Beyond the Code of Silence: Pathways to Accountability and Community Engagement in Law Enforcement

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ABSTRACT

This Comment examines the persistent issue of misconduct within police departments, particularly focusing on the role of the code of silence and its implications for accountability and reform efforts. Through a detailed analysis of internal reforms, the Comment explores how entrenched practices within law enforcement, such as the code of silence, hinder efforts to hold officers accountable. It critically examines the role of early intervention systems (EIS), integrity tests, and strengthened whistleblower protections in identifying and mitigating misconduct, while highlighting the limitations of these tools in the face of systemic issues. The discussion stresses the need for comprehensive reforms that address both individual accountability and the broader cultural shifts necessary to dismantle the protective barriers that shield misconduct within law enforcement.

Keywords: *Police Accountability; Police Reform; Code of Silence; Qualified Immunity; Whistleblower Protections; Internal Oversight; Police Misconduct;*

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Judicial Perspectives; Civil Rights Litigation; Criminal Prosecution; Systemic Issues; Law Enforcement Trust; Modern Reform Efforts; Police Culture; Legal Remedies.

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> Blue is Blue. You stick together. If something occurs on the street that you don't think is proper, you go with the flow. And after that situation, if you have an issue with that officer or what happened, you can confront them. If you don't feel comfortable working with them anymore, you can go to the watch commander and request a new partner. But you never break the code of silence.[1]

I. INTRODUCTION

"White former officers get sentences of 10 to 40 years in torture of 2 Black men in Mississippi."[2] Headlines like these do more than shock the conscience; they expose the deep-seated roots of police misconduct across the United States. From coast to coast, law enforcement is plagued by instances of grave abuse of power. In West Virginia, a former officer's use of excessive force left a man unconscious and severely injured, a stark betrayal of the public trust.[3] In New Orleans, an officer's sexual assault of a 14-year-old girl is a chilling reminder of the vulnerability of those whom the police are sworn to protect.[4] Meanwhile, the indictment of three NYPD officers for accepting bribes reveals a culture of corruption that corrodes the very foundation of

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1 *Spalding v City of Chicago*, 186 F. Supp 3d 884, 902 (ND Ill 2016)

2 Michael Goldberg & Emily Wagster Pettus, *White former officers get sentences of 10 to 40 years in torture of 2 Black men in Mississippi*, AP NEWS (21 March 2024). <https://apnews.com/article/mississippi-goon-squad-sentencing-6d0fb2b195ec319411a2ee2333b5f5d6> [perma.cc/Y6X5-8N4W]; see also Press Release, *Six Former Mississippi Law Enforcement Officers Sentenced for Torturing and Abusing Two Black Men* (21 March, 2024). <https://www.justice.gov/opa/pr/six-former-mississippi-law-enforcement-officers-sentenced-torturing-and-abusing-two-black> [perma.cc/TR8Y-G4GJ].

3 MetroNews Staff, *Former Logan police officer sentenced for assaulting arrestee*, METRONEWS (17 March, 2022) <https://wvmetronews.com/2022/03/17/former-logan-police-officer-sentenced-for-assaulting-arrestee/> [perma.cc/678Y-ZRZQ] [MetroNews Former Logan Police]; *see also* Press Release, *Former West Virginia Police Officer Sentenced for Using Excessive Force* (17 March 2022) <https://www.justice.gov/opa/pr/former-west-virginia-police-officer-sentenced-using-excessive-force> [US Justice WV Police].; see also [*Maynard*].

4 MetroNews Former Logan Police, *supra* note 3 ; see also US Justice, *supra* note 3 see also*Maynard, supra* note 3.

law enforcement.[5] These stories, though drawn from different corners of the nation, illustrate a pervasive and systemic problem that demands urgent, comprehensive reforms to restore public trust and uphold justice.

Although police corruption and misconduct[6] is far from a new phenomenon, cities nationwide have had to confront these challenges with renewed urgency as a seemingly never-ending series of controversial police use-of-force incidents[7] have shaken the American public in the past decade; thereby, sparking debate within communities and on the national stage

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5 Ali Watkins & Nicole Hong, *'Bro I Robbed Everyone': 3 NYPD Officers Charged in Bribe Scheme*, NY TIMES (11 May 2021) <https://www.nytimes.com/2021/05/11/nyregion/nypd-officers-arrested-bribes.html> [perma.cc/9QTA-K62S]; See also, *Three Current and Former NYPD Officers Charged with Bribery* (11 October 2021) <https://www.justice.gov/usao-edny/pr/three-current-and-former-nypd-officers-charged-bribery> [perma.cc/ZH8L-JEX3].

6 For the purposes of this Comment, police misconduct refersto the use of excessive force and brutality against suspects and civilians, and includes the punishing of its own for whistleblowing, but also includes dishonest and illegal acts by police officers, such as stealing evidence to perjury and obstruction of justice. Both types of police misconduct involve abuse of power and are sometimes referred to as "police abuse."

7 The following are some of the more widely publicized incidents in recent years: the 17 July 2014, in-custody death of Eric Garner in New York City; the 9 August 2014, fatal shooting of Michael Brown in Ferguson, Missouri; the 22 November 2014], shooting of Tamir Rice in Cleveland, Ohio; the 20 October 2014, fatal shooting of Laquan McDonald in Chicago; the 4 April 2015 , fatal shooting of Walter Scott in Charleston, South Carolina; the 12 April 2015, in-custody death of Freddie Gray in Baltimore; the July 2015 in-custody death of Sandra Bland in Waller County, Texas; the, 6 July 2016, fatal shooting of Philando Castile in Falcon Heights, Minnesota; and the 16 September 2016, fatal shooting of Terence Crutcher in Tulsa, Oklahoma. *See* Jonathan Allen et al., Factbox: *U.S. Police Officers Who Killed Unarmed Black Men Often Avoid Criminal Liability*, REUTERS (19 August 2019), <https://www.reuters.com/article/us-usa-police-garner-factbox/> [https://perma.cc/K8ST-45S7]; Kayla Epstein, *'So Much Mystery': A Man Went to Resolve a DUI. He Died at a Prison Days Later.*, WASH POST (8 June 2019), <https://www.washingtonpost.com/nation/2019/06/06/he-went-resolve-dui-warrant-two-days-later-he-died-prison> [perma.cc/27PR-6U95]

(discussing the jail death of Sandra Bland); Kori Rumore & Chad Yoder, *Minute by Minute: How Jason Van Dyke Shot Laquan McDonald*, CHI. TRIB. (18 Jan 2019), <https://www.chicagotribune.com/2019/01/18/minute-by-minute-how-jason-van-dyke-shot-laquan-mcdonald/> [https://perma.cc/24TC-B8RB] (discussing the fatal shooting of Laquan McDonald in Chicago).

about policing and police accountability,[8] and contributing to the explosion of criticism and distrust of the legitimacy of police actions.[9] These incidents, and the way city administrations have handled them, have laid bare deficiencies in the effectiveness and transparency of police accountability systems nation-wide.. As concerned communities have demanded change,

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[8] For example, in Chicago, a task force was created to address police accountability issues after significant public outcry. Chi Police Accountability Task Force, Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve 1 (2016), <https://igchicago.org/wp-content/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf> [perma.cc/PZ5C-DN6U].The task force recommended a number of changes to Chicago's police accountability *infra*structure, many of which were adopted by a city ordinance, including the creation of the City's Civilian Office of Police Accountability and Deputy Inspector General for Public Safety. *See* CHI, ILL, CODE, Ch 2-78 (2019); *id.* §§ 2-56-205 to 280.

[9] For example, one Pew Research poll detailed how the high-profile police killings of black Americans in 2020, including George Floyd and Breonna Taylor, have significantly impacted public trust in the police. The analysis found that overall trust varies significantly across racial, age, and political lines, with White adults *generally* expressing more confidence in the police than black or Hispanic adults. Additionally, younger adults tend to be less trusting of the police compared to older adults, and there are stark differences in confidence levels between Republicans and Democrats. Pew Research Center, *Trust in America: Do Americans trust the police?*, Pew Research Center (5 Janaury 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police/> [perma.cc/R5FU-V5E3]. Other such polls have also shown findings which underscore a complex landscape of public trust and confidence in law enforcement in the United States, marked by significant demographic divides and a clear call for systemic reforms. See also Mark Berman & Scott Clement, *Post-ABC poll: Confidence in police drops after Tyre Nichols beating*, Wash Post (3 February 2023) <https://www.washingtonpost.com/nation/2023/02/03/post-abc-poll-police-tyre-nichols/> [perma.cc/7NPM-S9ME]; Justin McCarthy, *Americans Remain Steadfast on Policing Reform Needs in 2022*, Gallup (27 May 2022), <https://news.gallup.com/poll/393119/americans-remain-steadfast-policing-reform-needs-2022.aspx> [perma.cc/RHT7-AX4G]; Emily Ekins, Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey, Cato Institute (7 December 2016), <https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national> [perma.cc/3TAE-QP6U]; Jeffery M Jones, *In US, Confidence in Police Lowest in 22 Years*, GALLUP (15 June 2015), <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx> [perma.cc/X5GF-HB2F].

state and city leaders have responded by creating or revamping systems that enable better oversight of police.[10]

Yet, in the aftermath of these incidents, the public focus often centers primarily on the individual police officers involved.[11] This perspective tends to isolate the issue to "rogue officers" or "bad apples," overlooking the broader systemic factors at play.[12] Organizational theory literature makes clear that organizations matter in analyzing and shaping the conduct of

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10 As communities demand police reform, one major remedy came in 34 USC § 12601 (formerly 42 USC § 14141), which empowers the DOJ to target systemic misconduct through civil actions and consent decrees, enforcing changes in departments with patterns of abuse. These decrees have led to policy overhauls and improved oversight, but challenges like high costs, limited investigations, and reliance on local cooperation hinder their effectiveness. States have responded by forming independent oversight boards, increasing transparency, and creating databases for disciplinary records, aiming for more sustainable reforms that address the "code of silence" protecting misconduct within law enforcement agencies. See generally Nat'l Conference of State Legislatures, *Democratizing Police Oversight*, (23 April 2024) <https://www.ncsl.org/civil-and-criminal-justice/democratizing-police-oversight> [perma.cc/Q979-NL9Z] (; Vance D Keyes & Latocia Keyes, "A Scoping Review of Police Civilian Oversight Literature 1992-2022" (2023) Policing: An Int'l J of Police Strategies & Mgmt; see also Jason Mazzone & Stephen Rushin "State Attorneys General as Agents of Police Reform" (Feb 2020) 69 Duke LJ .

11 In instances of police misconduct, such as undue use of force or racial epithets, the fault is often ascribed to the individual officer's failure, particularly their deviation from the so-called Warrior ethos. Seth W. Stoughton, "Principled Policing: Warrior Cops and Guardian Officers" (2016) 51 WAKE FOREST L REV 611, 662.

12 There are generally three theories that have been advanced for an officer's perpetration of abuse upon a suspect. The sociological approach states that officers are influenced by the "social attributes" of parties with whom they deal. Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force, in Police Violence* 23 (William A Geller & Hans Toch eds, 1996) [Worden]. Officers are thus more likely to take aggressive action against lower-status persons than a suspect of higher social status. *Ibid* at 24. This approach further suggests that if the victim is also of lower social status, an officer is less likely to use excessive force. *Ibid* .

Under the psychological theory, the personality traits and inherent characteristics of a particular officer are emphasized, specifically race, educational background and life circumstances. *Ibid* at 25. The psychological theory "implicitly presume[s] that the outlooks or personalities of... officers [are] at the root of their *see*mingly distinctive behavioral patterns." *Ibid* at 26. The organizational theory of police behavior views the influences of the police culture as playing a large role in defining how an officer treats individual citizens *Ibid* at 28. Under this theory, the police chiefs and captains of departments play a pivotal role in defining how officers will treat the public *Ibid.*

individual actors. When evidence points to a long-standing pattern of a code of silence within a police department–particularly when individuals with policymaking authority are involved or aware of it–the focus should shift from punishing individual officers to examining how the code affects the organizational structure and culture of the police.[13] Although addressing individual misconduct is important, it must be part of a broader discussion on systemic reform.

By attributing misconduct to isolated personal failings rather than examining the broader police culture, the argument deflects the need for systemic change, focusing instead on the elimination of problematic individuals from the force. And when allegations of misconduct arise against police officers, the instinctive response within the force often leans towards unity and protectionism. This "circling [of] the wagons"[14] leads officers to adhere to a "code of silence," shielding one another from external scrutiny and accountability. For example, one sergeant interviewed by the Department of Justice (DOJ) said that "if someone comes forward as a whistleblower in the Department, they are dead on the street."[15] Though studies indicate that "some form of a [c]ode of [s]ilence will develop among officers in virtually any agency" and efforts to uproot it altogether "will be futile,"[16] then the focus is on how institutional arrangements and practices

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13 *Ibid.*

14 See generally Jennifer E. Koepke, "The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury" (2000) 39 WASHBURN LJ 211-14 [Koepke].

15 *Baskins v Gilmore*, No 17 C 07566, 2018 US Dist LEXIS 168579 (ND Ill 2018).

16 Neal Trautman, Police Code of Silence Facts Revealed, Nat'l Inst. of Ethics <http://www.aele.org/loscode2000.html> [perma.cc/AFY5-ZBQD] (last visited 29 March 2024); see also Howard Henderson, *Meaningful police reform requires accountability and cultural sensitivity*, BROOKINGS INSTITUTE (8 July 2020) <https://www.brookings.edu/articles/meaningful-police-reform-requires-accountability-and-cultural-sensitivity/> [perma.cc/3H7T-X92H](highlighting that the "code" is when officers refrain from reporting misconduct, and how it deeply challenges efforts to build trust and transparency within police institutions. This silence, driven by loyalty, fear of repercussions, and a culture that often sees the public as adversaries, undermines accountability and strains community relations.)

within policing can be reshaped so as to make them more deserving of public trust.[17]

However, the conversation does not end at America's borders. The call for accountability and transparency in law enforcement reverberates internationally, especially in Canada, where the public is increasingly aware of similar issues, albeit in a different cultural and legal landscape.[18] Arguably, Canada has been slower to address systemic police misconduct, reflecting a historical denial or downplaying of such issues compared to the United States.[19] Yet, movements like Black Lives Matter (BLM) and calls to

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17 From the beginning, it is helpful to clarify two distinct uses of "organizational culture" within the realm of policing. Firstly, there's the unique occupational culture within police forces, shaped by the nature of law enforcement work. This culture, shared across officers regardless of their department affiliation, encompasses the traits of what is often referred to as the "working personality" typical of officers on patrol.

This occupational culture, embodying a set of characteristics common to all policing bodies, stands apart from what experts in organizational science term "organizational culture." This refers to the specific formal and informal values, norms, and principles that uniquely identify and shape an individual institution, such as a specific police department like the Chicago Police Department. As socialization influences the police, and both institutional and dispositional factors help shape officers' street-level behaviors, then, for the purposes of this Comment, this will bear the greater weight of responsibility. *See* Herbert C Kelman & V Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* (1989).

18 See generally Kate Puddister, "Oversight and Accountability for Serious Incidents in Canada: Who Polices the Police?" (2023) 66 Can. Pub. Admin. 390;; see also Statistics Canada, *Public Perceptions of the Police in Canada's Provinces, 2019*, STATCAN.GC.CA (30 March 2020), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00014-eng.htm> [perma.cc/787Z-U9Z3]; Canadian Civil Liberties Association, *Policing Canada in the 21st Century: Reimagining Public Safety* (Sept. 2021); Canadian Civil Liberties Association, *Anti-Black Racism Fact Sheet* (Dec. 2021).

19 See generally House of Commons of Canada, *Systemic Racism in Policing in Canada*, 43rd Parl., 2d Sess., Report of the Standing Comm. on Pub. Safety & Nat'l Sec. (June 2021) <https://www.ourcommons.ca/Content/Committee/432/SECU/Reports/RP11434998/securp06/securp06-e.pdf> [perma.cc/WFM7-JG5W]; see also Catharine Tunney, *RCMP Systemic Racism Exists, Trudeau Argues*, CBC NEWS (11 June 2020), <https://www.cbc.ca/news/politics/rcmp-systemic-racism-lucki-trudeau-1.5607622> [https://perma.cc/6S7M-8JPL]; Yellowhead Institute, *Police Brutality in Canada: A Symptom of Structural Racism and Colonial Violence* (15 July 2020) <https://yellowheadinstitute.org/2020/07/15/police-brutality-in-canada-a-symptom-

"defund the police" have amplified discussions in both countries, highlighting not only the systemic problems embedded in law enforcement practices but also the cultural reluctance to change.[20] The American experience provides cautionary tales and lessons that can be adapted or avoided by other nations. For Canada, this may present an opportunity to design accountability systems that learn from both American successes and failures.

While the primary focus of this analysis is the United States, parallels in Canadian law enforcement underscore the value of drawing international insights to inform a more comprehensive understanding of police reform and accountability. This Comment aims to address these issues where police culture and the code of silence present a significant challenge in fostering trust within institutional frameworks. Part I provided a brief context on how the police code of silence within the United States has led to institutional inertia among police organizations. Part II unfolds the code, drawing attention to its consequential role in perpetuating misconduct by shielding officers from accountability, and underscores the reforms that could help dismantle it. This section scrutinizes the failures of legal and internal procedures, such as whistleblower protections and Internal Affairs Divisions, in curbing police misconduct. By focusing on these internal mechanisms, the Comment emphasizes the necessity of reshaping institutional practices to foster a culture of transparency and accountability within law enforcement, a goal relevant not only in America but also in Canada and beyond.

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of-structural-racism-and-colonial-violence/> [https://perma.cc/JB9N-PSJ9]; Benjamin Shingler, *After Years of Complaints About Systemic Discrimination by Montreal Police, Report Finds Racial Bias*, CBC NEWS (7 Oct 2019), <https://www.cbc.ca/news/canada/montreal/montreal-police-report-discrimination-1.5313832> [https://perma.cc/A7PP-JLDB]

20 Debra Thompson, *Black Lives Matter and the Struggle for Racial Justice in Canada*, Canadian Museum for Human Rights (26 Sept 2023, <https://humanrights.ca/story/black-lives-matter-and-struggle-racial-justice-canada> [https://perma.cc/K6PA-27AV];

Mark Gollom, *Calls to Defund the Police Gain Traction with Some Canadian Lawmakers, Social Activists*, CBC NEWS (10 June 2020), https://www.cbc.ca/news/defund-the-police-canada-1.5605430; A. Splawinski, *Black Lives Matter in Canada Too: Inside the Movement*, RABBLE (19 June 2020), <https://rabble.ca/anti-racism/black-lives-matter-canada-too-inside-movement/> [https://perma.cc/6WJV-SSDJ].

II. REFORMING THE SYSTEMIC NATURE OF POLICE MISCONDUCT

As focus has shifted toward the organization itself, or, even more broadly, the police profession as a whole,[21] it becomes clear that the heart of the problem lies within this "code of silence":[22] the police cultural norm that prohibits disclosure of fellow officers' misconduct to supervisors.[23] As noted earlier, the code can be inferred from specific findings describing a long-standing pattern by the police department to engage in a code of silence, together with involvement or awareness of that code by individuals with policymaking authority.[24] Consequently, as law enforcement, like any institution, is shaped by the institution's structure, we need to look not only to regulation, but to institutional cultures.

As a manifestation of institutional mistrust, the code of silence underscores the complexity of fostering trustworthiness in environments where loyalty and solidarity often trump transparency and accountability.[25]

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21 A range of reforms are aimed at enhancing accountability, training, and altering police culture to better protect civilians and officers alike. These include reforms on qualified immunity, creating national standards for police training and de-escalation, and restructuring civilian payouts for police misconduct. Rashawn Ray & Clark Neily, *A better path forward for criminal justice: Police Reform*, Brookings Institute (April 2021), <https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-police-reform/> [https://perma.cc/FWW3-CP7G].

22 Henderson, *supra* note 16.

23 While the existence and impact of the code can vary depending on the specific context and case, it is mostly seen as an unwritten, often unspoken rule that prohibits members of law enforcement from reporting the misconduct of other members. It is a normal, inevitable feature of policing that permeates virtually every level of policing. *Hill v City of New York*, No 05-CV-3033 (FB)(LB), 2007 US Dist LEXIS 48641 (EDNY Jul. 5, 2007); As the code can be inferred from specific findings describing a long-standing pattern by the police department to engage in a code of silence, together with involvement or awareness of that code of silence by individuals with policymaking authority, for the purposes of this Comment, I will be focused on how the code effects the organizational aspects of the police. See generally, *Rubio v County of Suffolk*, No 06-CV-3663 (JS)(ARL), 2007 US Dist LEXIS 75344 (EDNY Oct. 9, 2007).

24 Worden, *supra* note 12, at 26-28.

25 See e.g., *LaPorta v City of Chicago*, 277 F Supp 3d 969, 979-80 (ND Ill 2017) (finding that the code of silence is not just an unwritten rule, but is institutionalized and

The same mechanisms that aim to increase trustworthiness in broader institutional contexts (such as regulation and transparency)face significant hurdles in the police force.[26] Efforts to impose stricter standards and enhance accountability are often met with resistance, viewed as undermining the solidarity essential to police culture.[27] Similarly, while transparency could theoretically counteract the code of silence by exposing misconduct it struggles against a deeply ingrained reluctance to break ranks, further complicating the task of aligning trust with trustworthiness in such settings.

While traditional legal remedies have played a role in addressing police misconduct, they are increasingly recognized as insufficient in tackling these systemic issues.[28] One obvious remedy, the exclusionary rule, was once a cornerstone in deterring police misconduct by preventing the use of illegally obtained evidence in court.[29] However, the Supreme Court's reluctance to

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reinforced by CPD rules and policies); *White-Ruiz v City of New York*, 983 F. Supp. 365, 383 (S.D.N.Y. 1997) [*White-Ruiz*] (finding that there was an unwritten policy that sanctioned a practice of discouraging reporting of corrupt acts by police officers and of retaliating against officers who reported misconduct.)

26 The "mechanisms" referred to are largely considered to be the traditional legal remedies afforded to civilians. These remedies, such as civil lawsuits under 42 USC § 1983 and criminal prosecutions under 18 USC §§ 241 and 242, are increasingly seen as insufficient for addressing systemic police misconduct due to several limitations. These remedies often focus on individual cases rather than patterns of behavior, require high burdens of proof, and face procedural barriers like qualified immunity. Moreover, they do not adequately address the entrenched code of silence and other structural issues within police departments, making it difficult to implement broad, lasting reforms needed for systemic change.

27 See, e.g., *Matter of Rochester Police Locust Club, Inc v City of Rochester*, No. 05959, 2023 NY Slip Op 05959 (2023) (In holding that the law was deemed invalid as it did not qualify as a pre-existing general, special, or local law or charter provision excluded from the scope of those sections by Civil Service Law § 76(4), this case highlights the attempt by cities to reassert local control over police discipline and attempts to vest the Police Accountability Board (PAB) with that power was met with resistance.)

28 See *supra* note 26.

29 See *Mapp v Ohio*, 367 US 643, 655 (1961) (requiring states to use the exclusionary rule remedy, which was initially reserved only for federal cases); see also *Weeks v United States* 232 US 383, 398 (1914) [*Weeks*] (holding that evidence obtained illegally could not be used against the defendant at trial, and thus, establishing the exclusionary rule in federal prosecutions). In *Weeks*, the Court, noting that the Fourth Amendment assures the

enforce a sturdier application of this approach has hindered efforts to rein in police abuses.[30] Given this diminishing support, and other judicial carve-outs for law enforcement,[31] it is evident that relying solely on external legal remedies is insufficient to address the deeper, systemic issues within police departments.[32]

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right to be safe from "unreasonable searches and seizures," but fails to provide an explicit remedy for those subjected to illegal searches, the Court determined that the appropriate remedy would be exclusion of the illegally obtained evidence at trial. *Ibid* at 389, 398 (quoting US Const amend. IV); For Canada's version of the exclusionary rule, see *infra* note 32.

30 See *United States v Leon*, 468 US at 906-07, 913 (extending the balancing test approach to criminal trials and holding that the exclusionary rule does not apply when an individual acts in good-faith reliance upon a warrant later determined to be lacking probable cause); see also *Herring v United States*, 555 US 135, 137 (2009) (here, the good-faith exception was expanded even further to include situations where an officer relies on another officer's negligent record-keeping. Despite the error originating within the police department, the Supreme Court concluded that the potential for deterring police misconduct was minimal); *Arizona v Evans*, 514 US 1, 4 (1995) (holding that good-faith reliance on an incorrect, outstanding arrest warrant will not result in the exclusionary rule being applied.)

31 See, e.g., *Vega v Tekoh*, 142 S. Ct. 2095, 2106 (2022) (here, the Supreme Court significantly reduced the impact of Miranda by ruling that a violation of Miranda does not constitute a Fifth Amendment violation. The Court clarified that Miranda rules are prophylactic standards, not constitutionally required, and thus a violation does not amount to the deprivation of a constitutional right under 42 USC § 1983); see also *Perry v New Hampshire*, 565 US 228, 232-33 (2012) (holding that eye-witness identifications are admissible, even when suggestive, so long as the police themselves are not responsible for the suggestive nature of the procedure; *Berghuis v Thompkins*, 560 U.S. 370, 374, 381-82 (2010) (requiring a suspect, paradoxically, to speak to invoke the right to silence because remaining silent for three hours is too "ambiguous.").

32 Canada's exclusionary rule, governed by section 24(2) of the *Charter of Rights and Freedoms*, aims to exclude evidence obtained through Charter breaches where its admission would bring the administration of justice into disrepute. The Supreme Court of Canada applies the Grant test to evaluate exclusion, considering the seriousness of the state conduct, the impact of the breach on Charter rights, and societal interests in adjudicating cases on their merits.

Although less rigid than the US exclusionary rule, providing judges with more discretion in deciding whether to admit or exclude evidence, critics still note that the test often falls short of addressing systemic police misconduct. For instance, decisions in *R v Grant* and *R v Harrison* illustrate inconsistencies in judicial reasoning, which undermine public confidence in law enforcement and judicial integrity, particularly

Therefore, to effectively confront the systemic nature of police misconduct, it is not enough to impose external regulations alone. The deeper issue lies in the organizational culture, where the code of silence and resistance to change prevail. Addressing these challenges requires both a re-evaluation of the core values guiding policing and an examination of the internal mechanisms, such as whistleblower protections and Internal Affairs Divisions (IADs), that are meant to uphold integrity. Only by fostering community-oriented values and strengthening internal accountability structures can the deep-seated barriers to reform begin to be dismantled.

A. *Building Trustworthy Police Agencies*

Drawing from a broader perspective on organizational integrity, akin to Baroness Onora O'Neill's address to banking leaders, it becomes clear that for law enforcement agencies to navigate the complexities of reform, a deep reflection on their foundational purpose and a commitment to trustworthiness are indispensable.[33] Just as O'Neill challenged banking executives to reconsider their organizations' roles beyond mere profit maximization, law enforcement agencies must introspectively examine their missions. This re-evaluation must aim to align more closely with the

among marginalized communities who frequently face Charter breaches. Such shortcomings parallel criticisms of the American exclusionary rule, which similarly struggles to address deeper systemic issues within law enforcement institutions. See *R v Grant*, [2009] 2 SCR. 353 (Can); *R v Harrison*, [2009] 2 SCR 494 (Can); see also Kanika Samuels-Wortley, "To Serve and Protect Whom? Using Composite Counter-Storytelling to Explore Black and Indigenous Youth Experiences and Perceptions of the Police in Canada" (2021), 26 CRIT. CRIM. 29, 37; Lisa Dufraimont, "Confusion in Exclusion: Inconsistencies in the Application of Section 24(2) of the *Charter*" (2017 54 Osgoode Hall LJ 631, 634–36.

[33] At the New York Federal Reserve's conference in 2016, the philosopher, Baroness Onora O'Neill, encouraged banking leaders to assess how they were doing, compared to what they had set out to do; in other words, were they fulfilling their purpose? This challenge, she emphasized, required of them to think on their organization's purpose, on what they were here for, and was it for something more than "maximizing shareholder value". Only then, she noted, that once we know what these institutions are for, may we ask which standards matter for achieving those purposes, and for the Baroness, the standard that mattered most for banking, as for other complex interactions and institutions, was trustworthiness. Onora O'Neill, *What is Banking For? Remarks at the Federal Reserve Bank of New York's Conference: Reforming Culture and Behavior in the Financial Services Industry: Expanding the Dialogue* (Oct. 20, 2016).

principles of community policing and prioritize the establishment of trustworthiness as a core organizational standard. As it has been noted:

> Trust has to be learned, just like any other kind of generalization . . . What it is sensible for a given individual to expect depends heavily on what the individual knows, both about the past and the future of the other person or other party to be trusted . . . . Experience molds the psychology of trust...[34]

Trustworthiness, then, is what must be judged. Which, of course, is difficult. Over the last few decades, American society has tried to construct systems of accountability for all sorts of institutions that will make it easier for us to judge their trustworthiness.[35] A lot of these systems have the converse effect; they do not work as they are supposed to. This has especially proven true regarding policing, an institution notorious for its almost steadfast refusal to change.[36] Recent investigations and academic studies

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[34] Institutional trust involves an interdependent trustor (e.g., citizen) and trustee (e.g., government branch, agency, institution) in a context that contains risk for the trustor. Trust is experienced by the trustor as voluntary and involves evaluations and/or expectations that the trustor has of the trustee. Russell Hardin, "The Street-Level Epistemology of Trust," Politics and Society" (1993), 508, 523, 525 ; see also Lisa M. PytlikZilliga & Christopher D. Kimbrough, *Consensus on Conceptualizations and Definitions of Trust: Are We There Yet?*(2015) [PytlikZilliga & Kimbrough].

[35] *See infra* Part II.

[36] Despite an increase in officers being charged for on-duty killings and more DOJ involvement, the core issues of police violence persist. Local departments have tried alternative response programs and cultural changes, while state legislatures have passed numerous reform laws. However, these efforts are hindered by inconsistent definitions of banned practices, like chokeholds, and federal reform remains stalled due to political deadlock. The Biden administration's actions, including an executive order and a proposed public safety funding package, show the ongoing struggle to balance reform with policing needs and recruitment challenges. Jamiles Lartey, *How Policing Has – and Hasn't – Changed Since George Floyd*, The Marshall Project (August 6, 2022) <https://www.themarshallproject.org/2022/08/06/how-policing-has-and-hasn-t-changed-since-george-floyd> [perma.cc/Q4UA-Q5ZL].

Additionally, there are cases highlighting the historical tendency of these organizations to resist major changes in policies and procedures despite the evolving needs of the communities they serve. For example, in *Hamilton v City of Clayton*, it is noted that police departments have a particular interest in maintaining a favorable reputation with the public, which likely contributes to their resistance to change, as they may fear that changes could negatively impact their public image. Civil Action No. 2:22-CV-194-RWS, 2022 U.S. Dist. LEXIS 245534 (ND Ga Dec. 22, 2022).

have shed light on the intricate dynamics of police departments' reluctance towards reform, particularly in areas of militarization and responding to public demands for change.[37]

In Canada, analogous patterns emerge. The Royal Canadian Mounted Police (RCMP), for instance, has faced criticism for fostering an internal culture akin to the American "code of silence," where officers are discouraged from reporting misconduct.[38] This institutional norm has posed significant barriers to reform and eroded public trust, particularly among black and Indigenous communities. Like their American counterparts, Canadian police forces have been scrutinized for prioritizing officer safety over community trust, often adopting militarized practices that strain relationships with marginalized communities.

This expansion and normalization of police militarization reflects a broader cultural shift within law enforcement, wherein civilians are increasingly perceived as potential adversaries. In America, this adversarial mindset, as observed by Jessica Katzenstein, is deeply entrenched and underpins a persistent prioritization of officer safety over community trust.[39] Through her fieldwork, Katzenstein identified law enforcement officers' nuanced views on militarization, distinguishing between "good" and "bad" practices while simultaneously endorsing measures that reinforce their sense of security.[40]

Likewise, in Canada, Brendan Roziere and Kevin Walby highlight the widespread deployment of Special Weapons and Tactics (SWAT) teams for non-urgent situations in cities such as Winnipeg and Calgary, revealing a troubling departure from the principles of community policing.[41] While a comprehensive analysis of police militarization is beyond the scope of this

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37 See generally Jessica Katzenstein, *Laundering Militarization: Preparedness, Professionalism, and Police Common Sense*, 75 Am. Q. 799 (2023); see also, *supra* note 11.

38 House of Commons Standing Comm. on Pub. Safety & Nat'l Sec., *Systemic Racism in Policing in Canada*, 43rd Parl., 2d Sess. 69 (2021).

39 Katzenstein, at *supra* note 37.

40 *Ibid.*

41 See generally Brendan Roziere & Kevin Walby, *The Expansion and Normalization of Police Militarization in Canada*, 26 Crit. Crim. 29 (2018), <https://doi.org/10.1007/s10612-017-9378-3>; see also Brendan Roziere & Kevin Walby, *Police Militarization in Canada: Media Rhetoric and Operational Realities*, 13 Policing: A J. Pol'y & Prac. 470 (2019), <https://doi.org/10.1093/police/pax075>.

paper, it is clear that these practices, often justified as necessary for ensuring officer safety, erode public trust and present formidable barriers to reform. In both contexts, efforts to demilitarize are thwarted not only by institutional resistance but also by a deeply rooted cultural framework that prioritizes solidarity within the force over transparency and accountability to the communities they serve.[42]

Another area of major resistance comes in the form of police unions.[43] Regardless of the outcry from the public and evidence presented, police unions have marshaled their considerable resources to challenge reforms proposed to increase accountability,[44] such as the use of body cameras, the

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[42] *Ibid;* see also Chris Madsen, *Green is the New Black: The Royal Canadian Mounted Police and Militarisation of Policing in Canada*, 42 Scand. J. Mil. Stud. (2019), <https://sjms.nu/articles/10.31374/sjms.42> (detailing how the RCMP's militarization, involving tactical units, armored vehicles, and advanced surveillance, has been notably evident during Indigenous protests and anti-pipeline demonstrations. Madsen details how heavily armed police have employed exclusion zones to prevent access to disputed lands, drawing public criticism for undermining community trust and reflecting the adversarial approach often seen in U.S. law enforcement); Katzenstein, at *supra* note 37. (noting that while some officers critique the use of excessive military gear in smaller departments and the aggressive policing of social justice demonstrations, the overarching focus on officer safety persists, presenting obstacles to substantial reform).

[43] See generally William Finnegan, *How Police Unions Fight Reform*, New Yorker (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform>; see also, e.g., *Fraternal Order of Police v District of Columbia*, 502 F. Supp. 3d 45 (D.D.C. 2020). Though the court dismissed the suit–finding the law was rationally related to a legitimate government purpose–when the District of Columbia passed laws that restricted police union bargaining rights concerning discipline, the union representing District of Columbia police officers filed a lawsuit in federal court. The suit claimed that the legislation unfairly targeted police officers by denying them, and not the forty-four other unions representing district employees, the right to negotiate over disciplinary matters, alleging violations of equal protection and other constitutional rights.

Another example comes in *Floyd v City of NY*, when a group of police unions attempted to intervene in a litigation where the City had agreed to a settlement regarding its "stop-and-frisk" policy. Though their motions were denied, this showcases how the unions sought to challenge rulings on certain policies and the imposition of various reforms. 302 F.R.D. 69 (S.D.N.Y. 2014).

[44] Police unions have been instrumental in negotiating contracts, typically known as Law Enforcement Bills of Rights. These include provisions making it exceedingly difficult to

establishment of civilian review boards, and policies aimed at de-escalation.[45] Their political clout is such that endorsements and campaign donations from police unions are highly sought after by candidates across the political spectrum, further entrenching their influence in the legislative process.[46] This dynamic often results in the passage of laws and policies that serve to shield police officers from accountability rather than exposing them to the scrutiny necessary for genuine trustworthiness.[47]

If the aim is to increase trust, and the task is to rebuild this trust, then the principles and values that underlie policing must encourage the police

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discipline or remove officers accused of misconduct. These contracts often ensure legal representation for accused officers, mandate extended periods for review of evidence before any interrogation, and guarantee pay for officers even when suspended for alleged misconduct. Complaints against officers can be disqualified if submitted too late, and records of misconduct may be kept secret or even destroyed after a minimal period, further obstructing efforts at accountability. *See generally* Nick Place, "Double Due Process: How Police Unions and Law Enforcement "Bills of Rights" Enable Police Violence and Prevent Accountability" (2018) 52 USF.L Rev 275.

45 *Ibid.*

46 Catherine L Fisk & L Song Richardson, "Police Unions" (2017) 85 Geo Wash L Rev 712, 744 (spotlighting unions involvement in a variety of political activities, including "electoral politics, in litigation, and in the media." Also discusses how police unions have criticized groups, like the ACLU, as well as reforms, such as citizen review of police misconduct.)

47 *Ibid.* In Canada, police unions have similarly exerted considerable influence over reforms aimed at enhancing accountability. Their resistance to measures such as the implementation of body cameras, the establishment of civilian oversight bodies, and de-escalation policies has been a notable barrier to change. This influence is often reinforced through political endorsements and campaign contributions, swaying legislative outcomes in favor of maintaining the status quo.

For instance, the *Comprehensive Ontario Police Services Act* 2019, SO 2019, introduced several reforms intended to increase police accountability, including the creation of the Inspector General of Policing and amendments to disciplinary procedures. However, the Act faced criticism from various stakeholders, including police associations, which argued that certain provisions could undermine police autonomy and effectiveness. See generally *Comprehensive Ontario Police Services Act*, 2019, Bill 68, 42d Leg, 1st Sess. (Ont. 2019), <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-68> [perma.cc/FS8A-Z224].

Additionally, in *Mounted Police Association of Ontario v Canada* [2015] 1 SCR 3, the Supreme Court of Canada recognized the right of RCMP officers to engage in collective bargaining, underscoring the role that police unions play in shaping labor relations and, by extension, accountability mechanisms within law enforcement agencies.

to rebuild public trust.[48] At the end of the day, trust is distinctive because it is granted by others.[49] One cannot simply rebuild what others have given; instead, one must provide a foundation that encourages others to bestow their trust. It is no secret that across North America, the public has grown increasingly more distrustful of the police, especially within minority communities.[50]

In 2000, John Paul Stevens J observed that minorities have significant distrust of police officers, believing "that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence."[51] Stevens J further noted that, at the time, forty-eight per cent of black Americans "have very little or no confidence" that law enforcement treats black and white Americans the same, and an additional seventeen per cent of black Americans only had "some" confidence in police

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48 Tracey L Meares & Peter Neyroud, "Rightful Policing" (2015) New Persp Policing 6-7, online: <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/RightfulPolicing.pdf> [https://perma.cc/A7H4-TN3N].

49 Trust stems from one's lived experiences and interactions with others, shaping expectations about future treatment by individuals and institutions. It is deeply influenced by personal experience, leading us to prioritize a form of trust that is thoughtful, discerning, and based on the reliability observed in others over time. This type of trust evolves from actively reflecting on past interactions and the reliability of individuals or institutions, highlighting how experiences shape one's willingness to trust. However, for experiences to inform trust, they must be interpreted, making the process of building trust both complex and deeply personal. See generally PytlikZilliga & Kimbrough, *supra* note 34 .

50 I imagine there are many who still share James Baldwin's sentiment that "[T]he police are simply the hired enemies of this population. . . . This is why those pious calls to 'respect the law,' always to be heard from prominent citizens each time the ghetto explodes, are so obscene." *A Report from Occupied Territory*, The Nation, (July 11, 1966).

51 *Illinois v Wardlow*, 528 US 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part). The Court held that unprovoked flight may be considered in the reasonable-suspicion justification. *Id.* at 121, 124-25 (majority opinion.) Justice Stevens rejected the majority decision because he believed unprovoked flight does not always reflect guilt; instead, it may reflect distrust of the police. See *ibid* at 132-33 (Stevens J, concurring in part and dissenting in part) (describing other reasons an individual might flee the police, such as minority individuals' distrust of law enforcement.)

officers to act without bias;[52] an attitude that has hardly changed in the twenty-four years since Justice Stevens' opinion.[53]

Subsequently, in considering this erosion of trust within communities, it is clear that past approaches to policing have failed to address these issues. Now it is best to look into the internal dynamics that sustain such a culture of distrust, into the very fabric of police culture itself, which perpetuates a problematic status quo through unwritten rules and unspoken bonds.

B. Breaking the Code

> The police culture demands of a patrolman unstinting loyalty to fellow officers, and he receives, in return, protection and honor: a place to assuage real and imagined wrongs inflicted by a (presumably) hostile public; safety from aggressive administrators and supervisors; and the emotional support required to perform a difficult task.[54]

Police subculture and its key element, the code of silence, have been a subject of steady inquiry for decades. Though, historically, the code of

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[52] In contrast, forty-two percent of white Americans have "a great deal" of confidence that police will treat individuals without racial bias. Overall, only eighteen percent of Americans polled "have very little or no confidence that police officers in their community treat people with different skin colors the same." Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWS HOUR (June 5, 2020), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> [https://perma.cc/ER3W-YSVJ] [Santhanam].

Within Canada, there is an overrepresentation of Indigenous and black populations in police interactions and incarceration rates. A 2020 report revealed that while Indigenous peoples represent 5% of the Canadian population, they account for 30% of incarcerated individuals. Similarly, black Canadians face higher levels of police stops and criminal charges, reinforcing concerns about systemic racism in policing. Despite ongoing reforms, the persistence of racial inequities underscores the challenges of achieving equitable law enforcement practices. See Statistics Canada, *Adult and Youth Correctional Statistics in Canada, 2018/2019*, CAT. NO. 85-002-X (2020), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00014-eng.htm> [perma.cc/72AV-RBNJ]; see also Statistics Canada, *Police-Reported Crime Statistics in Canada, 2021*, CAT. NO. 85-002-X (2022), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00003-eng.htm> [perma.cc/637E-XPG4].

[53] Santhanam, at *supra* note 52 .

[54] Eugene A. Paoline, "Taking Stock: Toward a Richer Understanding of Police Culture" (2003) J Crim Just 204 (2003) [Paoline].

silence protected the traditional corruption racket,[55] today it protects officers who violate civil rights through violence and other misconduct. The beginnings of the scholarly approach to studying the code in the United States date back more than fifty years.[56] In one of the first studies of police culture, when officers were asked whether they would report a fellow police officer who stole money from a person arrested for drunkenness, the overwhelming majority of the officers–about three-quarters–reported that they would not, thus suggesting that "illegal action is preferable to breaking the secrecy of the group."[57]

More recent studies demonstrate that the code of silence is still strong. In a study by the US National Institute of Ethics, 79 per cent of the recruits nationwide agreed with the statement that the code "exists and is fairly common across the nation," and nearly one quarter maintained that the code actually had a positive role to play in cases where an officer employed excessive force against an unruly suspect.[58] In a national study of more than 900 police officers from 121 police agencies, it was found that, although over 80 per cent of the police officers said that they did not accept the code "as an essential part of the mutual trust necessary to good policing,"[59] the majority of the surveyed police officers agreed that it is not unusual for police officers to keep silent about misconduct by fellow officers, thus confirming the existence of the code of silence in police culture.[60] At the

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55 See generally Hon. Harold Baer, Jr. & Joseph P. Armao, "The Mollen Commission Report: An Overview" (1995), 40 NYL Sch L Rev 73, 76 ("Gambling, prostitution and other vice rackets are no longer the springboard to a career of corruption in the Police Department as they were in times gone by. Corrupt cops…now actively engage in criminal activity.").

56 William Westley, *Violence and the Police: A Sociological Study of Law, Custom and Morality*, (Cambridge: Mit Press, 1970) 113 .

57 *Ibid.*

58 Neal Trautman, *Police code of silence facts revealed. In International Association of the Chiefs of Police, Annual conference* (Virginia: The International Association of the Chiefs of Police, 2000) <http://www.aele.org/loscode2000.html> [perma.cc/L6NM-WQCD].

59 David Weisburd and Rosann Greenspan, *Police attitudes toward abuse of authority: Findings from a national study*, (Washington DC: Office Of Justice Programs, 2000).

60 See *e.g.*, *Johnson Nguyen v Cnty. of Orange*, No. 8:22-cv-01693-DOC-ADS, 2023 U.S. Dist. LEXIS 127507 (C.D. Cal. 2023) (Here, the court cites plaintiffs' allegations that the county maintained a "code of silence" policy, where officers deny knowledge of

same time, it was further demonstrated that the failure to abide by these cultural rules would probably result in informal negative consequences as most of the respondents agreed that police officers who decided to report misconduct would be given a cold shoulder from fellow officers for doing so, or worse still, face internal persecution.[61]

For example, following the shooting of Laquan McDonald, investigations by the Chicago Police Accountability Task Force (PATF) and the DOJ were launched amid protests and allegations of a cover-up by city officials and the Chicago Police Department (CPD), including Mayor Rahm Emanuel.[62] The DOJ's in-depth analysis exposed a pattern of excessive and often lethal force by CPD officers, flagrant abuses in using non-lethal force, and systemic failures in investigating misconduct and holding officers accountable.[63] This misconduct was underpinned by a pervasive code of silence among officers and a racially discriminatory impact on Chicago's Black residents.[64] The PATF's investigation corroborated these findings,

misconduct. It also references a city official's deposition acknowledging the problem within the police department.); *Black v City of Chicago*, No. 18-cv-6518, 2022 U.S. Dist. LEXIS 24845 (N.D. Ill. 2022); (Here, the plaintiff alleged a widespread "code of silence" where officers don't report each other's misconduct, and a city official confirms in a deposition that this issue exists within the Chicago Police Department); *Chism v City of Chicago*, No. 21-cv-5835, 2022 U.S. Dist. LEXIS 171471 (N.D. Ill. 2022) (acknowledging the existence of a code of silence within the Chicago Police Department, and referencing the Seventh Circuit's holding that the code of silence "might be foolish" but "does not offend the first amendment" and that failing to report misconduct is part of that code); *Johnson v City of Chicago*, No. 20 C 7222, 2021 U.S. Dist. LEXIS 185416 (N.D. Ill. 2021) (noting statements made in 2016 by the Chicago police union president and police superintendent acknowledging the existence of a code of silence within the Chicago Police Department.)

61 See *infra* Part II.B.

62 Lisa Klein, *Three Chicago Cops Accused of Cover-Up in Laquan McDonald Case*, Courthouse News Service (June 28, 2017) <https://www.courthousenews.com/three-chicago-cops-accused-cover-laquan-mcdonald-case/> [perma.cc/6QMU-PJRV]; see also Megan Crepeau et al., *3 Chicago Cops Charged With Conspiracy to Cover Up Laquan McDonald Shooting*, GOVERNING (June 28, 2017) <https://www.governing.com/archive/tns-chicago-laquan-mcdonald-cops.html> [perma.cc/E9V5-CVFQ].

63 See generally United States Department of Justice Civil Rights Division and United States Attorney's Office Northern District of Illinois, Investigation of the Chicago Police Department 1 (2017).

64 *Ibid* at 51-52, 74-77.

highlighting a long history of CPD misconduct disproportionately affecting communities of color and fostering deep mistrust.[65] Despite commitments to reform, including a consent decree, the persistence of these issues suggests that the proposed changes have yet to fully take effect.[66] Both investigations called for comprehensive reforms in training, oversight, and accountability to rebuild public trust and align CPD practices with constitutional policing standards.[67]

Commission reports on corruption and brutality merely skim the surface of the code of silence's role in police misconduct. Moreover, it is this same code that not only enables officers with a history of violence[68] to continue serving and carrying weapons,[69] but also explains the

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65 See generally Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities They Serve: Executive Summary* 5 (2016).

66 Heather Cherone, *5 Years After Chicago's Consent Decree Took Effect, Little Urgency Surrounds Reform Push*, WTTW (March 4, 2024 5:00 a.m.) <https://news.wttw.com/2024/03/04/5-years-after-chicago-s-consent-decree-took-effect-little-urgency-surrounds-reform-push> [perma.cc/ZYF8-QTAY]; see also Madeline Buckley & Paige Fry, *New Consent Decree Report Criticizes Chicago PD's Staff Retention Efforts*, POLICE1 (Dec. 16, 2022) <https://www.police1.com/police-reform/articles/new-consent-decree-report-criticizes-chicago-pds-staff-retention-efforts-CgekMzHdV4DReDrO/> [perma.cc/8JV9-EP4V].

67 See *supra* notes 60, 62.

68 Returning to the Laquan McDonald incident, the officer involved, Jason Van Dyke, had a concerning history over his fourteen years on the force. He had accumulated at least twenty civilian complaints and twenty use of force reports, none of which led to disciplinary action. Additionally, Van Dyke was involved in at least two lawsuits concerning excessive force, including one that was settled for $350,000 in favor of the plaintiff. See Elliot C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN (Nov. 26, 2015), http://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits [https://perma.cc/VQ86-TV2T]; see also Citizens Police Data Project, *Jason Van Dyke* (last accessed April 13, 2024), https://cpdp.co/officer/29310/jason-van-dyke/. Although the Citizens Police Data Project site shows that Van Dyke was disciplined once for an "operation/personnel violation," that discipline was imposed for Van Dyke's conduct on the day he murdered McDonald. See Citizens Police Data Project, Operation/Personnel Violations: Oct. 20, 2014 (last accessed April 13, 2024), <https://cpdp.co/complaint/1081772/>.

69 There is also the incident with James Ashby, a police officer from Rocky Ford,

repercussions faced by officers who step forward to report misconduct within their ranks, breaking this unspoken rule.[70] To dismantle this engrained culture, it is important to scrutinize the internal structures and mechanisms within police departments that either sustain or challenge the code, beginning with the role of whistleblowers and the protections–or lack thereof–afforded to them.

1. A Culture of Silence and Retaliation

When a police officer engages in severe misconduct, it is often observed by another officer. Yet, many officers are reluctant to report their colleagues, and as the past decade has unfolded, this reluctance has been brought into sharp focus; highlighting serious concerns about internal accountability and the culture within police forces. As previously discussed, studies suggest that the occupational culture of policing plays a significant role in this hesitation.[71] This culture, closely tied to the code, fosters strong loyalty

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Colorado, who was sentenced to sixteen years in prison for the murder of Jack Jacquez. He had been involved in several troubling incidents. Ashby had faced multiple internal affairs investigations for misconduct, including one instance where he allegedly threatened to shoot a gunshot victim who was seeking help. *Estate of Jack J Jacquez v City of Rocky Ford et al.*, Case 1:16-cv-02519, Complaint and Jury Demand (Dist. Colo. Oct. 11, 2016).

In another case, Ashby was accused of brutally assaulting a man he had detained illegally without probable cause. His problematic behavior extended back to his time with another law enforcement agency, where he breached the sexual harassment policy, threatened a motel owner, was involved in a bar fight, and violently handled a woman. Moreover, just a week before Jacquez's murder, Ashby was accused of stomping and choking a man suspected of driving under the influence who had requested to speak with Ashby's superior.) Michael Roberts, *Ex-Cop James Ashby's Journey From Rage-acholic to Murderer*, WESTWORD (Nov. 22, 2016), <https://www.westword.com/news/ex-cop-james-ashbys-journey-from-rage-aholic-to-murderer-8397610> [https://perma.cc/2AZH-YYRQ]; Noelle Phillips, *Rocky Ford to Pay $1.3 Million to Family of Man Murdered By On-Duty Police Officer in 2014*, DENVER POST (Jul. 27, 2017), <https://www.denverpost.com/2017/07/27/rocky-ford-death-by-cop-settlement/> [https://perma.cc/4XXT-EZY3]; Robert Sanchez, *Small-Town Injustice: The Aftermath of a Police Officer's Murder Conviction in Rocky Ford*, 5280 (Oct. 2018), <https://www.5280.com/small-town-injustice-the-aftermath-of-a-police-officers-murder-conviction-in-rocky-ford/> [https://perma.cc/5BZG-J8VW].

70 See *infra* Part II.B(1).

71 See generally Steve McCartney & Rick Parent, Ethics in Law Enforcement (Victoria,

among officers. While this loyalty can lead to positive outcomes, it also has negative consequences, such as discouraging officers from reporting misconduct within their ranks; a reluctance further reinforced by the harsh treatment of whistleblowers.

In the aftermath of *Spalding v City of Chicago*, former officer Shannon Spalding, stated how "[w]histleblowing is a life sentence."[72] After revealing a corruption scheme that resulted in many wrongful convictions being overturned, she faced severe personal repercussions, including receiving threats to her life and being ultimately compelled to resign from her position.[73] Moreover, the consequences of Spalding's actions extended far beyond her career. As she remarked, "I'm an officer without a department. I lost my house. I lost my marriage. It affects you in ways you would never imagine."[74] The fallout from her decision to do the right thing was devastating, impacting her personal life and financial stability profoundly.[75]

Another case involved Baltimore detective Joe Crystal, who, in 2012, reported witnessing two officers assaulting a drug suspect when the suspect had initially tried to escape by breaking into an apartment, leading to his capture and initial removal by the officers.[76] However, upon discovering that the apartment belonged to another officer's girlfriend, the suspect was

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BC: BCcampus 2015); see also, Paoline, *supra* note 54. Note that while several theories have been influential in understanding the dynamics of police whistleblowing, such as the theory of police integrity, and the rotten apple thesis, for the purposes of this section, the focus is on the organizational theory, which encompasses occupational culture.

72 186 F. Supp. 3d 884 (N.D. Ill. 2016); see also Casey J. Bastian, *The Blue Wall of Silence: Law Enforcement Whistleblowers Face Severe Retaliation*, CRIM. LEGAL NEWS, (Oct. 2022).

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Crystal v Batts*, 151 F. Supp. 3d 626 (D. Md. 2015); see also Colin Campbell, *Batts Defends Officer Who Claims He Was Intimidated for Testifying*, BALT. SUN (Feb. 27, 2014), <https://www.baltimoresun.com/2014/02/27/batts-defends-officer-who-claims-he-was-intimidated-for-testifying/>; Ed Krayewski, *Ex-Baltimore Cop Alleges Retaliation for Reporting Police Brutality*, REASON (Dec. 26, 2014), <https://reason.com/2014/12/26/ex-baltimore-cop-alleges-retaliation-for/>; Sebastian Murdock, *'Rat Cop' Shunned from Baltimore Police Department After Reporting Police Brutality*, HUFFINGTON POST, (June 16, 2015), <https://www.huffpost.com/entry/baltimore-joe-crystal_n_7582374>.

brought back, and this officer then physically assaulted him.[77] Despite Crystal being advised against reporting this by his sergeant, he chose to inform the State's Attorney.[78] As a consequence, Crystal faced severe workplace harassment, including being ostracized, receiving threats of legal action, and finding a dead rat placed on his car.[79] His career, previously marked by rapid advancement and commendations, was overshadowed by the retaliation he endured for whistleblowing, ultimately leading him to resign from the police force after two years.[80]

In 2011, Idaho State Police investigator Brandon Eller found a deputy at fault for driving recklessly in a fatal crash, despite the other driver's intoxication level.[81] Eller faced pressure from his superiors to alter his report, emphasizing the other driver's intoxication as a causative factor, despite believing it was not.[82] After testifying truthfully in court, Eller experienced retaliation, including poor performance reviews and reassignment, ultimately leading to his resignation.[83] Similarly, Lorenzo Davis, an investigator and later supervisor for the now-defunct Independent Police Review Authority (IPRA) in Chicago, was pressured by higher-ups to alter his findings of unjustified use of excessive force to favor accused officers.[84] Despite threats of termination, Davis refused and was eventually fired, which he claimed was due to his refusal to change his findings.[85]

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77 *Ibid.*

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 *Eller v Idaho State Police*, 165 Idaho 147, 443 P.3d 161, 165-167 (2019); see also Katie Terhune, *ISP detective alleges retaliation, cover-up in whistleblower case*, CBS8 (Aug. 14, 2017), <https://www.cbs8.com/article/news/local/isp-detective-alleges-retaliation-cover-up-in-whistleblower-case/277-464415526>; Cynthia Sewell, *Another whistleblower case goes to trial. This one is against Idaho State Police*., Idaho Statesman (Aug. 02, 2017), <https://www.idahostatesman.com/news/northwest/idaho/article164985092.html>.

82 *Ibid.*

83 *Ibid.*

84 *Davis v City of Chi*., 889 F.3d 842, 844-845 (7th Cir. 2018); see also Chip Mitchell, *Appeals court upholds $1.1 million for investigator who refused to change findings on CPD shootings*, WBEZ CHICAGO (Mar. 19, 2024), <https://www.wbez.org/criminal-justice/2024/03/19/court-upholds-1-1-million-for-police-whistleblower>.

85 *Ibid.*

These cases are just the tip of what amounts to yearslong patterns of condoning retaliation. In 2020, over the course of a year, USA Today reporters analyzed thousands of documents from various law enforcement and oversight agencies, reviewed a decade of media reports and court cases, and conducted interviews with officers and victims of police misconduct from across multiple states.[86] Despite dozens of agencies fighting or refusing to release records, this investigation further exposed the pervasive "code of silence" within law enforcement, documenting over three hundred cases from the past decade where officers who reported misconduct faced severe retaliation, often losing their jobs and being branded as traitors.[87] Further, the investigation revealed that while whistleblowers suffered, the accused often retained their positions or received minimal punishment.[88]

Consequently, though the reluctance to challenge or report the misconduct of peers spans across professions,[89] and not solely within police ranks, it is much more worrisome among law enforcement because of officers' role in society and the great amount of trust and responsibility placed in them. As one commentator has noted, "Cops protect the state. They also are the state. We revere them for the first part. We fear them for the second."[90] Officers face immense pressure to uphold the code; if an officer comes forward to testify against another officer, he or she is likely to

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86 See generally Gina Barton, et al, *Dead rats, death threats, destroyed careers. How law enforcement punishes its whistleblowers*, USA Today (updated March 10, 2022). This investigation also highlighted other systemic issues, including the failure of reforms like body cameras and civilian oversight, and the role of police unions in perpetuating the culture of silence.

87 *Ibid.*

88 *Ibid.* It should be noted that while some cases, such as Eller's or Davis', may reach a substantial payout, for many whistleblowers, there has been no compensation for the retaliation, abuse, and loss of employment inflicted upon them; largely due to various factors, like institutional mechanisms, such as internal affairs investigators or union and oversight members, or inconsistent whistleblower protection laws.

89 See generally Marina A. Torres and Felipe Curiel, *Feature Cracking The Code: A Necessary Step For Police Reform*, ABA (October 11, 2023) <https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2023/september-october/cracking-blue-wall-silence-necessary-step-police-reform/>.

90 Timothy Egan, *The Blue Wall of Silence Is Starting to Crack*, N.Y. TIMES (April 16, 2021), <https://www.nytimes.com/2021/04/16/opinion/police-brutality-chauvin-minnesota-chicago-virginia-blue-wall.html>.

face extreme retaliation.[91] As a result, when an individual, whether they are private citizen or officer, brings a complaint of misconduct against an officer, it is unlikely that other officers will substantiate the claim, even if they witnessed the act, and thus, rendering any potential for accountability doubtful.[92] Hence, those reform advocates, and the public at large, who strive to hold the government accountable, and wish to see the code broken, should place a greater emphasis on strengthening whistleblower protections and exceptions, particularly for law enforcement.

As stated earlier, if an aim of reform is to build trustworthy police agencies, then a foundation must be established.[93] This rings especially true for whistleblowing, as it is a significant source for detecting and preventing crime; more so than government regulators, law enforcement personnel, and program auditors combined.[94] Accordingly, the introduction of anti-retaliation measures would help in alleviating the backlash faced by police whistleblowers, in addition to weakening the decision of the Supreme Court in *Garcetti v Ceballos*, which supplanted the original two-step analysis regarding First Amendment rights for public employees with an additional

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91 Henderson, *supra* note 16; see, e.g., *Diaz v Comm'r of Corr.*, 344 Conn. 365, 400-401 279 A.3d 147 (2022) (Here, the court recognized that officers breaking the code risk severe personal and professional consequences.); Est. of *McIntosh v City of Chi.*, No. 15-cv-01920, 2022 U.S. Dist. LEXIS 172509 (N.D. Ill. Sep. 23, 2022) (In this case, the plaintiff argued that the code includes officers providing false testimony, failing to report criminal misconduct committed by other officers or the officer himself, failing to report misconduct that violates department policies or general orders, and covering up officer misconduct.)

92 Koepke, *supra* note 14 . To illustrate the grimness of the code, one stark reminder is case of Abner Louima, a Black Haitian immigrant who was brutally assaulted by NYPD officers in 1997, underscores the harsh reality of the code within the police force. Despite widespread knowledge of the incident, few officers were willing to testify against their colleagues. Of the approximately hundred officers offered immunity, only two came forward, highlighting the deep-seated reluctance to break ranks. Those who did testify faced serious threats, requiring round-the-clock protection for themselves and their families.

93 See *infra* Part II.A.

94 See generally Association of Fraud Examiners**,** *Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study* (2016); see also PricewaterhouseCoopers, *Economic Crime: People, Culture and Controls–The 4th Biennial Global Economic Crime Survey: Engineering and Construction Industry Supplement* (2017); U.S. Department of Justice, Civil Division, Commercial Litigation Branch, *Fraud Statistics–Overview: October 1, 1987-September 30, 2010* (2010).

"duty speech" rule. This not only significantly diminished the scope of protection afforded to public employees, but also their ability to report misconduct under the First Amendment; a rule that has specially made it hard for law enforcement to do so.[95] Such burdensome limitations are keenly felt by police officers who seek to expose wrongdoing, and parallel tensions emerge north of the border as well, where Canada's *Public Servants Disclosure Protection Act* (*PSDPA*) leaves municipal and provincial officers with uneven safeguards. In the subsections that follow, this Comment will examine how both nations' approaches fall short, why stronger anti-retaliation and constitutional protections are key, and how reforms such as a federal-level whistleblower program could help dismantle the code of silence from within.

i. Anti-Retaliation Measures for Police Whistleblowers

Whistleblowers play a crucial role in shedding light on information that would otherwise go undetected, seeding improvement in the "prevention, detection, investigation and prosecution of corruption."[96] Yet, in the United States, while whistleblower protections have significantly improved for employees in other government sectors and the private industry over the past few decades, reforms within policing have notably lagged.[97] Unlike in most professions, law enforcement policies often require officers to report internal misconduct through their chain of command, which frequently involves reporting to the very individuals implicated in the misconduct, creating a challenging and often risky environment for whistleblowers[98] as first-line supervisors, caught between their responsibilities to both superior officers and subordinates, may view such reports as a reflection of their

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95 See *infra* Part II.B(1)(b).

96 Niamh Leonard, "Breaking the Silence: The Path Towards Stronger Whistleblower Protection Laws in Canada" (2021) 10:1 McGill Hum Rts Internships Working Paper Series 7 [Leonard].

97 See generally Patrick C. Exmeyer and So Hee Jeon, *Trends in State Whistleblowing Laws Following the Whistleblower Protection Enhancement Act of 2012*, Review of Public Personnel Administration 2022 42:2, 287-311 [Exmeyer & Jeon].

98 With regard to internal affairs divisions, I discuss issues with existing protections lacking independent oversight bodies to investigate complaints impartially, leading to biased internal investigations, in Part II.B(2).

leadership failures; thus, leading to retaliatory actions aimed at the whistleblower.[99]

This challenge is likewise reflected in Canada's approach to whistleblower protections. The *PSDPA* requires public servants, including federal law enforcement officers, to report misconduct either to their direct supervisors or through internal mechanisms like the Office of the Public Sector Integrity Commissioner (PSIC).[100] Much like in the United States, this reliance on internal reporting mechanisms often leaves whistleblowers vulnerable to retaliation, as the structural hierarchy and organizational culture discourage transparency.[101] Moreover, the *PSDPA*'s limited scope–covering only federal employees–excludes the majority of municipal and provincial police officers, resulting in significant gaps in protection.[102] These parallels between the two nations underscore the shared challenges in addressing the systemic risks whistleblowers face.[103]

In recent years, while several states have attempted to address issues of overall police misconduct, many of them fail to introduce anti-retaliation laws specifically aimed at protecting police whistleblowers. For example, Oregon's 2021 police accountability package included HB 2929, which

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99 See generally Joseph Schafer & Thomas J. Martinelli, First-line Supervisor's Perceptions of Police Integrity: The Measurement of Police Integrity Revisited (2008) 31 Policing: An Int'l J. of Police Strategies & Mgmt 306, 306-23 .

100 See generally Royal Canadian Mounted Police, *Public Servants Disclosure Protection Act*, <https://www.rcmp.gc.ca/en/public-servants-disclosure-protection-act>.

101 See generally House of Commons of Canada, Committee Report No. 9 - OGGO (42-1), <https://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/page-21>.

102 See generally *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Can.), available at <https://laws-lois.justice.gc.ca/eng/acts/P-31.9/>; *see also* FAIR (Federal Accountability Initiative for Reform), *The Public Servants Disclosure Protection Act Explained*, <https://web.archive.org/web/20140220023400/http://fairwhistleblower.ca/psdpa/psdpa_explained.html>.

103 It should be noted that Canada's international ranking for whistleblower protections, tied for last among 62 countries, underscores the systemic issues that inhibit meaningful reform and accountability. See Samantha Feinstein & Tom Devine, "Are whistleblowing laws working? A global study of whistleblower protection litigation" (2021) Int'l Bar Ass'n <https://www.ibanet.org/article/ee76121d-1282-4a2e-946c-e2e059dd63da> [perma.cc/R65Q-ZK7Z] [Feinstein & Devine]; see also *supra* notes 100-102.

requires officers to report misconduct by a fellow officer within 72 hours.[104] However, the bill still mandates that the report be made to a direct supervisor or through the chain of command, leaving whistleblowers vulnerable to retaliation.[105] While a minority of states like Colorado[106] and California[107] have made efforts to strengthen protections, these measures often fall short due to inconsistencies in implementation and the limited scope of protection.[108]

These state-level efforts highlight a broader problem: the patchwork nature of protections across the country. Statutory protections for state and municipal whistleblowers vary considerably, with vast discrepancies in the

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104 Oregon H.B. 2929, 81st Legis. Assemb., Reg. Sess. (2021).

105 *Ibid.*

106 See Colo. H.B. 24-1460, 74th Gen. Assemb., Reg. Sess. (2024). This bill initially included strong anti-retaliation measures to protect police whistleblowers, such as penalties for retaliating departments and provisions for maintaining whistleblower anonymity. However, during the legislative process, these protections were weakened, reducing penalties and narrowing the scope of protection, which potentially leaves whistleblowers more vulnerable to retaliation from their departments; see also Sara Wilson, *Law Enforcement Whistleblower Protections Bill Heads to Colorado House Floor*, Colo. Newsline (May 2, 2024) <https://coloradonewsline.com/2024/05/02/law-enforcement-whistleblower-protections-bill-colorado-house/>.

107 See S.B. 497, 2023-2024 Reg. Sess. (Cal. 2024). The California whistleblower protection measures outlined provide general anti-retaliation safeguards, creating a presumption of retaliation if adverse actions are taken within 90 days of a report. However, these measures, while beneficial to whistleblowers overall, do not explicitly address the unique challenges faced by police whistleblowers, such as internal pressures and the need for anonymity within law enforcement agencies; see also Hoge Fenton, *Legislature Sharpens Pitch of California's Whistleblower Statute*, Hoge Fenton (Jan. 2024), <https://www.hogefenton.com/news-events/cawhistleblower/>.

108 In Canada, the PSDPA provides some recourse for whistleblowers but faces criticism for weak enforcement mechanisms and inadequate penalties for retaliation. For example, officers who report misconduct often face cultural and professional repercussions despite the Act's promises of protection; mirroring the patchwork protections seen across the states, where the lack of uniformity creates vulnerabilities for law enforcement whistleblowers operating in insular, hierarchical environments. Although this paper largely concerns issues within the United States, it is not America alone which illustrates the personal and professional costs whistleblowers face, even when attempting to act in the public interest. See generally Whistleblowing Canada Research Society, *Weak Legislation*, <https://www.whistleblowingcanada.com/weak_legislation>; see also Transparency International Canada, *Report on Whistleblower Protections in Canada* (2015).

type of whistleblower protected, the appropriate recipient of reports, and the remedies available for retaliation.[109] This dissonance creates significant gaps in protection, particularly for law enforcement officers who are already operating in a highly insular and hierarchical environment.

Given these challenges, a federal approach could provide the uniformity and comprehensive protections that state-level reforms currently lack. Nationally, the struggle for effective whistleblower protection continues. Though there has been no shortage of major legislation aimed at curbing police misconduct, many specifically lack whistleblower protections or programs designed to protect officers from retaliation.[110] Even 42 U.S.C. § 1983, which generally protects whistleblowers from retaliation by public officials for disclosing constitutional violations[111] it does little for officers, who typically must report to internal affairs, wherein most internal

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[109] See Exmeyer & Jeon *supra* note 97 ; see also Callahan, E.S & Dworkin, TM, The state of state whistleblower protection (2000) 38 Am Bus LJ 99, 99–175 [Callahan & Dworkin].

[110] See, e.g., George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7120>; see also Law Enforcement Trust and Integrity Act, S. 1700, 117th Cong. (2021) <https://www.cardin.senate.gov/wp-content/uploads/imo/media/doc/LETIA%20Bill%20Text.pdf>.

[111] In brief, to establish a § 1983 claim, four basic elements must be met: 1) the "defendant must be a natural person or a local government;" 2) the "defendant must be acting under 'color of law;' 3) the "violation must be of a constitutional or federally protected right;" and 4) the "violation must reach a constitutional level. See 42 U.S.C. § 1983 (2018).

Though § 1983 applies to citizens and officers alike, in a § 1983 claim involving police whistleblowers, the plaintiff (often the whistleblower) must prove a violation of constitutional or federal rights and show that the defendant (a supervisor or police department) is responsible through direct involvement or by failing to address the misconduct. *See* White-Ruiz, *supra* note 25 at 382. Whistleblowers may focus on showing that a supervisor was aware of the misconduct through reports or appeals and failed to act, created or allowed unconstitutional policies, was grossly negligent in supervising officers, or showed deliberate indifference to ongoing violations. *Ibid* at 386. This standard is challenging because whistleblowers need strong evidence of a supervisor's knowledge and failure to act, which often relies on internal documentation or testimony, making it difficult to meet the high threshold required for § 1983 claims. *Ibid.*

disclosures of wrongdoing are not protected by the Constitution and § 1983.[112]

A potential model for reform is H.R. 6762, otherwise known as the Special Inspector General for Law Enforcement Act (SIGLE).[113] Developed after in-depth consultation with law enforcement officers, civil rights groups, and whistleblower organizations, SIGLE would have established a federal oversight body specifically designed to handle misconduct within law enforcement agencies.[114] Despite its failure in passing, and concerns that SIGLE represented an overextension of federal authority into state and local matters–further complicating an already complex system with redundant bureaucracy–proponents of the bill can at least point to the Act's protections for whistleblowers as a critical step towards breaking the code of silence.

First, SIGLE would have created an anonymous reporting system where law enforcement officers at the federal, state, and local levels could report misconduct without fear of being identified.[115] This hotline would be a necessary tool for officers who want to expose wrongdoing while protecting their identity, while lessening the influence of the code over an officer's decisions.[116] Secondly, the Act would empower SIGLE to conduct independent investigations into allegations of misconduct, bypassing internal police departments' investigations, which are often biased or influenced by department politics.[117] This independence is imperative to

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112 See *infra* Part II.B(1)(b) (explaining the impact of *Garcetti v Ceballos* on police whistleblowers); see also, *supra* note 111 .

113 Special Inspector General for Law Enforcement Act, H.R. 6762, 117th Congress (2021-2022). <https://www.congress.gov/bill/117th-congress/house-bill/6762/text?r=61&s=1>.

114 *Ibid.*; see also Press Release, REP. GERRY CONNOLLY, *Connolly Introduces Legislation to Establish Special Inspector General for Law Enforcement*, Gerry Connolly, U.S. House Of Representatives (Feb. 18, 2022) <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4476> [perma.cc/GN2B-HMN8].

115 H.R. 6762, 117th Cong. § 4(a)-(b) (2022).

116 *Ibid.*

117 H.R. 6762, 117th Cong. § 2(c)(1)-(2), (d)(1) (2022).

ensuring that police whistleblowers are protected from internal retaliation.[118]

Moreover, SIGLE provides robust anti-retaliation protections for whistleblowers, including safeguarding them from demotion, dismissal, harassment, and other forms of retaliation.[119] The Act further stipulates that any officer who faces retaliation for reporting misconduct can seek redress through SIGLE, which can impose penalties on those who retaliate.[120] Additionally, this includes provisions to protect officers from false accusations.[121] If an investigation determines that a whistleblower has been falsely accused or if the complaint was made in bad faith, SIGLE would have taken action to clear the officer's name and hold the accusers accountable, ensuring the system is fair and that only legitimate complaints are pursued.[122] Lastly, SIGLE requires regular reports be presented to Congress on the status of investigations and the outcomes of whistleblower complaints, granting oversight not only of law enforcement agencies but also of the SIGLE office itself.[123]

SIGLE provides a promising framework for future legislation aimed at curbing the creation of untenable situations that undermine police whistleblowers' ability to expose misconduct. State-level efforts have proven inconsistent and inadequate in providing comprehensive protection, and their complexities and limitations underscore the need for a more uniform federal approach. Legislation like SIGLE, despite concerns about federal overreach, is necessary to address the inconsistencies in state laws, and a federal basis could ensure that all officers, regardless of jurisdiction, are afforded the same robust protections, thereby lessening the code's influence.

As Canada's experience reflects a similar need for uniformity–thus, risking perpetuating the same inconsistencies that weaken protections for officers in the United States–it could draw from SIGLE's approach to create a parallel federal oversight body for law enforcement misconduct, extending

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118 *Ibid.*

119 H.R. 6762, 117th Cong. § 4(b)-(c) (2022).

120 *Ibid.*

121 H.R. 6762, 117th Cong. § 4(c)(1)(C)(ii) (2022).

122 *Ibid at* 4(c)(3)(B)(i).

123 H.R. 6762, 117th Cong. § 2(i) (2022).

PSDPA protections to provincial and municipal levels. Such a body could ensure independent investigations, bypassing department politics, and provide consistent protections nationwide, a necessity given the decentralized nature of Canadian policing.

For instance, by adopting SIGLE's anonymous hotline and independent investigative structures, Canada could address criticisms of the PSDPA's reliance on internal mechanisms, thereby encouraging reporting and reducing fears of retaliation. Further, incorporating such measures into the PSDPA would strengthen its credibility, ensuring not only that whistleblowers are protected but also that unfounded claims are addressed fairly. Requiring transparent reporting on the handling of whistleblower cases, as SIGLE proposes, would enhance public trust in oversight mechanisms and ensure accountability at every level of Canadian law enforcement.

ii. First Amendment Protections for Police Whistleblowers: The Impact of *Garcetti v. Ceballos*

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[124] Yet, for public employees, including police officers, these rights are balanced against the government's need to maintain an efficient and effective workplace.[125] While public employees generally retain their free speech rights, said rights are conditional. If the speech does not address a matter of public concern or is made pursuant to the employee's official duties, it is not protected under the First Amendment.[126] Concerning law enforcement, however, although the public would be correct to assume rampant police

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124 U.S. CONST. amend. I.

125 *Karney v DOL & Indus. Rels.*, 599 S.W.3d 157 (Mo. 2020); see also *Borzilleri v Mosby*, 874 F.3d 187 (4th Cir. 2017).

126 *Ibid.* ; see also *Prince George's Cty v Brooke*, No. 1730, 2023 Md. App. LEXIS 567 (App. Aug. 18, 2023); *Kaye v Bd of Trs of San Diego Cty.* Pub. Law Library, 179 Cal. App. 4th 48, 101 Cal. Rptr. 3d 456 (2009).

misconduct is an issue of public concern, the Supreme Court held differently in *Garcetti v. Ceballos.*

In *Garcetti*, Richard Ceballos, a deputy district attorney for Los Angeles County, raised concerns in 2000 about inaccuracies in an affidavit used to obtain a search warrant.[127] After investigating, Ceballos found serious misrepresentations and recommended dismissing the case.[128] Despite his findings, his supervisors chose to proceed with the prosecution, and Ceballos testified about the inaccuracies in court.[129] Subsequently, he sued then-Los Angeles District Attorney Gil Garcetti's administration, arguing that he faced retaliatory actions–such as reassignment, transfer, and denial of a promotion–due to his speech, claiming these actions violated his First and Fourteenth Amendment rights, as well as the *Illinois Whistleblower Act*.[130] Garcetti's administration denied said retaliation, and further argued that the First Amendment doesn't apply when government employees make statements as part of their jobs.[131]

Upon reaching the Supreme Court, the central question was whether Ceballos' speech, made in his capacity as a public employee, was protected under the First Amendment. Although the Court acknowledged that while public employees don't forfeit all First Amendment rights, those rights are protected only when the employee speaks as a citizen on matters of public concern;[132] a principle outlined in cases such as *Pickering v. Bd. of Educ.*[133] and *Connick v. Myers*.[134] Additionally, the Court further noted that while

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127 *Garcetti v Ceballos*, 547 U.S. 410, 413-14 (2006) [*Garcetti*].

128 *Ibid.*

129 *Ibid* at 414-15.

130 *Ibid.*

131 *Ibid* at 415-16.

132 547 U.S. 410, 417-20.

133 391 U.S. 563, 568 (1968) (requires determining whether the employee spoke as a citizen on a matter of public.)

134 461 U.S. 138, 147 (1983) (requires determining whether the employee has a First Amendment cause of action based on the employer's reaction to the speech.)

government employers have broader discretion to regulate speech, they must justify restrictions that impact an employee's ability to speak on public matters.[135] Thus, the First Amendment protects public employees, not just for their own sake, but also to ensure the public receives informed opinions on important issues.[136]

Still, in what was a narrow decision, the Court ultimately sided with the defendant, holding that because Ceballos wrote the memo as part of his official duties, he was not speaking as a private citizen and therefore was not protected by the First Amendment from employer discipline.[137] The Court emphasized that when public employees speak pursuant to their professional responsibilities, their speech does not receive the same constitutional protection as speech made in their capacity as private citizens, resulting in Ceballos' claim of unconstitutional retaliation failing, as his memo was considered part of his job duties and not protected speech.[138]

This ruling effectively created a "duty speech" loophole, wherein the speech must be made as a citizen, rather than as part of one's official duties, to be protected under the First Amendment. Yet, it is a line drawn that makes little sense. For instance, were non-police personnel, say, sanitation services, to report any police misconduct, then presumably they would enjoy First Amendment protections as their job would not require him to expose said misconduct, although their awareness comes from their employment, just like the officer whose job includes reporting such issues. Additionally, an officer would be free to report instances of misconduct to a third-party, such as a newspaper, but, under *Garcetti*, would be prevented from doing so internally; which is an issue considering internal policies typically

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135 *Garcetti*, *supra* note 127 at 417-20 (reasoning that restrictions on employee speech should encompass only those "necessary for their employers to operate efficiently and effectively").

136 *Ibid.*

137 *Ibid* at 421-422.

138 *Ibid* at 423-25.

mandate that officers report misconduct through their chain of command.

Of further note is the dissent. In it, the dissenting justices were concerned that the majority's decision would have a chilling effect on the speech of public employees, chiefly those who are in the best position to know "what ails the agencies for which they work," which is exactly why they should be free to speak up–publicly or in private–about matters related to their job duties; especially when those matters involve public concern.[139] The dissent further advocated adherence to the *Pickering* balancing test approach, without a loophole for speech when it is a part of job duties.[140] Employees, the dissent emphasized, do not forego their citizenship by taking a job with the government, nor should their rights be diluted by doing so.[141] As such, the holding in *Garcetti* should not overrule free speech protections under the First Amendment where whistleblowing is not an obligation or duty as part of employment.[142]

The majority of the Court dismissed these concerns, asserting that whistleblower protection laws and labor codes would protect those who spoke out,[143] in addition to qualifying that not all workplace speech is precluded from First Amendment protection.[144] Yet, these safeguards are inadequate. *Garcetti* sits at the top of a patchwork system of whistleblower laws that vary from state to state, the majority of which do not protect internal whistleblowers who blow the whistle pursuant to their official duties.[145]

Consequently, even when cases pass the high bar of the *Garcetti* ruling, these laws present another hurdle in which police whistleblowers are largely forced to seek help from government agencies or internal departments that will likely retaliate against them, while aiding the same parties they seek to

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139 *Ibid* at 429 (quoting *Waters v Churchill*, 511 U.S. 661, 674 (1994)).

140 *Ibid.*

141 *Ibid.*

142 *Ibid,*

143 *Ibid* at 425.

144 *Garcetti*, *supra* note 127.

145 See *infra* Part II.B(1)(a).

expose.[146] What is more is that the Court even suggested that public employers could write "internal policies and procedures that are receptive to employee criticism."[147] This is highly unrealistic within law enforcement, given the incredible amount of pushback a majority of police unions and higher-ups commit when it comes down to issues involving anything remotely surrounding police misconduct and accountability measures.[148]

Nonetheless, there is some hope. While the *Garcetti* exception remains law, some circuit courts have pushed back against the ruling; recognizing that to apply it to disclosures of police abuses should be exercised with caution, if at all. One notable example is *Dahlia v Rodriguez*,[149] wherein the Ninth Circuit held that when conducting a First Amendment retaliation inquiry to determine the duties of a government employee, post-*Garcetti* courts should not "broadly define police officers' duties" so as to discourage police whistleblowers.[150]

With regard to First Amendment whistleblower protections for public employees, the court emphasized that the goal is to prevent or address government actions that chill the exercise of constitutional rights, focusing on the effect of the action rather than its form, in whether said action is "reasonably likely to deter" an employee from engaging in protected First Amendment activity.[151] It concluded that the state has no legitimate interest in concealing corruption or abuse, and, as a matter of public policy, the First Amendment protects public employee whistleblowers from retaliation by their employers.[152]

In this case, Dahlia had reported that officers used guns and beat robbery suspects to obtain information.[153] After speaking up, he faced harassment, exclusion from interviews, and threats from fellow officers.[154] When he reported this retaliation, Dahlia was placed on administrative

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146 See *infra* Part II.B(2).

147 *Garcetti*, *supra* note 127 at 424.

148 *See infra* Part II.A.

149 735 F.3d 1060 (9th Cir. 2013) (en banc) [*Dahlia*].

150 *Ibid* at 1063.

151 *Ibid* at 1078.

152 *Ibid* at 1067.

153 *Ibid* at 1064.

154 *Ibid* at 1064-65.

leave, losing pay and the chance to take the sergeant's exam.[155] The defense argued that, under *Huppert v. City of Pittsburg*, police officers' official duties included reporting police misconduct, and as such, Dahlia acted within his official duties; therefore, he was not protected by the First Amendment.[156] See, in addition to establishing the "duty speech" loophole, the *Garcetti* court also failed to define the scope of the term "official duties," which resulted in lower courts applying a variety of inconsistent tests.[157] One of these was the *Huppert* court, which relied on the general job description in *Christal v Police Commission of City and County of San Francisco*, in seeking to automatically classify whistleblowing as part of an officer's official duties.[158] However, this argument was rejected by the court in *Dahlia*, as it, in essence, would make it where these reports are always unprotected under the First Amendment, and to not do so, would be "dangerous."[159] The court clarified that the duties within *Huppert* related to the Fifth Amendment right against self-incrimination, not First Amendment free speech protections, and thus, overruled this decision in *Huppert* as it improperly relied upon the findings in *Christal*.[160]

While the *Dahlia* court's success in overruling *Huppert* was a step forward in granting police whistleblowers better First Amendment protections, it erred in its attempt to apply a formal test to what the scope of "official duties" ought to be. Without *Huppert's* definition of official duties, the court set forth three factors in an attempt to clarify *Garcetti*: 1)

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155 *Ibid.*

156 574 F.3d 696, 707 (9th Cir. 2009) [*Huppert*].

157 *Garcetti*, *supra* note 127 at 424. Although the Garcetti court failed in giving a formal definition for "official duties," it did mandate that "the proper inquiry [to determine the scope of an employee's professional duties] is a practical one," which was meant to be factual specific; see also Sarah L. Fabian, Comment, *Garcetti v. Ceballos*: *Whether an Employee Speaks as a Citizen or as a Public Employee–Who Decides?,* 43 U.C. DAVIS L. REV. 1675, 1706 & n.239 (2010) (citing cases).

158 *Huppert*, *supra* note 156 at 707 (quoting *Christal*, 92 P.2d 416, 419 (Cal. Ct. App. 1939)). The *Christal* court reasoned that police officers have diverse responsibilities, of which key duties included crime prevention, assisting in crime detection, and sharing information that leads to the apprehension and punishment of offenders. Hence, officers are expected to report incriminating facts to their superiors and testify truthfully in court or before a grand jury; see also *Dahlia*, *supra* note 149, at 1070.

159 *Dahlia*, *supra* note 149 at 1106–07.

160 *Ibid* at 1071.

whether the employee communicated with individuals outside his chain of command, 2) the subject matter of the communication, and 3) whether the employee was speaking in direct contravention to his supervisor's orders.[161] Ultimately, the *Dahlia* court found that Dahlia's communication with Internal Affairs fell outside his chain of command, and thus, supported his claim.[162] The court reasoned it was reasonable to infer that Dahlia had no duty to report threats to his union, thus speaking outside his official duties.[163] The chain-of-command factor was deemed relevant but not decisive in determining if his speech was protected, therefore, the court reversed the lower court's ruling without analyzing other factors.[164]

If the objective, though, is to ease the ability for police whistleblowers to report misconduct, thereby lessening the code's influence, then the test set by the *Dahlia* court would threaten that. Recall that the majority of misconduct reports must be conveyed to a direct supervisor, and accordingly will be subject to First Amendment limitations.[165] By applying this chain-of-command approach, *Dahlia* undercuts the balancing approach *Garcetti* sought to implement, wherein courts would balance deference to government employers' daily operations, while still providing an individual citizen a platform to speak out on matters of public concern.[166]

Though *Garcetti* failed in this by applying its "duty speech" loophole, the *Dahlia* court also failed to consider the arguments put forth in *Garcetti*'s dissent; namely, that it benefits both the government and society to allow employees to report up the chain of command, without fear of being subject to retaliation.[167] With the ruling in *Dahlia*, the court states that either officers violate their duty to report misconduct to receive First Amendment protection, or they adhere to their duty and risk retaliation.[168] This forces officers to choose between public interest and self-interest, essentially pressuring them to sacrifice either public safety or their own job security,

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161 *Ibid* at 1076.

162 *Ibid* at 1074-78.

163 *Ibid* at 1077-78.

164 *Ibid* at 1080.

165 See *supra* note 98.

166 *Garcetti*, supra note 127, at 418-19.

167 *Ibid* at 427-29 (Souter J, dissenting); see also, *supra* notes 139-142.

168 *Dahlia*, *supra* note 149 at 1083.

and thereby highlighting the need to abandon the chain-of-command analysis.[169]

In an effort to curb this, some alternatives should be considered. First, there is the civilian-analogue exception established in *Jackler v Byrne*, in which the Second Circuit held that if a government employee's speech has a civilian equivalent, it is not "pursuant to his [official] duties" and is thus beyond the scope of *Garcetti*.[170] This finding was based on the court's reasoning that " . . . activities required of the employee as part of his employment duties are not performed 'as a citizen' if they are not 'the kind of activity engaged in by citizens who do not work for the government.'[171] The Second Circuit in *Jackler* found that his First Amendment claim arose from his refusal to falsely exculpate a colleague, which had a civilian analog in the right to reject false statements.[172] Thus, despite an officer's actions being part of his official duties, in reporting misconduct, an officer would create a civilian analog, thereby being afforded First Amendment protections.

Another approach to define the scope of "official duties" would be under assigned responsibilities. Utilizing this approach, courts would examine whether the public employee was required to engage in speech as part of their official duties.[173] Instead of focusing on whom the speech was directed toward, this approach asks whether the speech aligns with the employee's job responsibilities. This method shifts the analysis to whether the speech is integral to the employee's role, recognizing that job-related speech can still hold value and be worthy of protection, thereby emphasizing the context and nature of the duties rather than the audience of the speech.

For example, in comparing *Marable v Nitchman* to *Freitag v Ayers*, both courts used the assigned-responsibilities analysis to determine if the speech was within the employees' official duties. In *Marable*, the court found that reporting financial misconduct was outside the plaintiff's official role, thus protecting his speech under the First Amendment.[174] In contrast, *Freitag*

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169 *Ibid* at 1082-83.

170 658 F.3d 225, 237-38 (2d Cir. 2011).

171 *Ibid* at 237 (quoting *Garcetti*, at 423).

172 *Ibid* at 241-42.

173 *Marable v Nitchman*, 511 F.3d 924, 932–33 (9th Cir. 2007).

174 *Ibid* at 926, 933.

held that internal reports on inmate misconduct were part of the plaintiff's duties, but communications to external officials were protected.[175] These cases illustrate how the scope of an employee's duties influences the protection of their speech. Had a chain-of-command analysis been used in *Marable*, then it is likely that the plaintiff's communication would have been considered within his official duties, and likely unprotected under the First Amendment; thus, demonstrating the importance of considering whether the speech truly aligns with job responsibilities.

Ultimately, the failure to protect police whistleblowers is not just a legal issue; it is a threat to public safety, justice, and the integrity of our democratic institutions. Whistleblowers deserve the right to expose misconduct without fear of overhanded consequences. Yet, under current legal doctrine, police whistleblowers must survive a gauntlet of legal obstacles to gain protection. Not only is it a major gamble for police officers to prove that they are eligible for constitutional protection, but even if they are eligible, there would still be no guaranteed protections from retaliation under federal or state law.

In comparing the existing anti-retaliation measures and the First Amendment protections for police whistleblowers, it becomes evident that both frameworks are riddled with significant shortcomings that undermine their effectiveness. The inconsistent state-level anti-retaliation laws create major gaps in protection, particularly in the tightly knit and hierarchical structure of law enforcement. While the proposed SIGLE Act provides a promising framework by offering federal-level protections, including anonymous reporting systems and independent investigations, without a cohesive federal standard, these measures can vary widely, with some states offering robust safeguards while others fall behind. This inconsistency not only weakens the effectiveness of anti-retaliation laws but also places whistleblowers in a precarious position, particularly when they are required to report misconduct within the very chain of command that might retaliate against them.

This is only further complicated by *Garcetti*'s stripping of First Amendment protections from public employees who speak out as part of their official duties. This "duty speech" loophole effectively silences those best positioned to report misconduct; law enforcement officers themselves.

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[175] 468 F.3d 528, 546 (9th Cir. 2006).

While some courts, like in *Dahlia* or *Jackler*, have attempted to narrow the scope of this ruling, these efforts are not enough on their own to secure the level of protection necessary for police whistleblowers. Without First Amendment protections, officers are forced to choose between fulfilling their duty to report and safeguarding their own livelihoods, a choice that too often results in silence rather than exposure of wrongdoing.

Turning to Canada, there are meaningful parallels and differences when it comes to protecting whistleblowers, including police. Much like the United States, Canada grapples with whether free expression by public employees can be limited by employer interests in organizational efficiency and loyalty. However, Canada's governing law in this realm is Section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression.[176] Canadian courts also consider the "duty of loyalty" owed by public servants, articulated in cases like *Fraser v Public Service Staff Relations Board*.[177] In practice, Canadian courts will typically apply a more open-ended balancing analysis, asking whether restricting an officer's speech is a proportionate and minimally impairing way to achieve legitimate objectives, rather than drawing a bright line around 'official duties' as in *Garcetti*.

At the federal level, Canada has the Public Servants Disclosure Protection Act (PSDPA), which aims to protect public servants (including members of the RCMP) who disclose wrongdoing.[178] Yet, as with U.S. state-level laws, provincial or municipal police agencies in Canada may be governed by a patchwork of their own whistleblower statutes or internal policies.[179] Critics argue that these protections can be uneven, particularly

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176 *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

177 [1985] 2 SCR 455.

178 See generally *Public Servants Disclosure Protection Act*, SC 2005, c 46.The *Public Servants Disclosure Protection Act* (*PSDPA*) applies to federal public sector employees, including RCMP members, but excludes organizations such as the Canadian Forces and CSIS. It protects public servants from reprisals, including termination or demotion, for making disclosures or cooperating in investigations. Disclosures can be made to supervisors, designated Senior Officers, or the Public Sector Integrity Commissioner, with safeguards to protect the identity of whistleblowers.

179 See Alex Komarov, *Briefing Note on Whistleblowing*, Anti-Corruption Law Program at The Centre for Business Law (Vancouver: Peter A Allard School of Law, University of British Columbia 2022) <https://allard.ubc.ca/sites/default/files/2022-

since Canadian police forces–whether local (like Toronto Police Service) or provincial (like the Ontario Provincial Police)–may not be fully covered by federal whistleblower protections.[180] As it has been iterated throughout, the code of silence is just as present in Canadian policing culture, and fears of retaliation can deter whistleblowing regardless of the Charter or statutory safeguards. Thus, while Canada lacks a direct parallel to *Garcetti*'s bright-line rule, the practical outcomes can mirror U.S. situations, where police officers must decide between loyalty to the organization and public interest in rooting out misconduct.[181]

A more robust set of protections–both statutory and constitutional–would likewise benefit Canadian policing. If free expression rights under Section 2(b) were more clearly affirmed in whistleblowing contexts, and if the PSDPA or its provincial counterparts were strengthened to shield officers from retaliation, Canadian police whistleblowers could more safely report wrongdoing. In other words, a combined approach–comparable to what U.S. critics call for–would better uphold public trust in law enforcement by ensuring insiders can speak up without losing their careers.

Thus, in the interest of securing real reform, and of breaking through the barrier that is the code, both anti-retaliation measures and First Amendment protections should be strengthened and implemented in tandem. Correspondingly, Canadian jurisdictions should reinforce their *Charter*-driven protections and fortify whistleblower statutes such as the PSDPA; ensuring they apply fully to police forces at all levels. This dual approach is not just theoretical; it is supported by the experiences of other sectors. For instance, in the corporate world, the combination of whistleblower protections and free speech rights has proven effective in

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02/Briefing%20Note%20on%20Whistleblowing%20-%20Anti-Corruption%20Law%20Program%20%28ACLP%29.pdf> [perma.cc/7Y6E-LZXX].

180 See Feinstein & Devine, *supra* note 103; see also Kohn, Kohn & Colapinto LLP, *Canada Whistleblower Protections*, <https://kkc.com/canada-whistleblower-protections/>; Ian Bron, *A Former Whistleblower Explains the Dangers of Canada's Feeble Whistleblowing Laws*, Canadian Manufacturing <https://www.canadianmanufacturing.com/features/a-former-whistleblower-explains-the-dangers-of-canadas-feeble-whistleblowing-laws/>.

181 See Leonard, *supra* note 96 .

exposing financial fraud and other misconduct.[182] A similar approach in law enforcement could lead to significant improvements in accountability. By ensuring that officers are protected both from internal retaliation and from legal vulnerabilities when reporting misconduct can a system be created that that truly values this, and not the current prevailing culture, driven by fear of retaliation and ostracism, which often dissuades officers from taking such steps. Officers should not end up paying a horrible price with lifelong scars out of a concern that they should be doing the right thing.

2. Internal Affairs: How a Lack of Oversight Shields Misconduct

Building on the previous section about police whistleblowers, to achieve meaningful reform, the internal mechanisms that investigate and enforce accountability within police departments must also be addressed. One key mechanism is the Internal Affairs Division (IAD), which plays a pivotal role in overseeing and investigating allegations of misconduct, whether reported internally or by the public. However, the effectiveness of these divisions is often undermined by not only systemic issues, including procedural delays and the misclassification of complaints, but, as with so much else, the code of silence as well. These challenges highlight the limitations of relying solely on IADs and underscore the necessity of comprehensive reforms that go beyond surface-level changes. Enhancing the clarity, efficiency, and fairness of how police misconduct cases are handled within these divisions is crucial to ensuring that reform efforts in breaking the code are not just an ideal but a practical reality.

In *Johnson v. Balt. Police Dep't*, the plaintiffs alleged that the Baltimore Police Department's (BPD) IAD had several deficiencies in its procedures for investigating police misconduct.[183] These deficiencies included discouraging people from filing complaints and tolerating excessive and chronic delays in resolving disciplinary complaints.[184] The plaintiffs also claimed that supervisors misclassified serious complaints as minor ones to

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182 See Jeffrey T. Sprung, *State Could Recoup Millions Under Fraud False Claims Act*, The Olympian (Mar. 3, 2012) (noting that the "U.S. Government Accountability Office estimates that 10% of government health care dollars are lost to fraud"); see also Kelly Kennedy, *$4.1B Recovered in Fight Against Health Care Fraud*, USA Today (Feb. 14, 2012); see generally Callahan & Dworkin, *supra* note 109.

183 608 F. Supp. 3d 227 (D. Md. 2022).

184 *Ibid* at 234.

avoid IAD involvement and failed to consider evidence contrary to an officer's report.[185] Furthermore, the IAD was accused of failing to effectively discipline officers found to have engaged in misconduct.[186] The plaintiffs argued that these failures allowed a custom of unconstitutional policing to develop in the BPD's plainclothes units, which the BPD allegedly condoned by willfully ignoring it.[187]

What the above goes to show is that although internal, administrative discipline exists to address police misconduct, it does little in solving it, and may, in certain cases, further it. Further, there is no central federal oversight agency that holds each individual department accountable, nor do states necessarily have their own independent, oversight bodies.[188] This means that, typically, police departments manage misconduct issues internally, relying on their own "Internal Affairs" units for investigation.[189] These units are staffed by fellow officers, often those who have risen through the ranks of the same department, which can lead to a potential bias in favor of protecting colleagues over the public, victims of misconduct, or even colleagues who report misconduct. This inherent conflict of interest can result in investigations that neither satisfy public expectations nor effectively deter future misconduct, in addition to discouraging citizens from filing

185 *Ibid.*

186 *Ibid.*

187 *Ibid.*

188 Leandra Bernstein, *America has 18,000 Police Agencies, No National Standards; Experts Say That's a Problem*, WJLA (June 9, 2020), <https://wjla.com/news/nation-world/america-has-18000-police-agencies-no-national-standards-experts-say-thats-a-problem> [perma.cc/M7K6-YKH2] [Bernstein]; It should be noted, however, that there has been some federal and state efforts made in establishing oversight boards to enhance police accountability. The DOJ, through § 12601, employs consent decrees and independent monitors to oversee reforms in departments with patterns of misconduct. States are also taking steps: Virginia and California, for example, have empowered local oversight boards and sheriff oversight bodies to investigate complaints, enforce disciplinary actions, and promote transparency. These initiatives reflect a growing commitment to proactive oversight and more democratic involvement in policing practices, aiming to dismantle systemic issues and build public trust. Nat'l Conference of State Legislatures, *supra* note 10; see generally Va. S. 5035 (2020); Cal. A.B. 1185 (2020).

189 See Rachel Moran, "Ending the Internal Affairs Farce" (2016) 64 Buff LRev 837, 852-53 (explaining the internal affairs unit and its role within police departments [Moran]).

complaints due to skepticism about the impartiality and effectiveness of the process.[190]

To initiate an internal affairs investigation in US police agencies, a formal complaint is required; a step many citizens hesitate to take due to fears of police hostility or overly burdensome procedures.[191] Even when complaints are made, particularly those concerning excessive force, they are often not pursued by police departments.[192] This can be shown in *Noble v City of Camden*, in which the court permitted a *Monell* claim[193] to proceed where the city had an alleged custom of ignoring or failing to investigate unconstitutional excessive force complaints properly and promptly against city police officers for years preceding the plaintiff's incident.[194] The plaintiff's expert report noted a consistent backlog of cases involving alleged

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190 It is worth noting that a similar fragmentation in oversight exists in Canada. While the Royal Canadian Mounted Police (RCMP) is accountable to the Civilian Review and Complaints Commission (CRCC) at the federal level, provincial and municipal forces often come under different agencies. See generally "Civilian Review and Complaints Commission for the RCMP", *RCMP Divisions and Police Oversight*, <https://www.crcc-ccetp.gc.ca/en/rcmp-divisions-and-police-oversight> [perma.cc/NZ28-FY94].

For instance, Ontario has the Office of the Independent Police Review Director (OIPRD) and the Special Investigations Unit (SIU), while British Columbia has the Office of the Police Complaint Commissioner (OPCC). Though these structures differ from U.S. Internal Affairs models, the underlying critiques–such as procedural delays, reluctance to discipline senior officers, and the "blue wall" phenomenon–echo across both countries. See Canadian Civil Liberties Association, *Who Polices the Police? Civilian Police Oversight in Canada* (Toronto: Canadian Civil Liberties Association, March 2017) <https://ccla.org/get-informed/talk-rights/who-polices-the-police-civilian-police-oversight-in-canada/> [perma.cc/YA24-R5CM]; see also Office of the Police Complaint Commissioner, *Canadian Police Oversight Agencies*, <https://opcc.bc.ca/resources/canadian-police-oversight-agencies/> [perma.cc/9ZRV-GBYB] (lists various municipal, provincial, and federal civilian oversight agencies in Canada, showcasing the decentralized nature of police oversight).

191 *Ibid* at 854-56.

192 *Ibid* at 856.

193 For clarification, a *Monell* claim establishes that municipalities and other government entities are "persons" subject to liability under 42 U.S.C. § 1983 for constitutional rights violations, but that they were not liable under the doctrine of *respondeat superior* for the misconduct of its employees. To prevail on such a claim, a plaintiff must first establish that the municipality had a policy or custom that deprived them of their constitutional rights. 112 F. Supp. 3d 208, 221 (D.N.J. 2015).

194 *Ibid* at 221-23.

officer misconduct that were pending before the Internal Affairs Unit (IAU), demonstrating a lack of standard of care to thoroughly and timely investigate allegations of abuse.[195] The city, by its inaction, was allegedly deliberately indifferent to the need for such investigations to protect persons against excessive force during arrests, and was thus in part complicit in the misconduct that ensued, with the court ultimately finding that the plaintiff provided sufficient evidence to conclude that the city was deliberately indifferent in investigating these claims.[196]

Additionally, although police departments often require officers to report instances of force to assess their appropriateness, these reports are frequently overlooked.[197] The DOJ has documented various cases where police departments have failed to adequately follow up on reports of force used by officers. For instance, in its review of the Detroit Police Department, the DOJ pointed out significant shortcomings in how complaints and reports of force were handled, noting that such reports were often not tracked or reviewed properly, which impaired the resolution and accountability processes.[198] Similarly, investigations into the Albuquerque Police Department by federal monitors revealed instances of mishandling police shootings and other use of force cases.[199] The monitoring team

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195 *Ibid* at 222.

196 *Ibid* at 223-24; see also, e.g., *Hensley v City of Upland*, No. ED CV 20-2462-CBM-(ASX), 2021 U.S. Dist. LEXIS 158238 (C.D. Cal. May 4, 2021) (finding that the plaintiff's allegations regarding the City's failure to "reprimand" or "penalize" officers for prior alleged incidents of excessive force were sufficient on the pleading stage to state a Monell claim against the City based on a custom of failing to adequately supervise, discipline, employ or retain police officers.); *Delgado v City of Chi.*, 547 F. Supp. 3d 824 (N.D. Ill. 2021) (providing an example of a city allegedly ignoring or failing to investigate excessive force complaints against its police officers. The Second Amended Complaint in this case included allegations regarding the number of excessive force complaints investigated, the number found to have merit, and examples of the city failing to investigate or otherwise condoning officers' use of deadly force.)

197 See Moran, *supra* note 189 at 861.

198 *Justice Department Announces Successful Resolution of Consent Judgment Involving Detroit Police Department*, Office of Public Affairs (August 25, 2014) <https://www.justice.gov/opa/pr/justice-department-announces-successful-resolution-consent-judgment-involving-detroit-police> [perma.cc/E7F7-H3E6].

199 See generally James D Ginger "Compliance Levels of the Albuquerque Police Department and the City of Albuquerque with Requirements of the Court-Approved

expressed concern about the competency of the IAD and the Force Review Board in handling such serious matters, indicating that there were risks of systemic issues in addressing and reviewing use of force incidents effectively.[200]

To elaborate, in *Peterson v City of Fort Worth*, the Fort Worth Police Department's (FWPD) General Order 306.09 mandates that any use of force involving hard open-hand control or greater must be reported as "Use of Force by an Officer."[201] Officers are required to detail these incidents in related arrest or offense reports, or, if no such reports are filed, in an

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Settlement Agreement" (US Department of Justice: Nov 8, 2023) <https://www.justice.gov/d9/2023-11/imr-18.pdf> [perma.cc/C98Y-U3P8] [Ginger].

200 Canadian departments have been subject to similar critiques when it comes to record-keeping and follow-up, particularly through internal "professional standards" branches. Inquiries in several provinces have shown that while external oversight bodies exist, the first line of investigation remains internal. Thus, some complaints never advance to external review if an internal process is delayed, mishandled, or discouraged; a situation that mirrors the systemic failures in places like Detroit and Albuquerque. See generally Civilian Review and Complaints Commission For the RCMP, *Police Investigating Police – Final Public Report*, <https://www.crcc-ccetp.gc.ca/en/police-investigating-police-final-public-report> [perma.cc/2GMX-K6Y8]; see also Royal Canadian Mounted Police, *Audit of Investigator's Notes*, <https://www.rcmp-grc.gc.ca/en/audit-investigators-notes> [perma.cc/FNX3-8FCJ]; Edmonton Police Service, *2021 Professional Standards Branch Annual Report*, <https://edmontonpolicecommission.com/report/2021-professional-standards-branch-annual-report/> [perma.cc/BPZ3-KULQ]; Toronto Police Service, *Professional Standards*, <https://www.tps.ca/chief/chiefs-office/professionalism-and-accountability/professional-standards/> [perma.cc/7QYP-CGGM] [Toronto Police]; Pierre Saint-Arnaud, *Why Quebec Officers Are Refusing to Answer Questions from Police Watchdog*, GLOBAL NEWS (July 2023) <https://globalnews.ca/news/9848613/quebec-officers-silent-treatment-bei-police-watchdog/> [perma.cc/A3RC-26LK].

201 588 F.3d 838, 854 (5th Cir. 2009) [*Peterson*] (Montalvo J, concurring in part and dissenting in part); In addition, the DOJ noted that though Ferguson Police Chief Jackson had implemented new use-of-force reporting policies, "these policies are routinely ignored." The DOJ also determined that the individuals tasked with reviewing uses of force "do little to no investigation" and "either do not understand or choose not to follow [the Ferguson Police Department's] use-of-force policy in analyzing officer conduct; rarely correct officer misconduct when they find it; and do not see the patterns of abuse that are evident when viewing these incidents in the aggregate." See U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* 38 (2015) <https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf> [perma.cc/73RG-PZM9]

incident report.[202] Upon completion of a Use of Force report, a supervisor must create a separate internal document that is passed up through the chain of command for review and filing.[203] These reports are meant to be completed at the end of an officer's shift, titled "Use of Force," and sent to a captain for evaluation.[204] The purpose of this review is to decide if there's a need for changes in departmental practices or additional officer training.[205]

Despite these requirements, the officer in question, Officer Horner, did not complete a Use of Force report after witnessing the offending officer execute a knee strike; a maneuver classified under hard open-hand control.[206] No disciplinary action was taken when this oversight was discovered, and the FWPD chief dismissed Horner's omission as merely "ancillary" to the broader investigation of the plaintiff's allegations.[207] Moreover, the General Order 306.10 outlines that Use of Force reports should be forwarded to the Training Division to ensure that training is timely and relevant.[208] Even so, the failure to enforce the reporting requirement, highlighted by an officer's acknowledgment of unreported use of force, tacitly permits the omission of such reports.[209] This lack of enforcement potentially obstructs any reassessment of the frequency or methods of training on excessive force, and is further compounded by a principle from the Defensive Tactics Manual of the Fort Worth Police Academy, which states, "If it makes you look good, but it's not in your report, it didn't happen," suggesting an unofficial policy that if officers do not report an incident, they might altogether avoid scrutiny or repercussions.[210] Lastly, as discussed in Part II.B(1), there is a high risk that IAD officers may use the disciplinary system to retaliate against those

202 *Ibid.*

203 *Ibid.*

204 *Ibid.*

205 *Ibid.*

206 *Ibid.*

207 *Ibid.*

208 *Ibid.*

209 *Ibid.*

210 *Ibid* at 854-55.

officers who oppose improper departmental processes when reporting issues of misconduct or corruption.

Overall, the repeated failures within Internal Affairs divisions to adequately address and rectify police misconduct risk accentuating a systemic flaw in the oversight of law enforcement. And despite clear guidelines and procedural mandates, many of these units often fall short; allowing detrimental behaviors to persist unchallenged and undeterred through intent or ineffectiveness.[211] The question for reform advocates would then be by which mechanisms would ultimately serve best to correct such glaring issues, as well as lessening the code's influence over IADs. While many advocates still champion civilian oversight boards[212] as the best method, for the purposes of this section, the focus is on moving towards a more effective, proactive model of oversight for IADs, rather than the reactive approach currently used.[213]

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211 See generally Moran, *supra* note 189; see also Ginger, *supra* note 199; Peterson, *supra* note 201.

212 Civilian oversight boards, though regarding consent decrees, have faced challenges such as limited authority, lack of independence, and insufficient resources. See Stephen Rushin, "Federal Enforcement of Police Reform" (2014) 82 FORDHAM L REV 3189 ; see also Martin Kaste, *Police Consent Decrees Are Coming Back-But They Might Not Make Sense Anymore*, NPR (June 22, 2021), <https://www.npr.org/2021/06/22/1009182213/police-consent-decrees-are-coming-back-but-they-might-not-make-sense-anymore> [perma.cc/454E-XQPB]. Many boards struggle with maintaining objectivity and enforcing disciplinary actions due to close ties with police departments and legal constraints. *Ibid.* Recent reform efforts aim to address these issues by expanding the powers of oversight boards to investigate complaints, review use-of-force incidents, and enforce disciplinary measures. See *supra* note 188. Most of the issues that have plagued such boards, and the reform efforts made to alleviate these issues, are largely the same, and thus, would likely be implemented the same, were they to oversee IADs.

213 In Canada, comparable frustrations regarding the limits of civilian oversight boards–such as Ontario's Special Investigations Unit or British Columbia's Office of the Police Complaint Commissioner–underscore that civilian bodies often remain reactive. They frequently become involved only after serious incidents occur, rather than preventing smaller misconduct issues from escalating. Hence, the concept of reforming IADs (or internal "Professional Standards" units, in the Canadian context) toward a proactive structure resonates on both sides of the border. See *supra* notes 190, 200; see also Special Investigations Unit, *Special Investigations Unit Annual Report 2013–2014*, <https://www.siu.on.ca/pdfs/siu_ar_2013_14_english_ltr_final_v2.pdf> [perma.cc/2A22-5CKT].

As noted, IAD officers will only begin an investigation once either a formal complaint is lodged, or circumstances arise under department policy that requires an investigation into an officer's actions.[214] While a proactive model would not, nor should not, entirely eliminate these triggers–as they are still essential–such a model would allow IADs to curb problematic behavior earlier on by engaging more with pattern analysis. Two approaches would be integrity tests and Early Intervention Systems.

i. Spotting the Red Flags: Integrity Tests in Action

The first approach, integrity tests, is not new. Its usage can be traced back to the early 1970s when it was employed with the aim of reducing corruption within the New York Police Department (NYPD), and has since been adopted as an anti-corruption tool in various sectors in many other countries including Australia, Hungary, Romania, Kenya, and Moldova.[215] Yet, the procedure has remained more or less the same: the integrity test serves as an operational police method of covert collection of information, conducted for the purpose of preventing and detecting corruption in the police force.[216] In implementation, it is relatively straightforward, and over the decades, has broken off into two forms: random and targeted.

The first form, random integrity tests, are designed to observe and evaluate an officer's conduct in situations in which a specific set of circumstances has been created that requires police intervention.[217] The goal of such investigations is to deter future corrupt behavior, and as such, revolve around officers who are not under suspicion of corruption or misconduct, and so, can be applied broadly throughout a police

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214 See Bernstein, *supra* note 189, at 854-56.

215 See generally W. Knapp et al., *Report on Police Corruption* (1972) <https://iwpchi.wordpress.com/wp-content/uploads/2019/12/knapp-commission-report-part-1.pdf> [perma.cc/N53Y-Z657]; see also DCAF Geneva Centre for Security Sector Governance, *Police Integrity Testing: A Tool to Enhance Police Accountability* (2021) <https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Brief_Police_Integrity_Testing_Jan2021_final_ENG_0.pdf> [perma.cc/EZ5X-AHLX] [DCAF].

216 Tim Prenzler & Carol Ronken, "Police Integrity Testing in Australia" (2001) 1 CRIMINOLOGY & CRIM JUST 319, at 321.

217 *Ibid.*; see also DCAF, *supra* note 215; Steve Rothlein, "Conducting Integrity Tests on Law Enforcement Officers" (2010) Legal & Liability Risk Management Institute [Rothlein].

organization or unit.[218] However, the efficacy of such tests is often brought up as many organizations not only find these tests to be costly, but they also have a high likelihood of just being a waste of resources as random tests might not be deployed in areas where misconduct is more likely to occur–thus missing more significant issues within the force–or said tests would take officers from attending to their "real" duties.[219] In addition, this adversarial approach of targeting officers who have no history of misconduct would likely have a negative impact on morale.[220]

As a result, the modern trend has been toward utilizing the second form, targeted integrity tests. Unlike random tests, targeted tests are usually conducted within the context of an investigation into the alleged misconduct of a specific officer, based on previously collected and analyzed intelligence.[221] Hence, these tests are both reactive and proactive, as for a targeted test to occur, there needs to be a trigger, such as an allegation or complaint. However, this tends to improve the success rate of these tests as they are more tailored to the underlying allegations, meaning that the officer, if actually corrupt, is more likely to repeat the misconduct during the test.[222] Also, unlike in random test wherein the scenarios are less complex, this tailoring allows for the test to be more sophisticated, which makes it more likely a suspect officer would not realize they are being targeted.[223] For example, such a test could involve an officer in a vice squad who is suspected of taking bribes to ignore illegal gambling activities. After multiple complaints, internal affairs sets up a sting where an undercover agent offers the officer a bribe, which the officer accepts, leading to their arrest.

Targeted tests could also be used in conjunction with peer officer performance reviews. Even though many complaints against officers are not

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218 See DCAF, *supra* note 215; see also Commonwealth of Australia, *Inquiry into Integrity Testing* (Canberra: Australian Commission for Law Enforcement Integrity, 2011) [perma.cc/M6D3-DG5N].

219 *Ibid.*

220 *Ibid.*

221 Louise Porter & Tim Prenzler, *Corruption Prevention and Complaint Management*, in *Policing and Security in Practice: Challenges and Achievements* 130, 130–48 (Basingstoke & NY: Palgrave Macmillan, 2012).

222 *Ibid.*; see also DCAF, *supra* note 215.

223 *Ibid.*

sustained due to a lack of corroborating evidence, these unsustained complaints are still valuable.[224] Proactive IDAs can utilize them to reveal patterns of alleged misconduct. To illustrate, in brief, Baltimore Police Department (BPD) Detective Wayne Jenkins, who was part of the Gun Trace Task Force, led a group of officers who engaged in widespread corruption, including robbing citizens, planting evidence, and selling drugs.[225] Fellow officers sometimes reported suspicious behavior to supervisors or made informal comments about Jenkins' aggressive tactics and questionable activities, but these concerns were not formally documented in disciplinary records.[226] The internal culture of the department, combined with a lack of formal oversight, allowed Jenkins and his team to continue their criminal activities unchecked for years.[227] Although, admittedly, a complex case, nonetheless, a more proactive IAD could have employed a targeted integrity test based on the informal reports and suspicions raised by his peers. Additionally, peer performance reviews could have formally documented these concerns from fellow officers, creating a record of the task force's aggressive tactics. This combined approach could have triggered earlier investigations, preventing the unchecked corruption that later unfolded.

Similar conversations around targeted integrity tests have taken place in Canada, but their implementation must carefully balance policing objectives with constitutional safeguards. Under the Canadian Charter of Rights and Freedoms, individuals are protected from unreasonable search

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224 See State Attorney's Office, *Investigating and Prosecuting Police Misconduct: Reform Proposals*; see also Samuel E. Walker & Carol A. Archbold, *The New World of Police Accountability*, 153 (3d ed. 2020).

225 See generally Michale R. Bromvich et al, *Anatomy of the Gun Trace Task Force Scandal: Its Origins, Causes, and Consequences*, Steptoe (Jan. 2022) <https://www.steptoe.com/a/web/219380/GTTF-Report.pdf> [perma.cc/F2QD-6B8P]; see also Justin Fenton, *Ignoring warning signs of misconduct, Baltimore Police praised – and promoted – Gun Trace Task Force leader*, Baltimore Sun (June 19, 2019) <https://news.baltimoresun.com/cops-and-robbers/part-one/> [perma.cc/86XS-TR9Z] ; German Lopez, *8 cops allegedly used an elite Baltimore police team to plunder the city and its residents*, Vox (Feb. 13, 2018) <https://www.vox.com/policy-and-politics/2018/2/2/16961146/baltimore-gun-trace-task-force-trial> [perma.cc/CBA7-KT3K].

226 *Ibid.*

227 *Ibid.*

and seizure, as well as from being unduly provoked or entrapped by law enforcement.[228] As a protection meant for all of Canada's citizens, said protection extend to officers as well. Canadian courts, notably in the landmark case *R. v. Mack*, have emphasized that entrapment can arise when law enforcement provides a person with an "opportunity" to commit an offense without having reasonable suspicion that the individual is already engaged in criminal activity.[229] As such, any integrity testing operation–particularly those that are targeted at suspected wrongdoing–must be grounded in credible intelligence and must not cross the line into coercing officers into illegal acts they would not otherwise commit.[230]

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228 *Charter,* supra note 176, s 8. Additionally, targeted integrity tests in Canada must comply with provincial and federal privacy statutes, including the various provincial privacy acts and federal regulations such as the Personal Information Protection and Electronic Documents Act (PIPEDA), depending on the information gathered during the operation. See *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. Police oversight bodies, such as the Office of the Independent Police Review Director (OIPRD) in Ontario and similar agencies in other provinces, also play a role in ensuring that covert operations respect due process and protect individual rights. See also Office of the Privacy Commissioner of Canada, *PIPEDA Compliance Help*, <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information->protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/> [perma.cc/G8ZH-SD5A]; Office of the Independent Police Review Director, *About Us*, <https://www.oiprd.on.ca/about-us/> [perma.cc/2GE7-ATXR]; Office of the Privacy Commissioner of Canada, *PIPEDA Interpretation Bulletins*, <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/> [perma.cc/LPQ8-LH2T].

229 [1988] 2 S.C.R. 903, 916. In this case, the Supreme Court of Canada established that entrapment occurs when law enforcement induces an individual to commit an offense without reasonable suspicion of their involvement in criminal activity. The Court emphasized that providing an opportunity to commit a crime without such suspicion constitutes entrapment, thereby violating principles of justice.)

230 Please note that there are considerable differences between entrapment in the United States and entrapment in Canada. For instance, in the United States that entrapment "is an affirmative defense on which the government bears the burden of proof beyond a reasonable doubt," whereas, in Canada, it has been indicated that "[e]ntrapment is a unique area of the criminal law," and is ". . . in reality a motion for a stay of proceedings based on the accused's allegation of an abuse of process. It does not rely on the underlying charge and does not affect the admissibility of any evidence which might influence the jury on the merits." See *United States v Berrios*, No. 21-CR-123, 2022 WL

A recent example showing the careful balance required in implementing integrity testing in Canada is *Ahlstrom v Edmonton (Police Service)*. This case involved Constable David Ahlstrom of the Edmonton Police Service, who was subjected to targeted integrity tests following allegations of corruption-related misconduct.[231] The tests were designed to evaluate Ahlstrom's ethical conduct after credible evidence emerged suggesting prior wrongdoing.[232] The first test occurred in May 2017 when an undercover officer provided Ahlstrom with a duffel bag containing $25 in cash and $50 in two prepaid Visa cards under the guise of them being found.[233] Ahlstrom failed to log or report the items and instead retained them for personal use.[234] A second test followed in August 2017 during a staged vehicle search, where Ahlstrom removed $88 in cash and cigarettes, later found in his possession.[235] These tests confirmed suspicions of misconduct and were used as evidence in subsequent disciplinary proceedings.[236] Ahlstrom ultimately pled guilty to multiple counts of misconduct, including neglect of duty and corrupt practices.[237]

This case exemplifies the use of integrity testing as a tool for identifying and addressing corruption within law enforcement. Although it can be argued the use of "integrity testing" or undercover investigators by regulators may be seen as entrapment, the law is clear that this is a legitimate investigative technique where it is part of a bona fide investigation.[238] In

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17075289, at 8 (E.D.N.Y. Nov. 18, 2022); see also *R v Pearson*, [1998] 3 SCR 620, at paras 6–7.

231 2023 ABLERB 06 [*Ahlstrom*].

232 *Ibid* at paras 3-4.

233 *Ibid* at para 5.

234 *Ibid.*

235 *Ibid* at para 6.

236 *Ibid* at para 9.

237 *Ibid.*

238 *R v Ramelson*, 2022 SCC 44, at paras 35, 53. Here, the Supreme Court of Canada articulated the criteria for a bona fide inquiry: police must have (1) reasonable suspicion over a sufficiently precise space and (2) a genuine purpose of investigating and repressing crime. Satisfying these criteria permits the police to present an opportunity to commit an offense to any person associated with the space, even without individualized suspicion. The Court emphasized that reasonable suspicion, while not

Ahlstrom, the integrity tests were triggered by credible evidence of prior misconduct, aligning with principles that such tests must not provoke officers into actions they would not otherwise commit.[239] The constable's actions during the staged scenarios demonstrated pre-existing unethical behavior rather than conduct induced by the tests, supporting the appropriateness of targeted integrity testing when backed by sufficient intelligence.[240] And despite the strict legal and regulatory frameworks, the concept of targeted integrity testing remains an attractive tool for rooting out corruption within Canadian law enforcement, particularly in large municipal forces and the RCMP.[241] As in the United States and other jurisdictions, the appeal lies in the test's precision: by zeroing in on officers already suspected of unethical behavior, the operation can produce strong evidence for disciplinary proceedings or criminal prosecution. When properly implemented, these tests can serve as a powerful deterrent to misconduct, reinforcing a culture of accountability and transparency in policing.

While these tests can prove successful in leading to the arrest and prosecution of corrupt officers, and are generally less cost prohibitive, they also pose significant risks. As noted earlier, integrity testing raise serious concerns around privacy, deception, entrapment, provocation, and the legal rights of individual police officers.[242] Because of these surrounding issues, it is likely that there would need to be existing legislation directly applying to integrity testing; legislation which would prevent abuses or unjustified infringements on privacy, or inducements of officers into committing crimes they would not otherwise commit. However, given the proven effectiveness of integrity testing programs globally, uncovering misconduct

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onerous, requires objective evidence to avoid improper practices such as profiling or stereotyping, ensuring that police actions are subject to "exacting curial scrutiny."

239 See *Ahlstrom*, *supra* note 231.

240 *Ibid.*

241 See generally Transparency International, *The Efficacy of Undercover Integrity Testing in Preventing Corruption*, <https://knowledgehub.transparency.org/helpdesk/the-efficacy-of-undercover-integrity-testing-in-preventing-corruption> [perma.cc/EZH5-6RJJ] (discusses the efficacy of undercover integrity testing as an anti-corruption measure, noting that such tests can detect and deter corrupt behavior, encourage officials to report bribery, and identify training needs.)

242 See Rothlein, *supra* note 217; see generally DCAF, *supra* note 215.

highlights their significant value, and should be seen by IADs, and reform advocates, as effective oversight measures.[243]

ii. Early Intervention Systems: Catching Problems Before They Grow

Early Intervention Systems ("EIS") are another proactive measure used by law enforcement, and despite having been around for over two decades, are largely still in their infancy with regard to their potential.[244] These systems are meant to identify officers at risk of misconduct, and to implement targeted interventions that support them and prevent future issues based around a series of pre-determined "red flags" that represent threshold levels of risky outcomes.[245] One thing of note is that EISs are meant to implement non-punitive measures.[246] Once an officer is flagged by the EIS based on data that predicts potential future risks, a supervisor will deliver or assign a non-punitive intervention to address the behavior, such as training, or peer mentoring.[247] Continued monitoring by the supervisor ensures that the problematic behavior has stopped.

While an EIS aims to reduce negative incidents and improve officer performance, its effectiveness can be undermined by poor design or implementation. For instance, an EIS might identify high-risk officers but fail to provide effective support, leading to no improvement.[248] There's also the risk that interventions could be ineffective or even harmful, in addition

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243 See generally DCAF, *supra* note 215; see also Michael Johnston, "It Takes a Whole Society: Why Hong Kong's ICAC Cannot Succeed Alone" (2022) 25 Pub Admin & Pol'y: An Asia-Pac J 109, 109-23.Highlighting how the Independent Commission Against Corruption in Hong Kong has employed integrity testing as a key tool to combat deep-rooted corruption within the police force, which have led to the prosecution of numerous officers).

244 Christopher J. Harris, *Early Intervention Systems and the Prevention of Police Misconduct*, in Stress in Policing: Sources, Consequences and Interventions 207, 209 (Ronald J. Burke ed. 2017) [Harris].

245 See John A. Shjarback, *Early Intervention Systems*, in *Critical Issues in Policing: Contemporary Readings*, 655 (Roger G. Dunham et al. eds., 8th ed. 2021) (discussing examples of different "red flags" in police departments) [Shjarback].

246 *Ibid.*

247 Geoffrey P. Alpert & Samuel Walker, "Police Accountability and Early Warning Systems: Developing Policies and Programs" (2000) 29 Just. Res. & Pol'y 59, 60 ; see also Zoe Russek & Dylan Fitzpatrick, *Early Intervention Systems*, (Chicago: University of Chicago Crime Lab, 19 Jan 2021).

248 See Shjarback, *supra* note 245.

to the fear that being flagged might cause officers to disengage from their duties, and those flagged might feel targeted, increasing stress and the likelihood of adverse events.[249] This was a key reason the Chicago Police Department discontinued an early EIS tool, as it led to perceptions of unfair targeting and adversarial questioning.[250]

Furthermore, like many of the abovementioned reforms, EISs lack uniformity. EISs vary significantly in their design,[251] with most using a rule-based thresholding approach to flag officers who may need intervention.[252] Departments select specific performance indicators, such as use of force or citizen complaints, and compare an officer's incidents against department averages.[253] When an officer's actions exceed set thresholds, the system triggers an alert for potential intervention.[254] Additionally, in building on peer performance reviews, many systems also include peer comparisons, where officers are evaluated against the average performance within their peer group.[255] This approach, pioneered in Pittsburgh and adopted by major departments like the LAPD, helps ensure that interventions are targeted and effective.[256] Yet, to note, these triggers are still largely left to the intuition and professional judgment of police professionals.[257]

In Canada, similarly, some larger municipal forces have begun exploring or implementing EIS frameworks to detect patterns of problematic behavior among officers. For example, the Toronto Police Service has used data-driven performance management initiatives that serve a comparable function, flagging officers based on various indicators (e.g., complaint frequency, use of force reports) so that supervisory staff can

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249 See Russek & Fitzpatrick, *supra* note 247.

250 See generally U.S. Dep't of Justice Civil Rights Div. & U.S. Attorney's Office N. Dist. of Ill., Investigation of the Chicago Police Department 1 (2017).

251 By "design," I am referring to what triggers the flagging of officers, units, or practices for intervention.

252 Russek & Fitzpatrick, *supra* note 247.

253 *Ibid.*

254 *Ibid.*

255 *Ibid.*

256 *Ibid.*

257 See Harris, *supra* note 244, at 208.

intervene.[258] These efforts, while less standardized across provinces, reflect the broader North American trend of using data to identify potential misconduct before it escalates. In addition, oversight and privacy regulations differ among provinces, meaning Canadian police agencies must navigate both local and federal guidelines–such as the respective provincial police acts and the federal Privacy Act–when building out their EIS.[259]

Still, for their weaknesses, EISs should be held as best practice for police accountability. As stated by the Commission on Accreditation for Law Enforcement Agencies:

> A comprehensive Personnel Early [Intervention] System is an essential component of good discipline in a well-managed law enforcement agency. The early identification of potential problem employees and a menu of remedial actions can increase agency accountability and offer employees a better opportunity to meet the agency's values and mission statement.[260]

Hence, EISs use by IDAs should be paramount. As discussed, IDAs serve an essential role–sometimes the only role–in overseeing issues of police misconduct. To elaborate; as society as a whole has only become all too

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258 See generally, Toronto Police, *supra* note 200 (showcases how the TPS has implemented an Early Intervention program within its Professional Standards Information System (PSIS). This program analyzes data, including use of force reports, to identify performance patterns that may require intervention before escalating into misconduct or adversely affecting an officer's health and wellness. The Incident Review Committee reviews aggregate trends from use of force reporting, and individual reports are entered into the PSIS for monitoring.)

However, as always, such systems are not perfect. The Ontario Human Rights Commission's (OHRC) inquiry into anti-black racism within the TPS highlighted significant gaps in the Service's accountability mechanisms. The OHRC recommended that the TPS's Early Intervention System include indicators of racial discrimination or profiling by individual officers, units, and divisions to enhance monitoring and accountability. See also Ontario Human Rights Commission, *From Impact to Action: Final Report on Anti-Black Racism by the Toronto Police Service*, (Toronto: Ontario Human Rights Commission, Mar. 18, 2024) <https://www3.ohrc.on.ca/en/impact-action-final-report-anti-black-racism-toronto-police-service> [perma.cc/8Z4A-ZFEB].

259 See generally Office of the Privacy Commissioner of Canada, *Privacy Laws in Canada*, <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/> [perma.cc/DUZ9-U4JF]; see also *supra* note 228.

260 *CALEA Law Enforcement Agency Standards* § 35.1.9 cmt. (Comm'n on Law Enf't Agencies 2006).

aware of the consequences when law enforcement faces a legitimacy crisis, then another tool in society's collective toolbelt–aimed at more data-driven and effectively managed police personnel–should be viewed as a boon.

Further, EISs will only make technological gains.[261] While the development of EISs was largely focused on individual officers, the potentiality of going further by adapting it to both frontline supervision and organizational decision-making is a reachable goal.[262] ESIs would then be able to provide supervisors with better tools to monitor and manage officers, thus holding them more accountable for their team's behavior.[263] Additionally, the data from ESI systems would help police higher-ups make informed decisions, identifying areas of substandard performance and enabling policy, procedure, or training changes.[264] This not only improves individual officer performance but also addresses broader issues like citizen complaints or use-of-force incidents, ultimately supporting the public's overall goals of accountability.[265]

While the whistleblower protections discussed in Part II.B(1)(a) may prove better in weakening the code of silence's pervasive influence, the enactment of stronger, proactive internal mechanisms would enable IADs to circumvent what could amount to departmental catastrophes; of course, provided said policies and procedures are consistently applied. Concerns with individual officers aside, the supervisors in these IAD roles are fundamental in mitigating risks for other, typically front-line, officers, alongside the department's interests. Integrity tests, although resource-intensive and carry with them potential risks, offer IADs a direct and effective means of identifying and addressing misconduct, thereby enabling decisive action. EISs, on the other hand, take a broader and more preventive approach. Though inconsistent, by continuously monitoring officer behavior and analyzing data for early warning signs, EISs show incredible,

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261 See Mary D. Fan, "Smarter Early Intervention Systems for Police in an Era of Pervasive Recording" (2018) U Ill L Rev, 1706.Detailing efforts to adapt ESIs through the use of machine learning to better predict and identify which officers are at greater risk while minimizing false positives, and discusses incorporating audiovisual big data, like that from body-worn cameras.

262 See Shjarback, *supra* note 245.

263 *Ibid.*

264 *Ibid.*

265 *Ibid.*

and viable, promise in enabling IADs to intervene before minor issues escalate into major incidents. Each, in their own way, would transform IADs from reactive bodies into proactive enforcers of accountability within police departments.

Therefore, in examining the roles of both whistleblower protections, and integrity tests and EISs, it becomes evident that each are necessary to achieve real reform. There needs to be working methods for addressing acute cases of misconduct, while there also needs to be strong anti-retaliation measures and Constitutional protections for those officers who come forward when those internal mechanisms fail. Despite their drawbacks, the strengths of both far outweigh their limitations when used in tandem, and by integrating them, they can ultimately contribute to the broader goal of effective and trustworthy law enforcement that the public can rely on. Yet, each of these would need to operate within a judicial context that significantly influences their effectiveness.

As discussed, transparency and accountability are pillars of ethical governance, not only in the United States but in Canada as well. However, when these mechanisms are inconsistently applied, weakened, or simply nonexistent, then these pillars crack, placing the integrity of our democratic systems at risk. When citizen rights are trampled upon by those of us in society who have taken the oath to uphold the law, reform advocates and the public at large justly cry out. Yet, many of these very people are less inclined to lend their voices when members of law enforcement speak out against their fellows.

In the end, the enduring issue of police misconduct is a complex and multifaceted problem that requires more than just surface-level solutions. As these sections have demonstrated, addressing the deeply entrenched culture of silence within law enforcement is imperative to achieving meaningful reform. The reluctance of officers to report misconduct, reinforced by fear of retaliation and a lack of strong protections, is not simply an individual failing but a systemic issue that has been perpetuated by institutional inertia and insufficient oversight mechanisms.

Whistleblower protections are a critical starting point in this reform process. Officers who witness misconduct are often the best positioned to expose it, yet they are also the most vulnerable to retaliation. As illustrated, numerous cases have shown that the consequences for those who dare to speak out can be severe, ranging from career-ending retaliation to personal threats and social ostracism. Strengthening legal protections for these

individuals is essential not only to encourage reporting but also to begin dismantling the toxic code of silence that shields misconduct from public view.

However, these protections must be complemented by effective internal oversight. IADs, as they currently stand, are often reactive and suffer from inherent biases, being staffed by officers from the same departments they are tasked with investigating–whether in a major metropolitan U.S. police department or a Canadian municipal force governed by the Charter–wherein the loyalty to colleagues can outweigh the commitment to justice. For IADs to fulfill their intended role as guardians of integrity within police departments, it is suggested they adopt a more proactive stance. This can be achieved through the implementation of integrity tests and EISs, which would allow these divisions to identify patterns of misconduct early and address them before they escalate into systemic issues. Such tools not only help in detecting wrongdoing but also serve as deterrents, signaling to officers–and to the public–that misconduct will be identified and addressed.

The interplay between these various elements–whistleblower protections and internal oversight–illustrates that no single reform can suffice in isolation. Each component addresses a different aspect of the problem, and together they form a comprehensive strategy that can significantly reduce police misconduct. Whistleblower protections ensure that those who witness wrongdoing have the support and security needed to report it. Proactive internal mechanisms like integrity tests and EIS transform IADs into effective watchdogs capable of preventing misconduct before it becomes endemic. When the public perceives that law enforcement officers are above the law, it fosters a climate of cynicism and distrust that can have destabilizing effects on society as a whole. If the goal is to create a law enforcement system that the public can trust, then there must be an integration of reforms that serve officers, for such reforms would also serve the greater public; be it in the United States, Canada, or elsewhere.

III. CONCLUSION

Misconduct and corruption in law enforcement are not accidental phenomena that can be easily combated through temporary, repressive measures. As explored in this Comment, each initiative–ranging from

strengthening whistleblower protections to reimagining the role of Internal Affairs Divisions–serves as a crucial element in a larger framework aimed at mitigating misconduct and increasing accountability within police departments. Moreover, these challenges and solutions are not confined to the United States: Canadian law enforcement bodies, too, grapple with balancing robust investigative tactics like integrity tests against constitutional safeguards under the Charter of Rights and Freedoms, underscoring the universal complexity of implementing real reform.

Part II's examination of internal reforms highlights the necessity of penetrating the institutional barriers that perpetuate the code of silence. These internal mechanisms are not merely adjuncts to broader reforms; they are foundational to dismantling the insular cultures that allow misconduct to thrive. By focusing on internal accountability through proactive oversight and robust whistleblower protections, in both the U.S. and Canada, we can create a more resilient system that prevents misconduct from becoming entrenched within police departments.

Ultimately, achieving a more just and accountable law enforcement system is not a linear process; it requires persistent engagement and a willingness to confront deeply ingrained cultural and institutional barriers at all levels of government and society. Although legislative and constitutional frameworks vary on both sides of the border, the fundamental goals–protecting officers who expose wrongdoing, ensuring due process, and upholding public trust–remain the same. The reforms discussed in this Comment offer a blueprint for such a transformation, but their success hinges on our collective commitment to integrating these efforts into a comprehensive strategy. Only by addressing these broader issues can we hope to create a law enforcement culture that truly serves and protects all members of society, ensuring that the code of silence–whether in American or Canadian policing–becomes a relic of the past.