance necessarily implicates the importance of COPA's investigatory role; the report on the Muhammad shooting was "exemplary in its clarity, rigor, and thoroughness."[268] The quality of the report notwithstanding, the ultimate discipline recommendation decision lies with the chief administrator.[269] The COPA investigators and supervisors involved claim the only outcome they

255. *Id.*
256. *Id.* at 92.
257. Kalven, *supra* note 10.
258. DOJ REPORT, *supra* note 149, at 92.
259. *Id.*; *see* CHI., ILL., MUN. CODE § 2-78-120 (2016).
260. DOJ REPORT, *supra* note 149, at 92.
261. *Id.* at 92–93.
262. *Id.* at 154–61.
263. Kalven, *supra* note 10.
264. *Id.*
265. *Id.*
266. Matt Masterson, *Chicago Sergeant Claims Retaliation After Refusing to Participate in Alleged Cover-Up*, WTTW (Mar. 4, 2019, 3:25 PM), https://news.wttw.com/2019/03/04/chicago-police-sergeant-claims-retaliation-alleged-cover-up [https://perma.cc/83UJ-DNRK].
267. Kalven, *supra* note 10.
268. *Id.*
269. CHI., ILL., MUN. CODE § 2-78-120(l) (2016).

expected was termination.[270] They were shocked, however, when COPA chief administrator Sydney Roberts recommended a mere sixty-day suspension.[271] This led to a "crisis of confidence in leadership" with nearly thirty staff members leaving the agency in the following year.[272] Former staff expressed concern that COPA's mission was being undermined because Roberts "was more interested in building her relationship with the [CPD] superintendent than in maintaining the agency's independence."[273] It thus seems clear that COPA may have serious work to do in (re)building its public image; an image essential to its ability to work effectively.[274]

The 2018 COPA report released by Roberts was much more optimistic.[275] It highlighted COPA's efforts to build trust with community residents and COPA's dedication to "increase investigative timeliness and quality."[276] Of the complaints and notifications of potential misconduct received in 2018 by COPA, it retained 1207 out of 4181, or approximately 28.8%.[277] The remainder were referred to the Bureau of Internal Affairs.[278] Of those complaints retained by COPA, 228 were excessive force complaints.[279] 2018 was the third consecutive year with a decrease in complaints related to excessive force.[280]

While the year-over-year decrease in such complaints is heartening, COPA has an increasing number of pending investigations.[281] A significant plurality of pending investigations are related to excessive force and domestic violence.[282] During 2018 COPA concluded 1039, of which 346 were concluded "with findings," 171 of which were sustained.[283] Although a sustained rate of approximately 16% across all concluded complaints may appear to be low,[284] it is a significant increase over the less than 2% sustained rate identified in the DOJ report.[285] Yet nearly two-thirds of all complaints were closed "without findings" suggesting that policy changes may increase the total number of sustained complaints.[286] For example, COPA concludes some investigations without findings

270. Kalven, *supra* note 10.

271. *Id.* In an uncommon turn of events—one that highlights the suspicious nature of the recommended sixty-day period of discipline—CPD Superintendent Eddie Johnson recommended a longer period of discipline than COPA. *Id.*

272. *Id.* As of February 2019, COPA had a total workforce of 151 full-time staff. ROBERTS, *supra* note 239, at 8.

273. Kalven, *supra* note 10.

274. *See* DOJ REPORT, *supra* note 149, at 93.

275. ROBERTS, *supra* note 239, at 1–2. The chief administrator of COPA is required to release an annual report no later than February 15th of the following year. CHI., ILL., MUN. CODE § 2-78-150(b) (2016).

276. ROBERTS, *supra* note 239.

277. *Id.* at 16.

278. *Id.*

279. *Id.* at 22.

280. *Id.*

281. *Id.* at 24 ("As of December 31, 2018, COPA had 1193 pending investigations, an increase over 2017.").

282. *See id.* at 26.

283. *Id.* at 27.

284. *Id.* at 26.

285. DOJ REPORT, *supra* note 149, at 7.

286. ROBERTS, *supra* note 239, at 28.

if the complainant is unable or unwilling to sign an affidavit.[287] This practice was criticized by the DOJ Report as an "institutional barrier[]" that contributes to non-investigation by creating a "tremendous disincentive to come forward with legitimate claims."[288] Although COPA's 2018 report acknowledges that it can request an affidavit override, 339 of 693 cases, or were concluded without findings due to a lack of affidavit or affidavit override.[289]

Although it appears that COPA is a more effective agency than IPRA was, there remain significant issues that have yet to be addressed. First, the appearance of political influence over the outcome of discipline recommendations related to particular investigations is problematic.[290] If the saga involving Sgt. Kahlil Muhammad is illustrative,[291] there may need to be reforms in the discipline recommendation process. Second, with approximately two-thirds of all complaints closed without a determination of the merits, there may be a large number of officers engaging in unrectified misconduct.[292] Finally, the causal mechanism behind the decrease in use of force complaints remains unidentified.[293] Nevertheless, COPA is a more transparent organization than IPRA and has significant reporting requirements.[294] Further, the increased sustained findings rate appears to be a positive development, although without knowing the content of the underlying complaints it is hard to evaluate whether the discipline was meaningful.[295]

B. Civil Conspiracy and Cultures of Silence

It is self-evident that in order for civil conspiracy liability to be effective in curtailing cultures of silence the requisite elements must be capable of being met. This Section discusses the elements of civil conspiracy[296] and questions whether the elements of civil conspiracy can be met without doctrinal adjustments. Treating the officer-involved conspiracies in the Laquan McDonald and Jon Burge sagas as illustrative, what follows analyzes the titular question of Part III.B.1.

287. *Id.*

288. DOJ REPORT, *supra* note 149, at 47, 50.

289. ROBERTS, *supra* note 239, at 29.

290. Kalven, *supra* note 10.

291. *See generally id.*

292. *See* ROBERTS, *supra* note 239, at 29.

293. *See id.* at 22. Hopefully this is a positive development related to actual decreased use of force, increased transparency, and effective accountability measures. Determining the causal mechanism(s) should be the subject of future research.

294. *See* CHI., ILL., MUN. CODE § 2-78-145, 150 (2016).

295. *See* ROBERTS, *supra* note 239, at 32. Although COPA is required to release summary reports for any investigation with a sustained finding, the final summary report is not posted until the disciplinary recommendation process is completed and the impacted officer is served with the charges. *See* CHI., ILL., MUN. CODE § 2-78-145 (2016). This can be a lengthy process; sustained reports from 2018 have yet to be posted as of Feb. 2, 2020. Jodi S. Cohen & Jennifer Smith Richards, *Police Oversight Ordinance Promised Transparency but Doesn't Fully Deliver*, PROPUBLICA (Nov. 13, 2017 5:00 AM), https://www.propublica.org/article/copa-chicago-police-oversight [https://perma.cc/Q64E-R78U]; *see 2018 Summary Reports*, COPA, https://www.chicagocopa.org/news-publications/publications/summary-reports/2018-summary-reports/ (last visited Apr. 4, 2021) [https://perma.cc/4ATH-H4T3].

296. *See supra* notes 51–60 and accompanying text.

1. Can the Elements of Civil Conspiracy be Met?

As discussed above, the elements of civil conspiracy are: "(1) two or more persons; (2) an unlawful object or a lawful object to be accomplished by unlawful means; (3) an agreement or meeting of the minds on the object or course of action; (4) one or more wrongful acts; and (5) damage resulting therefrom."[297] Illinois defines civil conspiracy as an intentional tort and hues to the common formulation.[298] Illinois defines civil conspiracy as "a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means."[299]

In order to prevail on such a claim, litigants seeking recovery in the aftermath of the Burge saga will likely have little trouble alleging the involvement "of two or more persons."[300] Indeed, not only did numerous government employees and officials participate in the torture[301] it was an "open secret" in the police department.[302] Laquan McDonald's estate also would likely have little trouble alleging that two or more officers were involved in covering up for Van Dyke.[303] Nor is it likely that litigants in either case would face difficulty alleging the existence of "an unlawful purpose or a lawful purpose by unlawful means."[304] In both cases the officers involved in covering up for Burge and Van Dyke took steps that seem to clearly fall within the statutory definition of obstruction of justice.[305] For example, the Inspector General report concluded that officers investigating Van Dyke gave false statements "to exaggerate the threat McDonald posed" and "improperly disposed of three original general progress reports. . . . [and] then 'personally recreated the reports.'"[306] In the Burge investigation a CPD investigation concluded that "Area 2 command personnel . . . encouraged [systemic abuse] by 'actively participating.'"[307] Nor is the requirement that a wrongful act be committed likely to pose much difficulty for the same reason: in each case the wrongful acts were not only committed but documented by an external investigation.[308]

297. Pritikin, *supra* note 35, at 7–8.

298. *See, e.g.*, Tucker v. Soy Cap. Bank & Tr. Co., 974 N.E.2d 820, 834–35 (Ill. App. Ct. 2012) (citing McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 258 (Ill. 1999)).

299. *Id.*

300. *See id.*

301. Taylor, *A Long and Winding Road*, *supra* note 106, at 180.

302. *Id.* at 189.

303. Safia Samee Ali, *Inspector General Report Shows at Least 16 Officers Involved in Cover-Up of Laquan McDonald Shooting*, NBC NEWS (Oct. 9, 2019, 4:22 PM), https://www.nbcnews.com/news/us-news/inspector-general-report-shows-least-16-officers-involved-cover-laquan-n1064401 [https://perma.cc/5F2S-AV6W].

304. *Tucker*, 974 N.E.2d at 834–35.

305. *See* 720 ILL. COMP. STAT. 5/31-4(a) (2012).

306. Ali, *supra* note 303.

307. Taylor, *A Long and Winding Road*, *supra* note 106, at 184; Shines & Goldston, *supra* note 116, at 6 ("Particular command members were aware of the systematic abuse and perpetuated it either by actively participating in [sic] same or failing to take any action to bring it to an end.").

308. *See Tucker*, 974 N.E.2d at 834–35; *see also supra* notes 294–95 and accompanying text.

Such claims, however, will likely run into doctrinal impediments in demonstrating an "agreement."[309] The existence of an agreement is "a necessary and important" element of civil conspiracy in Illinois.[310] Indeed, the Supreme Court of Illinois has said that "evidence of parallel conduct," without more, "is insufficient to establish the agreement required by civil conspiracy liability."[311] Thus, demonstrating the existence of an agreement between the officers is essential to prevailing on a claim of civil conspiracy.[312] This showing is likely to be difficult given the typically unstated but implicitly understood nature of the "blue wall of silence."[313]

Difficult, but likely not impossible given that a "defendant who understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further those objectives . . . is liable as a conspirator."[314] Some of the difficulty results from the very nature of conspiracies because "[a] conspiracy is almost never susceptible to direct proof."[315] The conspiracy then, is proven by drawing together "circumstantial evidence," "inferences drawn from evidence," and "common-sense knowledge of the behavior of persons in similar circumstances."[316]

Because civil conspiracy extends liability "beyond the active wrongdoer to those who have merely planned, assisted or encouraged the wrongdoer's acts" the "gist of the conspiracy claim" is the "tortious acts performed in furtherance of the agreement."[317] The existence of the agreement is not independently actionable; there must be accomplished tortious acts.[318] This presents the puzzle of which tortious acts are the focus of the conspiracy.

2. Difficulties with Traditional Civil Conspiracy Tort Liability

In order to succeed on a civil conspiracy claim, litigants will need to demonstrate the existence of tortious acts that were performed in furtherance of the agreement.[319] The difficulty here is that, under one view, the tortious act in many cases was completed *before* the particular conspiracy to cover up the

309. *See Tucker*, 974 N.E.2d at 834–35.

310. McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 258 (Ill. 1999) (quoting Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894 (Ill. 1994)).

311. *Id.* at 267.

312. *Id.* at 258.

313. Tom Jackman, *New Orleans Police Pioneer New Way to Stop Misconduct, Remove "Blue Wall of Silence"*, WASH. POST (Jan. 24, 2019, 5:00 AM), https://www.washingtonpost.com/crime-law/2019/01/24/new-orleans-police-pioneer-new-way-stop-misconduct-remove-blue-wall-silence/ [https://perma.cc/NJU8-EKW4].

314. *McClure*, 720 N.E.2d at 258 (citing *Adcock*, 645 N.E.2d at 894).

315. *Id.*; Walsh v. Fanslow, 462 N.E.2d 965, 970 (Ill. App. Ct. 1984).

316. *McClure*, 720 N.E.2d at 258 (quoting *Adcock*, 645 N.E.2d at 895). An additional difficulty, beyond the scope of this Note, is that Illinois imposes a heightened burden of proof—clear and convincing evidence—in civil conspiracy suits. *Id.*

317. *Adcock*, 645 N.E.2d at 894.

318. *Id.* at 63.

319. *Id.*

wrongdoing came into existence.[320] This may present greater difficulties for single instances of wrongdoing (*i.e.* a police involved shooting) than for prolonged examples of wrongdoing (*i.e.* the Burge-led torture ring.) For example, it is highly unlikely that a stated conspiracy to cover up Van Dyke's wrongdoing could have come into existence before he killed McDonald.[321] Conversely, it seems highly likely that the officers who knew of, participated in, and obscured investigations into the ongoing torture ring at Area 2 engaged in a conspiracy that arose before the wrongdoing was completed.[322]

This would suggest two avenues for litigants who were the subject of a conspiracy that was not previously ongoing. First, they may argue that the culture of silence in the police department constructively created a dormant conspiracy that was activated by the incident in question. This argument would be that the officers involved constructed an *ex ante* agreement to engage in conspiratorial behavior to protect a wrongdoer *ex post.* As currently constituted, though, this argument runs into doctrinal difficulty because "civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong."[323] This dormant conspiracy theory is unlikely to fit nicely into existing civil conspiracy doctrine because even if there is only a general intent to cover up a possible future wrong, there is still no specific intent to accomplish a particular wrong.[324] Thus, for such a claim to succeed, the dormant conspiracy theory of liability would likely need to be adopted by statute.

The second avenue, then, is to demonstrate that the tortious act at the center of the conspiracy is the cover-up itself. Under this theory, the agreement arose in response to a particular event and the object of the conspiracy was the tortious act of falsifying reports, misleading investigators and the like in order to conceal wrongdoing. These tortious acts, then, may be likened to common law fraud[325] and fraudulent concealment.[326] The difficulty on both of these particular theories of liability, however, is that each require damage to the plaintiff resulting from reasonable reliance on the truth of the statement(s) made by the defendant.[327] While this may present a viable vehicle for a government entity such as COPA to sue, it likely forecloses suits from the individual harmed by the conspiracy.

320. *See* Lockhart, *supra* note 4. *Cf.* Martinez v. Cnty. of Suffolk, 999 F.Supp.2d 424, 431 (2014).

321. *Cf. Criminal Law: The Crime of Conspiracy*, LAWSHELF, https://lawshelf.com/shortvideoscontentview/criminal-conspiracy/ (last visited Aug. 23, 2021) [https://perma.cc/R6N6-GPUJ].

322. *See* Taylor, *A Long and Winding Road*, *supra* note 106, at 184; Shines & Goldston, *supra* note 116, at 6 ("Particular command members were aware of the systematic abuse and perpetuated it either by actively participating in [sic] same or failing to take any action to bring it to an end.").

323. Miller v. Hecox, 969 N.E.2d 914, 925 (Ill. App. Ct. 2012) (citation omitted).

324. *See id.*

325. *See* Phillips v. DePaul Univ., 19 N.E.3d 1019, 1036 (Ill. App. Ct. 2014).

326. Vandenberg v. Brunswick Corp., 90 N.E.3d 1048, 1056 (Ill. App. Ct. 2017).

327. *Phillips*, 19 N.E.3d at 1036; *Vandenberg*, 90 N.E.3d at 1056. It is hard to see how an individual plaintiff, as opposed to an investigatory body, would come to reasonably rely on the truth of the statements of the officers involved.

Another theory of the tortious act is defamation.[328] Under Illinois law, "words that impute a person has committed a crime" are defamatory *per se*.[329] In some cases of police involved shootings, for example, the cover-up is premised upon allegations that the person shot presented a danger to the officers.[330] Here, the argument would be that the officers conspired to cover up the wrongdoing of a fellow officer by making false and defamatory statements about the person harmed by the initial wrongdoing.

C. How Would Civil Conspiracy Tort Liability Affect a Broader Culture of Silence?

Imposing civil conspiracy liability against officers who engage in covering up the wrongdoing of others functions not only as a deterrent to those who commit the tortious acts, but also as a deterrent against those who have "planned, assisted, or encouraged the wrongdoer's acts."[331] By broadening the scope of liability, such a regime imposes costs, and thus the potential for behavioral impact, on a greater network of culpable actors.[332] This in turn increases the risk to an officer otherwise inclined to engage in activities that would obscure a search for the truth when a fellow officer may be found to have done wrong.

Such conspiracies of silence are a "well-documented phenomenon" and have "existed . . . for as long as there have been organized police forces."[333] Yet absent strong countervailing forces, it is perhaps unsurprising that, as one report on police corruption concluded, "because of a police culture that exalts loyalty over integrity[,]" otherwise honest officers remain silent rather than face "the consequences of 'ratting' on another cop no matter how grave the crime."[334] In such an environment, it is well within any given officer's self-interest to avoid being perceived as a 'rat.'[335] The blue wall of silence is "[h]ighly engrained" and relates to "a plethora of counterproductive and hazardous results."[336] Imposing civil conspiracy liability presents an opportunity to introduce countervailing concerns such that officers may begin acting with their fiscal self-interest in mind—avoiding costly suits—rather than acting with their cultural self-interest in mind (never-mind considerations of ethics and morality).

328. Dobias v. Oak Park & River Forest High Sch. Dist. 200, 57 N.E.3d 551, 562 (Ill. App. Ct. 2016).

329. *Id.* at 563.

330. *See, e.g.*, Ali, *supra* note 303. ("The formerly confidential report, written in 2016 by the [C]ity of Chicago's inspector general, Joseph Ferguson, revealed that several officers committed numerous ethical and internal violations in order to cover up former officer Jason Van Dyke's shooting off the 17-year-old, including giving false statements to 'exaggerate the threat McDonald posed.'").

331. Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 894 (Ill. 1994).

332. Miller & Wright, *supra* note 27, at 773 ("But the behavior shaping function of tort claims may exist so long as there are a decent number of successful cases.").

333. Gilles, *supra* note 84, at 63–64.

334. *Id.* at 66 (citation omitted).

335. *See, e.g.*, Second Amended Complaint at ¶¶ 29, 31, 33, 36, 37, Spalding v. City of Chi., 186 F. Supp. 3d 884, 913–15 (N.D. Ill. 2016) (No. 12-8777).

336. Samuel Vincent Jones, *Police, Heroes, and Child Trafficking: Who Cries When Her Attacker Wears Blue?*, 18 NEV. L.J. 1007, 1023 (2018).

1. Maximizing Success

Of course, the impact of any scheme of liability is affected by the system within which it operates. Current liability mechanisms are often plagued by a lack of transparency through systems that serve to keep the public in the dark.[337] For example, it is "standard litigation strategy" in some cities to require parties to sign binding agreements not to discuss the judgment and have all discovery sealed.[338] These secrecy devices "should raise problems" for those who are "concerned with open government."[339] Indeed, in other settings, such as the Catholic child sexual abuse crisis, these devices have been identified as problematic.[340] Thus, maximizing the efficacy of various efforts to mitigate cultures of silence (including through the imposition of civil conspiracy as advocated herein) should be a priority.

i. Mandatory Disclosure of Settlements

Miller and Wright have argued that the public interest in barring sealed judgments and secret settlements in police misconduct cases is at least as strong as the public interest in barring such secrecy devices in cases involving "sexual abuse by priests or for any other class of civil suit."[341] Simply put, "few privacy interests are at stake" because, in part, "[t]he public interest in police litigation is confirmed by the public actor on one side of the lawsuit."[342] Even if such a mandatory disclosure regime were implemented and resulted in decreased settlements (by number or by value), the "public's competing interest in the power of tort law to deter future misconduct" is "especially powerful."[343]

A few states have recognized this, and have codified bans on secret settlements in cases involving public funds.[344] North Carolina, for example, provides that "[n]o agency of North Carolina government or its subdivisions . . . shall approve, accept or enter into any settlement of any such suit . . . if the settlement provides that its terms and conditions shall be confidential."[345] Unless an "overriding interest" that "cannot be protected by any measure short of sealing the agreement" exists, a "presumption of openness" requires transparency.[346] Similarly, Oregon provides that government agencies and officers "may not enter into any settlement or compromise of the action" if "the terms or conditions of the settlement or compromise [must] be [kept] confidential."[347]

337. *See* Miller & Wright, *supra* note 27, at 773–74.
338. *Id.* at 775.
339. *Id.* at 776.
340. *Id.*
341. *Id.* at 780.
342. *Id.*
343. *Id.*
344. N.C. GEN. STAT. § 132-1.3 (2020); OR. REV. STAT. § 17.095 (2020).
345. § 132-1.3(a).
346. § 132-1.3(b).
347. § 17.095(1).

ii. Shaping Behavior

There are at least two sets of actors whose behavior may be affected by such a scheme of liability: departments and officers. Civil conspiracy liability combined with a mandatory disclosure requirement would likely be influential in shaping their behavior. Shaping the behavior of police departments requires that they "internalize those costs" which result from the unreasonable behavior of their police officers.[348] Whether governments respond to economic incentives in a similar manner to other actors is disputed.[349] Daryl Levinson, for example, has argued that achieving optimal deterrence for government actors requires the imposition of political rather than purely economic costs.[350] Myriam Gilles, conversely, argues that economic incentives do in fact matter vis-à-vis government actors even if such incentives are more complex than in cases involving strictly private parties.[351] Miller and Wright rightly conclude that either way, "for tort judgments to shape institutional and individual behavior the defendants must bear the cost of the misbehavior."[352] Such cost allocation is absent in the current system[353] and should be imposed by any statutory regime that imposes conspiracy liability against officer-involved conspiracies.

The literature on shaping the behavior of individual actors to incentivize whistleblowing is fairly robust,[354] though much of it has developed in the context of corporate wrongdoing. For example, Dodd-Frank[355] and the False Claims Act[356] establish bounties for whistleblowers, both to incentivize the act of whistleblowing but also to compensate for expected career harms.[357] The structure of both statutes is to create a 'carrot'—the bounty—rather than a "stick" (*i.e.*, liability for failing to blow the whistle).[358] Although the proposal to impose civil conspiracy liability is properly characterized as a negative incentive, it will be most effective in conjunction with positive incentives, as described *infra*.[359]

Within police departments, a traditional mechanism for accountability relies on internal administrative discipline, brought to the attention of superior officers by internal whistleblowers.[360] All too often, internal review mechanisms

348. Miller & Wright, *supra* note 27, at 781.

349. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000).

350. *Id.*

351. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 879–80 (2001) (responding to Levinson).

352. Miller & Wright, *supra* note 27, at 781.

353. *Id.* at 781–82. *But see* White et al., *supra* note 27, at 40 (arguing that securing affordable liability insurance has led to improved police practices because of insurance risk management protocols).

354. *See, e.g.*, Verity Winship, *Private Company Fraud*, 54 U.C. DAVIS L. REV. 663, 706, 713 (2020).

355. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank); 15 U.S.C. § 78u–6.

356. 31 U.S.C. § 3729.

357. *See, e.g.*, Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 667–68 (2018).

358. *See* 15 U.S.C. § 78u–6(b)(1).; 31 U.S.C. § 3729(a)(2).

359. *See infra* notes 360–65 and accompanying text.

360. Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U.L. REV. 1, 23 (2001).

fail would-be whistleblower police officers.[361] In order to incentivize whistleblowing activity, the most significant reforms will be those that "make [a] true change in the function and culture of police departments."[362] Creating such cultural change likely requires not only negative incentives (such as avoiding civil conspiracy liability) but also positive incentives.[363] This is the theory behind "Ethical Policing Is Courageous" ("EPIC")—a program developed in New Orleans in the wake of a federal consent decree imposed in 2012 after the killing of an unarmed man.[364] EPIC works to create a pro-active culture of ethical policing through "[a]ctive bystandership" such that "outspoken co-worker[s] who [are] intent on doing the right thing" are the new normal, thereby preventing other officers from looking the other way.[365]

2. Adoption Mechanisms

Civil conspiracy tort liability exists at common law, and to some extent, does not need modification to be pursued as a legal remedy in some cases of police-involved conspiracies.[366] Yet the difficulties in pursuing civil conspiracy for litigants who were harmed by solitary instances of wrongdoing (as opposed to long lasting wrongdoing as in the Burge torture ring) could be significant and warrant a solution.[367] Given the apparently ubiquitous nature of the "blue wall of silence" in police cultures,[368] courts could consider adopting an amended agreement requirement that recognizes a dormant civil conspiracy whose contours are tacitly understood but only concretized upon an instance of wrongdoing. Such a holding might recognize that police-involved conspiracies are born out of a culture of silence by combining "common-sense knowledge of the behavior of persons in similar circumstances" with evidence and the inferences drawn therefrom.[369]

Alternatively, state legislatures could choose to codify a civil conspiracy cause of action that deals with the difficulties identified above. This would represent an end-run around qualified immunity in § 1983 suits by creating a state remedy.[370] Such experiments in state-based qualified immunity reductions have

361. *Id.*

362. *Id.* at 24.

363. Such positive incentives could include a bounty system as is incorporated in the Dodd-Frank Act. *See* 15 U.S.C. § 78u–6(b)(1) (2010).

364. Jackman, *supra* note 313.

365. *Id.*

366. *See supra* notes 305–16 and accompanying text.

367. For example, and although beyond the scope of this Note, it is often difficult to find lawyers in these sorts of cases and a scheme of multiple damages or otherwise creating a statutory minimum has been identified as a potential solution. *See generally* W. Kip Viscusi & Scott Jeffrey, *Damages to Deter Police Shootings*, 2021 U. ILL. L. REV. 741 (2021).

368. Levenson, *supra* note 360, at 15.

369. *See* McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 258 (Ill. 1999) (citation omitted).

370. For an overview of qualified immunity, see generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

been gaining traction, at least in the academic literature on federalism.[371] Expansion of common law doctrine via legislation is certainly not an unheard-of solution.[372] The contours of such a legislatively created cause of action are explored below.

IV. RECOMMENDATION

It is no secret that officers engage in what is often called a "code of silence"—it has been acknowledged by "[t]he City, police officers, and leadership within CPD and its police officer union."[373] Yet this descriptor is too mild for a range of behavior that includes "lying and affirmative efforts to conceal evidence."[374] While such "tightly orchestrated lying" demonstrates an effort at "narrative control,"[375] in the context of the common law system, it may also constitute civil conspiracy. While the normative question of who *should* hold police accountable remains open to debate, it is clear that current mechanisms of police accountability all too often fail to deliver justice.[376]

Although pursuing claims of civil conspiracy against police officers is not a silver bullet, it does hold some meaningful benefits not as readily available elsewhere. Illinois and other states should codify the common law understanding of civil conspiracy and expressly include a cause of action against state actors who undermine, cover-up, or otherwise impede the results of official investigations.[377] To maximize the efficacy of such a route towards accountability, it would also be helpful for states to take additional steps towards transparency, such as mandating the disclosure of suits and settlements where police misconduct is involved as well as requiring all funds paid to come from the police budget rather than the city's budget.[378] Finally, states should recognize and reward those officers who refuse to engage in conspiratorial behavior by cooperating with investigators.[379]

A. Adopt Civil Conspiracy Tort Liability for Officer-Involved Conspiracies

As demonstrated above, civil conspiracy tort liability can, at least theoretically, be imposed in officer involved conspiracies against those officers who contribute to a conspiracy that results in material harm to an individual.[380] As various

371. *See, e.g.*, Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1458 (2019); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 234 (2020).

372. *See, e.g.*, Dobias v. Oak Park, 57 N.E.3d 551, 563 (2016) (noting legislative expansion of common law defamation *per se*).

373. DOJ REPORT, *supra* note 149, at 8.

374. *Id.*

375. Kalven, supra note 125.

376. *See supra* Section III.A.

377. For one example of what such a statute might include, see *infra* Appendix 1.

378. *See infra* Section IV.B.

379. *See infra* Section IV.B.2.

380. *See supra* Part III.

avenues to successfully holding public officials accountable, including (and perhaps especially) police officers, are foreclosed for legal[381] or practical reasons,[382] citizens need new methods of accountability. Civil conspiracy has two benefits that do not exist in some alternative methods of accountability. First, the abused citizen has control over their claims.[383] Second, as compared to criminal conspiracy, the burden of proof is lower.[384] Thus, civil conspiracy liability ought to be adopted as a mechanism to provide relief to citizens who have been harmed by police involved conspiracies.

1. External Rationale

The first type of rationale for pursuing and legitimizing civil conspiracy for police involved conspiracies takes an outside-in view. That is, there are strong reasons for citizens—for "We the People"[385]—to view such suits as socially valuable. First, the moral view: it is simply a travesty of justice to allow police officers to insulate themselves from accountability by falsifying reports and covering up the wrongdoing of fellow officers.[386] Second, the fiscal view: judgments against and settlements with local governments cost taxpayers hundreds of millions—perhaps billions—of dollars.[387] Strengthening accountability systems is likely to lead to fewer taxpayer dollars used to compensate victims because there may be fewer victims,[388] a normatively desirable outcome.

381. For example, the doctrine of qualified immunity works to substantially hinder accountability for relatively egregious conduct. *See* 42 U.S.C. § 1983; Pierson v. Ray, 386 U.S. 547, 553–54 (1967); Chen, *supra* note 197, at 261–62.

382. Miller & Wright, *supra* note 27, at 762–63.

383. By contrast, for example, the allegedly abused party cannot force the prosecution of their abuser. *See generally* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 376 (2d Cir. 1973). Similarly, the allegedly abused party cannot force an investigation by the Department of Justice. *See id.*

384. *Compare*, *e.g.*, Siddiqui v. Holder, 670 F.3d 736, 742 (7th Cir. 2012), *with* United States v. Hall, 854 F.2d 1036, 1043 (7th Cir. 1988) (Posner, J., concurring) ("The question whether the prosecution has proved the defendant guilty beyond a reasonable doubt is central to every criminal trial."). *But see* McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 258 (Ill. 1999) (clear and convincing burden of proof in Illinois civil conspiracy claims).

385. U.S. CONST. pmbl.

386. *See*, *e.g.*, John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 811–12 (2000).

387. *See*, *e.g.*, DOJ REPORT, *supra* note 149, at 46 (Chicago "paid over half a billion dollars to settle or pay judgments in police misconduct cases since 2004").

388. *See id.* at 46. Similarly, insurance carriers have been able to influence police department practices by mandating certain reforms in order to receive attractively priced policies – the threat of increased liability is a strong motivator. White et al., *supra* note 27, at 40–41.

i. Moral Imperative

When police operate behind a code of silence and are able to escape accountability for their actions, it eviscerates community trust in law enforcement.[389] And while releasing information is one way to restore trust in government,[390] providing victims with avenues for self-help within the boundaries of the legal system is also desirable.

Police misconduct, corruption, and conspiracies of silence are "symptoms of greater ailments" which must be dealt with effectively in order to maintain "an effective criminal justice system without abandoning our commitment to protecting the rights and liberties of individuals."[391] In other words, there is a moral imperative to allow for abuses of police authority to be exposed and subjected to sanction lest the "wide-scale corrosive effects" of police misconduct inhibit the justice system as a whole.[392] When victims of police corruption and their communities do not see justice, there is little chance that those communities will cooperate with law enforcement on other matters.[393]

There is value in expanding individuals' agency in the prosecution of their own affairs. It recognizes the dignity of the individual[394] and the role of accountability in rectifying prior wrongs. Indeed, that is a central premise of the tort system itself: making the injured whole.[395] There is also value in an additional mechanism for substantive accountability, as well as in a potentially increased level of perceived procedural justice.[396] For communities that often feel forgotten, ignored, or downtrodden by the criminal justice system, alternate routes to a just outcome may increase faith in the system as a whole. The findings of the DOJ Report made the need for proactive reform clear,[397] but the consent decree that was imposed[398] and the efforts of COPA[399] are primarily forward looking. They do not provide remedies for those already harmed, nor do their findings result in recourse for the abused beyond the knowledge that their abuser

389. Jacobi, *supra* note 386, at 847–48.

390. Ali, *supra* note 303.

391. Levenson, *supra* note 360, at 3.

392. *Id.*

393. *See Importance of Police-Community Relationships and Resources for Further Reading*, U.S. DEP'T JUST., https://www.justice.gov/crs/file/836486/download (last visited Aug. 23, 2021) [https://perma.cc/5T8F-NXQ7].

394. *See* Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victim's Rights Movement*, 9 DREXEL L. REV. 43, 62 (2016).

395. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 877 (1984).

396. *See* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1227–29 (2000).

397. *See generally* DOJ REPORT, *supra* note 149.

398. *See* Consent Decree, Illinois v. City of Chicago, No. 17-cv-6260, 2019 WL 398703 at *1 (N.D. Ill. Jan. 31, 2019); *see also* CHICAGO POLICE CONSENT DECREE, ILL. ATT'Y GEN., http://chicagopoliceconsent decree.org (last visited Aug. 23, 2021) [https://perma.cc/VV6Y-4JRF].

399. *Municipal Ordinance*, CIVILIAN OFF. OF POLICE ACCOUNTABILITY, http://copadev.wpengine.com/about-copa/ordinance/ (last visited Aug. 23, 2021) [https://perma.cc/RQ36-D97R]; *see* CHI., ILL., MUN. CODE § 2–78–105 (2016).

may be fired.[400] Both the DOJ Report and the mission of COPA are laudable, but neither afford the individual autonomy in pursuing vindication.[401] So understood, civil conspiracy is aimed at rectifying a different problem.

ii. Fiscal Value

Simply put, police misconduct claims result in hundreds of millions of dollars of taxpayer funds being re-allocated from alternate pro-social uses to compensate victims.[402] Chicago spent at least $50 million on police misconduct claims in every year between 2011–2018, save one.[403] 2018 represented the highest figure over that time span, with the City spending (at least) a whopping $113 million on counsel fees and settlement costs.[404] Nor is this cost limited to Chicago. Cities across the country are paying millions of dollars per year in misconduct settlements.[405]

Not only is this a massive, unnecessary waste of tax dollars, it does not create a deterrent effect for police departments because such payments typically are not taken from police department budgets.[406] In order for a deterrent effect to take hold, the defendants—not society as a whole—must internalize the cost of the misconduct.[407] Considering the "[l]imited available information about Who Pays"[408] the above numbers are likely considerably under-inclusive. Miller and Wright note that the opaque nature of settlements and the secrecy devices employed "should be shocking. Citizens—including lawyers!—should have no trouble determining how many civil actions have been filed against a police department and officers, for what claims, and with what results."[409] As the oft-quoted Justice Brandeis noted, "[s]unlight is . . . the best of disinfectants."[410]

2. Internal Rationale

The second type of rationale for codifying civil conspiracy claims against officers involved in a conspiracy takes an inside-out view. It responds to the potential counterarguments that police officers should be necessarily opposed to policing reforms which include greater accountability for obscuring wrongdoing.

400. *See supra* Section II.C.2.

401. *See* DOJ REPORT, *supra* note 149; CHI., ILL., MUNICIPAL CODE § 2–78 (2016).

402. *See, e.g.*, DOJ REPORT, *supra* note 149, at 47, 66; Miller & Wright, *supra* note 27, at 768–69.

403. Newman, *supra* note 194.

404. *Id.*

405. Eleanor Lumsden, *How Much is Police Brutality Costing America?*, 40 U. HAW. L. REV. 141, 175–76 (2017); Liz Farmer, *Police Misconduct Is Increasingly a Financial Issue*, GOVERNING (June 20, 2018), https://www.governing.com/topics/finance/gov-police-misconduct-growing-financial-issue.html [https://perma.cc/RSZ2-BZQJ].

406. *See* Miller & Wright, *supra* note 27, at 781–82.

407. *Id.* at 781.

408. *Id.* at 782.

409. *Id.* at 784.

410. Buckley v. Valeo, 424 U.S. 1, 67 (1976).

This view recognizes that ethical policing, and police accountability, are fundamentally in the best interest of police departments and individual police officers.[411]

i. Public Relations and Officer Morale

The EPIC program developed in New Orleans and now exported to a number of cities across the country demonstrates the value of ethical policing and internal accountability.[412] By appealing to self-interest and demonstrating the comparative value of "active bystandership" the program has been met with at least initial success.[413] The DOJ Report on the investigation into the Chicago Police Department came to a similar result, concluding that the kind of change it advocated would "increase officer morale" because "countless good officers within CPD" are eager for increased accountability.[414] Increased accountability is likely to "restore trust" that "is broken in many neighborhoods in Chicago."[415] The racial valence of the restoration project cannot be overstated: nonwhite persons have a dramatically lower degree of confidence in police.[416] By implementing accountability reforms, including liability for police-involved conspiracies, trust is likely to increase in the communities that are often hardest hit by violent crime.[417]

ii. Increased Legitimacy

Trust is key to legitimacy[418] and "[d]ecades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority."[419] Indeed, in order to rebuild public trust and legitimacy "[l]aw enforcement agencies should also establish a culture of transparency and accountability."[420] The EPIC program, for example, has demonstrated that ethical policing and accountability leads to improved ability to conduct the day-to-day work of policing.[421] A leading proponent of EPIC, New Orleans Deputy Superintendent Paul Noel, noted that "citizens' complaints . . . have gone down dramatically, and the citizen satisfaction has steadily risen."[422] That sort

411. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 1 (2015) [hereinafter 21ST CENTURY POLICING].

412. Jackman, *supra* note 313.

413. *Id.* ("This is designed to save officers' careers and save their lives . . . . What union leader is going to say 'I don't want that'?").

414. DOJ REPORT, *supra* note 149, at 4.

415. *Id.*

416. 21ST CENTURY POLICING, *supra* note 411, at 13.

417. DOJ REPORT, *supra* note 149, at 144–45.

418. 21ST CENTURY POLICING, *supra* note 411, at 1.

419. *Id.*

420. *Id.*

421. Jackman, *supra* note 313.

422. *Id.*

improvement, the DOJ Report concluded, would work to "increase police legitimacy and community trust" which in turn improves police efficacy[423] and safety.[424]

3. Adoption Mechanisms

i. The Legislature

Miller and Wright have recommended that "legislative bodies . . . take the lead in promulgating . . . bans" on secrecy mechanisms that prevent public scrutiny of police-involved misconduct settlements.[425] Legislatures should go further and implement a statute that creates a cause of action against individual officers and police departments that participate in conspiracies of silence that extend to active obstruction of investigations into police misconduct. Recognizing these sorts of conspiracies by statute avoids the difficulties that might otherwise face litigants trying to prove their claims under the current common-law construction[426] and accords with the historical development of civil conspiracy as a doctrine.[427]

Such a statute would necessarily deal with the ambiguity concerning whether a dormant conspiracy theory of liability is actionable at present.[428] It would, presumably, answer in the affirmative. This sort of statute is normatively desirable. It would have the effect of legally recognizing the reality that is known to far too many in the Chicago community[429]—the blue wall of silence is not so silent after all.[430] Further, it would work to shift some of the financial risk of wrongdoing away from taxpayers and onto the wrongdoers.[431] And it would be the sort of experiment in federalism that has shown theoretical promise.[432] But what might the text of such a statute include? I provide a model statute in Appendix 1 below.

423. DOJ REPORT, *supra* note 149, at 139.

424. Kyle Peyton, Michael Sierra-Arévalo & David G. Rand, *A Field Experiment on Community Policing and Police Legitimacy*, 116 PNAS 19894, 19894 (2019) ("Worse, police–public interactions charged by distrust are more likely to escalate into contests for dominance and status that can lead to the injury or death of police and the public alike.").

425. Miller & Wright, *supra* note 27, at 786.

426. *See supra* Section III.B.2.

427. *See generally* Leach, *supra* note 45.

428. *See supra* note 323 and accompanying text.

429. It is important to point out that although this Note has focused particularly on Chicago and its sordid history with police-involved conspiracies, such cultures of silence are ubiquitous in police departments across the country. Levenson, *supra* note 360, at 3.

430. For example, the cover-up in the wake of the murder of Laquan McDonald involved not merely silence, but active complicity from officers, detectives, sergeants, lieutenants, the chief of detectives, and a deputy chief of the Chicago Police department. *See Biggest Takeaways*, *supra* note 95.

431. *See supra* notes 402–10 and accompanying text.

432. *See, e.g.*, Crocker, *supra* note 371, at 1405; Nielson & Walker, *supra* note 371, at 229.

ii. Courts and Common Law

The skeptical reader may ask whether such an expansion of liability to police officers who engage in such conspiratorial behavior is, even if normatively desirable, politically impossible. Perhaps, but political realities notwithstanding, courts and enterprising lawyers can already play an important role in pursuing those officers engaged in ongoing conspiracies, such as the Burge affair.[433] And, utilizing a theory of conspiracy that conceptualizes the cover-up itself as tortious may be actionable at present.[434] Because these claims would originate in state tort law, litigants would not face the hurdles presented by qualified immunity for federal claims.[435] Because current mechanisms of accountability are often fraught and rely on external actors,[436] victims and their estates may want to turn to legal self-help mechanisms against wrongdoers.[437] Civil conspiracy liability presents such a self-help mechanism.

B. Maximize Efficacy

No single effort at police accountability is likely to emerge as a silver bullet. In order to maximize the impact of any individual reform, states should look to a slate of measures, no single measure dispositive but conjunctively effective.[438] A host of reform measures have been suggested,[439] but the two most relevant to civil conspiracy are discussed below.

1. Mandatory Disclosure of Suits and Settlements

As Wright and Miller have persuasively argued, "[i]t is easy to see why lawyers for police departments and cities would make strong claims 'invisible' through settlement."[440] And, the "lack of readily available information about suits against police in published case documents or data from government sources" continues to thwart ongoing efforts at police accountability.[441] The "standard litigation strategy" of negotiating binding secrecy agreements should be problematic for citizens interested in transparent government.[442] The use of

433. *See supra* Section III.B.2.

434. *See supra* notes 328–30 and accompanying text.

435. *See* Chen, *supra* note 197, at 261–62.

436. *See*, *e.g.*, Armacost, *supra* note 22, at 468–69; Miller & Wright, *supra* note 27, at 758, 762; White et al., *supra* note 27, at 10.

437. *See, e.g.*, Taylor Dolven, *Shot by Cops, Smeared in Court: Why It's so Hard for Victims of Police Abuse to Sue and Win*, VICE NEWS (Oct. 30, 2017), https://news.vice.com/en_us/article/pazq57/police-shootings-rule-609 [https://perma.cc/29NX-THLR].

438. *See* White et al., *supra* note 27, at 61–62.

439. *See, e.g.*, Armacost, *supra* note 22, at 522; Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 550–55 (2017); Linda Sheryl Greene, *Before and After Michael Brown–Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 43–56 (2015); Miller & Wright, *supra* note 27, at 758; White et al., *supra* note 27, at 10.

440. Miller & Wright, *supra* note 27, at 774.

441. *Id.*

442. *Id.* at 775–76.

such instruments of secrecy have been used to obscure a variety of troubling behavior.[443] Nondisclosure agreements have been linked to the #MeToo movement,[444] substantial tort litigation,[445] and sexual abuse by Olympic coaches[446] and Catholic priests.[447] States should follow the lead of North Carolina[448] and Oregon[449] in banning such secrecy devices for all settlements involving public funds. Sealed judgments should similarly be banned.[450] Wright and Miller summarize the arguments in favor and against banning such devices in cases of public interest,[451] and rightly conclude that "the public's competing interest in the power of tort law to deter future misconduct should be especially powerful."[452] Additionally, information about who specifically pays for the misconduct—taxpayers generally, insurance, police departments—should be made available.[453]

2. Reward and Recognize

Turning a culture of silence into a culture of ethical policing requires not only potentially punitive measures but also proactive recognition of who is doing policing well. Courts have recognized that police officers who experience retaliation for breaking the code of silence are generally entitled to whistleblower protection.[454] In Illinois, the Whistleblower Reward and Protection Act of 1991 serves as an *ex post* mechanism to vindicate officers who experience retaliation for failure to abide by the code of silence.[455] But whistleblower protection does not proactively change internal cultural dynamics—whistleblowers are still considered "rats" by many.[456] Police departments should begin taking proactive steps to encourage ethical policing in general and honesty about wrongdoing by other officers in particular. A former officer, Philip Hayden, testified against another and later wrote "I still believe that it's important for officers to be loyal to

443. *See, e.g.*, RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS 221 (2019); Sarah Chilton, *NDAs: The Cause of #MeToo?*, FORBES (Feb. 24, 2019, 8:42 AM), https://www.forbes.com/sites/sarahchilton/2019/02/24/ndas-the-cause-of-metoo/#1fba47b62de5 [https://perma.cc/T9GG-5K8N].

444. FARROW, *supra* note 443, at 221.

445. Miller & Wright, *supra* note 27, at 776.

446. Alyssa Bailey, *Chrissy Teigen Pledges to Pay $100K Fine for McKayla Maroney*, ELLE (Jan. 16, 2018), https://www.elle.com/culture/career-politics/a15174640/mckayla-maroney-larry-nassar-nda-chrissy-teigen-response/ [https://perma.cc/PES5-37X3].

447. Miller & Wright, *supra* note 27, at 776.

448. N.C. GEN. STAT. § 132-1.3 (2020).

449. OR. REV. STAT. § 17.095 (2020).

450. Miller & Wright, *supra* note 27, at 777–78.

451. *Id.* at 778–79.

452. *Id.* at 780. Indeed, the public's interest in uncovering a "'pattern or practice' of illegal police conduct" is especially pressing yet provides a strong counterincentive to defendant police departments to hide misconduct through secret settlements in order to thwart future plaintiffs. *Id.* at 783.

453. *Id.* at 782.

454. *See, e.g.*, *Idaho State Police Whistleblower Wins Retaliation Case and Receives Financial Reward*, NAT'L WHISTLEBLOWER CTR. (Sept. 3, 2019), https://www.whistleblowers.org/news/idaho-state-police-whistleblower-wins-retaliation-case-and-receives-financial-reward/ [https://perma.cc/W2WN-S8XF].

455. 740 ILL. COMP. STAT. § 175/4 (2020).

456. *See, e.g.*, Kalven, *supra* note 125; Spalding v. City of Chicago, 24 F. Supp. 3d 765, 771 (N.D. Ill. 2014).

one another; it's a dangerous profession. But our first loyalty is to the law. Bad officers make maintaining loyalty unnecessarily tough for everyone."[457] Hayden's conclusion is correct: breaking the code of silence and failing to engage in conspiracies evinces not only a love for the law, but a love for fellow officers. The code of silence reduces legitimacy and, thus, counter-intuitively makes officers less safe.[458]

Widespread efforts are underway in some places. For example, EPIC, the New Orleans-based ethical policing program, encourages officers to wear an EPIC pin on their lapels to declare their commitment to ethical policing.[459] EPIC also honors officers who successfully intervene to end misbehavior by their colleagues.[460] As one former police officer noted, current efforts at undermining the code of silence are too often insincere because "telling the truth and lying can bring equally disastrous results."[461] Departments should turn the narrative of an "owe[d] [] life-debt" accumulated "[o]ver a 30 year career" into a reason to support ethical policing, not perpetuate the code of silence.[462] Practicing good policing by holding fellow officers to a high standard demonstrates a high view of those ethical officers who refuse to sully their oath and badge.

V. CONCLUSION

The murder of Laquan McDonald was an awful reminder of the distance our country has yet to travel when it comes to issues of race and policing. This was the primary angle that coverage of the murder and trial took; but it misses a primary and important frame of analysis. The homicide of McDonald was also notable for what it revealed in the internal workings of the Chicago Police Department: a culture of silence that protects, rather than roots out, "bad apples." If police departments are to gain and retain the trust of the communities they serve, serious mechanisms of accountability are needed to reinforce a perception of legitimacy. Imposing civil conspiracy liability through legislative action represents a promising method for imposing costs on cultures of silence in addition to individual wrongdoers.

457. Philip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 8:26 PM), https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/ [https://perma.cc/ZDU5-XRQ3].

458. Peyton et al., *supra* note 424, at 19894.

459. Jackman, *supra* note 313.

460. *Id.*

461. *The Cost of Breaking the Code of Silence*, OFFICER.COM (Nov. 28, 2006), https://www.officer.com/home/article/10250500/the-cost-of-breaking-the-code-of-silence [https://perma.cc/S9Y5-YPSU].

462. *Id.*

APPENDIX

§ 1. Civil action for falsified reports

(a)Who may bring a suit. Any person, estate, or predecessor in interest shall be authorized to bring a suit against those persons who create, generate, write, contribute to, or knowingly authorize a false report involving potential wrongdoing by an officer of the state.

(b) Elements. Any person authorized by subsection (a), in order to prevail at trial, must prove by a preponderance of the evidence each of the following:

1. The involvement of at least one person aside from the purported beneficiary of the false report;

2. The filing of an unlawful report, or an otherwise lawful report filed with the purpose of unlawfully obscuring the wrongdoing of another;

3. An agreement or meeting of the minds on the object of the false report or the course of action leading to such report, either directly or constructively;

4. One or more unlawful acts; and

5. Damage resulting therefrom.

(c) Clarification. The following shall be used to aid the interpretation of subsection (b).

1. In proving the existence of an agreement or meeting of the minds as required by subsection (b)(3), the plaintiff shall be entitled to prove such element by demonstrating the existence of a department-wide code of silence. Such a showing shall be taken to create a rebuttable presumption that the defendant(s) were engaged in a dormant, constructive agreement to obscure evidence favorable to the plaintiff;

2. Such a code of silence may be used to demonstrate a dormant conspiracy activated by the unlawful act(s) required by subsection (b)(4) such that the unlawful acts may precede action taken in conformity with the agreement.

3. In a case where physical or psychological harm befalls an individual as a result of the unlawful act, a rebuttable presumption shall arise that damage, as required by subsection (b)(5), resulted from the active concealment of such unlawful acts.

(d) Awards to prevailing plaintiffs. In any case where a finding for the plaintiff occurs, the plaintiff shall be entitled to:

1. Treble damages;

2. A rebuttable presumption of entitlement to punitive damages.

(e) Awards for cooperating witnesses. In any case where a finding for the plaintiff resulted in substantial part because of the cooperation of the defendant's employer and/or co-workers, the following awards shall be considered by the court:

1. The defendant's employer may be entitled to immunity from damages, except as justice so requires;

2. Any of defendant's co-worker(s) who testify on behalf of the plaintiff shall be entitled to a presumption of protected status against adverse employment actions for a period not less than three (3) years;

3. Each of defendant's co-workers who testify consistently with this subsection shall be entitled to a one-quarter share of any punitive damages award in the case.

(f) Limitations. In every case brought under this subsection, the following limitations shall apply:

1. Any funds recovered by a prevailing plaintiff shall be taken from the general budget of the department wherein the defendant was employed;

2. Any settlement or judgment procured under this section shall not be sealed or otherwise removed from the public domain;

3. A finding for the plaintiff shall not be sufficient to subject the defendant(s) to criminal liability.