

Breaking The Blue Wall of Silence

The Vital Role of Whistleblower Protections for Law Enforcement Officers

Government Accountability Project
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“On my honor, I will never betray my badge, my integrity, my character, or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the constitution, my community, and the agency I serve.”

Law Enforcement Oath of Honor, International Association of Chiefs of Police

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Acknowledgements

The countless acts of violence against Black Americans at the hands of police officers have laid bare the injustice furthered by systemic racism in law enforcement. Government Accountability Project stands with all those demanding accountability and institutional change to prevent continuing abuse and injustice against Black, Indigenous, and People of Color (BIPOC).

Government Accountability Project is grateful to the dozens of law enforcement officers who have blown the whistle on misconduct and abuses of public trust, too often fueled by systemic racism, and shared with us their stories of truth-telling and the retaliation they faced for exercising professional integrity.

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Forward by Frank Serpico

After millions of people around the world watched in horror as George Floyd was murdered during an arrest by Minneapolis police officers, millions of Americans were frustrated when Congress failed to pass new controls on police abuses of power. A political stalemate on new controls, however, does not mean we have run out of options to prevent these outrages. We can make a real difference with laws to crack what is widely known as “the blue wall of silence.” This is the unwritten code that values protection of fellow officers, sometimes even over protection of the public. This code means that law enforcement whistleblowers risk not only their careers when they come forward, they also risk their lives.

I know this from experience: In the late 1960s and '70s, I blew the whistle on police corruption. My disclosures prompted the Knapp Commission, an investigation that uncovered and helped combat systematic corruption. But my colleagues did not view my whistleblowing as a noble, important act. During a “drug buy and bust,” I was shot in the face. My back-up failed to call in “officer down” and left me to bleed to death. I would have died but for an elderly Hispanic neighbor who called for help.

I was tormented by the police during my entire recovery. The late New York City Police Commissioner Patrick V. Murphy was aware of my revelations and the resulting danger I faced. He could have protected me. Instead, he assigned me to the most dangerous position in narcotics. In his book, “Commissioner: A View from the Top of American Law Enforcement,” he was apologetic to his cronies, stating that he regretted my promotion. Instead of commending me for exposing corruption, he sent a clear, chilling message to any would-be whistleblower.

My experience was no aberration. For example, former U.S. Marshal Matthew Fogg also was abandoned and nearly lost his life during a stakeout after he challenged racial bigotry within the U.S. Marshals Service. Yet another former police officer, Cariol Horne, knows the risks of whistleblowing from experience. In 2006, Horne prevented a fellow Buffalo police officer from choking a black detainee. However, when she testified against her colleague in court, she was accused of interfering with the arrest and endangering the other officer. These accusations led to her dismissal and subsequent loss of pension.

Even if chokeholds were outlawed in all contexts, the deep-seated culture of peer pressure degenerates into personal harassment if an officer exposes anything that threatens a peer. When California police officer Jed Arno Blair exposed two other officers for theft and planting drugs on suspects, his colleagues rewarded him with scorn, harassment, and exclusion. Blair said colleagues threatened his family, spit in his locker, and threw his clothes in a urinal, and that leadership ignored his complaints.

Citizens’ outcries and video footage of police brutality have finally sparked a long-overdue national reckoning but are not sufficient alone. Exposing and reforming police misconduct requires more than capturing what happens on a smartphone. Often the only witness to these types of misconduct may be a fellow officer whose testimony against a colleague is the only chance for justice. The rule of law relies on their protection. Testimony from honest police officers can be the most effective path to justice.

Whistleblower protection will make a difference so that the laws already on the books get enforced as the rule, instead of the exception. After all, murder always has been illegal. Nor should whistleblower protection be limited to shielding law enforcement officers from getting fired. It must extend to all who bear witness, whether police officer, citizen witness, victims or NGO, against all forms of retaliation used to hide abuses of power. We need to protect all who bear witness, because it is irrelevant who blows the whistle to expose the indefensible. There can be no justice without the truth.

Introduction

These past two years, we have seen truth change the course of history. The murder of George Floyd in 2020 sparked a long-overdue national reckoning for greater police accountability and oversight. But citizens should not have to rely on smartphones alone to defend justice successfully. Now more than ever, we are witnessing powerful movements to address a vacuum of meaningful accountability in law enforcement.

Law enforcement whistleblowers are one of the most important vehicles for police accountability and reform. This is, in part, because they are often the only witnesses to corruption, waste, fraud, and abuse in their own departments. Unfortunately, police whistleblowers are rare. In fact, it is so uncommon for police officers to blow the whistle on their colleagues or testify against them that the phenomenon has a name—the “Blue Wall of Silence.” The “Blue Wall of Silence” – compounded by a lack of credible anti-retaliation protections – forces law enforcement officers to risk their careers, safety, and even their lives when they choose to blow the whistle on abuses of power in their ranks.

This culture of silence, ingrained in the nearly 18,000 police departments across the United States, makes whistleblowing in law enforcement extremely unlikely, and thus all the more necessary. To restore public trust in law enforcement institutions, a rigorous pursuit of police integrity must provide safe channels for reporting the truth if justice and accountability are going to prevail. Strong legislation that protects the indispensable role of police whistleblowers is an essential component of reform efforts to prevent and address police misconduct. Without meaningful legal protections, those officers who dare to disclose law enforcement corruption and abuse will continue to be left wrongfully exposed to ostracism, hostility, and retaliation, chilling others who might consider breaking the blue wall of silence and leaving the public at risk of harm.

This report provides a comprehensive overview of whistleblowing in the law enforcement community and seeks to begin a productive dialogue around this crucial, though often overlooked, aspect of police reform.

Section I, “Whistleblowing in Law Enforcement”, discusses the vital role whistleblowers play in enhancing policy integrity and community trust. Section II, “The Blue Wall of Silence,” and Section III, “Retaliation and the Law Enforcement Whistleblower Paradox” examine organizational disincentives to blowing the whistle on police misconduct. Section IV, “The Experiences of Nine Law Enforcement Officers,” details the accounts of Frank Serpico, Cariol Horne, Matthew Fogg, Javier Esqueda, Austin Handle, Brittany Iriart, Norman A. Carter, Jr., Shannon Spalding, and Lt. Kamil Warraich, presenting an overview of the type of retaliation law enforcement whistleblowers suffer. Section V, “Whistleblower Protection Laws” outlines the protections currently available to law enforcement whistleblowers and is followed by Section VI, “Recommendations for Reform,” which offers best-practice policy recommendations to dismantle the Blue Wall of Silence and empower law enforcement whistleblower essential to exposing and addressing police abuses. Section VII, “Conclusion,” offers brief concluding remarks.

Whistleblowing in Law Enforcement

Minneapolis Police Chief Medaria Arradondo's testimony condemning Derek Chauvin's actions was a welcome break from the "Blue Wall of Silence," which has long enabled and shielded police misconduct across the country. The number of his fellow officers and supervisors, including Lieutenant Richard Zimmerman, willing to publicly criticize Chauvin's actions served as a critical turning point in police reform. It was, however, still a far cry from breaking the "Blue Wall of Silence." The fight for accountable policing is far from over. Massive protests – from the local to the global level – reflect a deep lack of trust in police officers, not only among communities of color, but also nationwide. Almost 1,000 fatal shootings by on-duty police officers are reported in the United States each year, and yet the conviction rate for officers is just around 1 percent—less than nine prosecutions per year.¹ Chauvin's trial only underscored the extent to which structural inequities and institutional racism pervade law enforcement agencies. His case is a "major outlier in a system that very rarely imposes serious criminal charges against cops."²

The global landscape is undoubtedly shifting, and this demand for reform is not only coming from the public. Law enforcement leaders and officers alike want to restore trust and honor in policing. What is often overlooked in reform initiatives, however, is the power of whistleblowers to facilitate law enforcement that operates within the law.

In 1893, the International Association of Chiefs of Police devised "The Law Enforcement Code of Ethics"—principles accepted by police organizations nationwide.³ The Code of Ethics establishes the following benchmarks for officers:

"[T]o serve the community; to protect lives; to save the weak from those who would use intimidation; to obey the constitutional guarantees afforded to every citizen; to keep an officer's private life separate from his official duty (such as personal or political beliefs, prejudices, aspirations, animosities or friendships); to be courageous and show resolve when faced with the possibility of death; to uphold the principle that the badge symbolizes not only authority, but also acts as an image of public faith; maintain confidentiality; and always be ethical and consistent with department regulations and the law."⁴

Notably, whistleblowing, or even a responsibility to report peer misconduct, is not included.

Past and present investigations of police misconduct, such as the Ferguson Report,⁵ largely fail to mention the role of police whistleblowers. The term "whistleblower" does not appear once in the Interim Report of the President's Task Force on 21st Century Policing.⁶ Some advocacy organizations initially overlooked the importance of whistleblower rights and protections for police officers as a key component of meaningful reform.

This oversight is changing dramatically. In July 2021, 175 civil rights and good government organizations called for Congress to protect police whistleblowers who challenge police abuses that violate laws already on the books. The absence of whistleblower rights is a significant factor to explain decades of frustration seeking real progress in accountability and transparency. The lesson learned is simple: there is often no substitute for whistleblowers who disclose the necessary evidence to promote accountability and justice in the face of lawless law enforcement officers.

While the term itself lacks a uniformly accepted definition, "whistleblowers" are citizens who use free speech rights to challenge abuses of power that betray the public trust. In the context of law enforcement, whistleblowers are those officers who disclose illegal activity, abuses of authority, gross mismanagement, gross waste of funds, and substantial and specific dangers to public health or safety.⁷

Traditionally, there have been three main types of misconduct reported by police whistleblowers: (1) corruption or the use of public office for private gain; (2) excessive force; and (3) unequal treatment, such as discrimination.⁸ This is a longstanding global phenomenon, illustrated by 2003 research into Australian police practices.⁹ Specific types of abuse include improper questioning and interrogation practices, improper searches and seizures, racial profiling, accepting bribes, ignoring criminal behavior, exposure to provocation and temptations, and opportunities to obtain retribution or compliance through verbal or physical abuse.¹⁰ According to one global survey of police integrity, “illegitimate use of deadly force” was consistently identified by police officers as the most egregious form of misconduct.¹¹

Currently the whistleblowing process itself occurs in four stages.¹² First, a law enforcement employee observes or discovers unethical behavior or illegal activity. This triggers the witness officer to consider disclosing the misconduct. Second, the law enforcement employee weighs the pros and cons of blowing the whistle. That is, the potential whistleblower assesses the severity of the misconduct and potential repercussions of reporting, and in some cases, the whistleblower gathers more information or evidence for a responsible, informed choice. Third, the employee decides whether to blow the whistle or remain a silent observer. Fourth, assuming the employee decides to blow the whistle, the law enforcement organization reacts and either investigates the misconduct or retaliates against the whistleblower. Missing from this system are independent review of the misconduct and protection from retaliation for providing associated evidence.

On balance, the power of testimony from honest police officers remains a dormant factor in ending abuses of power by law enforcement officers. Neither the irony nor the consequences could be greater. As a rule, it is impossible to prosecute crimes without testimony. But until credible channels exist for police officers to testify safely against police illegality, successful prosecutions of abuses will be the exception.

The Power of Whistleblowing

Law enforcement whistleblowers are important because the risks they take in reporting misconduct help to restore integrity to policing and the justice system. They are uniquely positioned to detect and expose abuses of power in their departments, as they are often the only individuals with access to inside knowledge of such misconduct. Without police whistleblowers as a vital source of information, we are primarily limited to video evidence collected by victims and witnesses who justifiably fear retribution. From cellphones to dashboard and body cameras, external video evidence has exposed the schism between ex post facto police reports of an incident and what really happened. But the question remains—quis custodiet ipsos custodes (who will guard the guards themselves) off the streets or behind department walls, where phones are not able to capture police abuses of power?

Bystander and bodycam footage from communities across the country have disabused the myth that American policing is plagued by just a few “bad apples.” There is a widespread, deeply ingrained culture that sustains abuses of power. To understand why, it is imperative to consider the plight of the “good apples” who risk their professional and sometimes personal lives to defend the rule of law.

First is their unique significance. In the struggle for accountability and transparency, police whistleblowers play a vital role, and their disclosures provide immeasurable public value. Front-line police officers who witness misconduct within their ranks are uniquely positioned to expose it. Law enforcement whistleblowers preserve our most important democratic values by disclosing instances of police misconduct, thereby improving public discourse on the progress of police reform in the process. At great professional and personal cost, they stand up against misconduct in their departments, selflessly representing public interest in the face of corruption.

Their disclosures fuel oversight, preserve the rule of law, and are a critical source of information about serious abuses of public trust. Whistleblowers in law enforcement, however, still face the “Blue Wall of Silence,” risking their careers and safety when they choose to expose instances of misconduct. For power to be held accountable, we need whistleblowers. The decision to blow the whistle is not easy, but when law enforcement officers choose to stay silent in the face of misconduct, it is police institutions, the justice system, and the public that suffer.

The Blue Wall of Silence

Police work is conducted in unpredictable – and often violent – conditions. Thus it is no surprise that internal solidarity and loyalty are encouraged. That is a natural characteristic of a job where life-threatening situations necessitate effective interdependence and mutual trust. Police officers have a significant amount of discretion in carrying out their duties, which limits capacity for immediate supervision, especially in high-risk and fast-paced environments. “Group dynamics are crucial: young officers relate primarily to small, cohesive units on joining and have to conform to informal norms to be accepted.”¹³ As a particularly insular group, police officers depend on tight-knit subcultures and peer group socialization to provide on-the-job training. Loyalty is a key feature of this internal culture. “Officers tend to respond to values communicated in daily action rather than from written policy. [They] bond ‘through the emotional glue of shared dangers’ and because their ‘universe so dramatically’ separates them from civilians.”¹⁴

Loyalty to one’s colleagues is an undeniably valuable characteristic. However, when officers are committing crimes rather than enforcing the law, the “Blue Wall of Silence” fosters abuse of power without accountability. This poses a systemic threat not only to public trust and safety, but also to the integrity of police organizations, and by implication, to the entire justice system which depends on the knowledge and expectation that those who enforce the rule of law are also subject to it.

The “Blue Wall of Silence” refers to a social control within police culture that deters reports of misconduct and enforces conformity through fear of retaliation. Often, loyalty to one’s peers supersedes both an officer’s dedication to public service and the rule of law itself. In other words, protection of fellow officers can often be valued over the protection of the public. Broad cultural norms of peer solidarity are continually promoted and sustained through a sense of obligation to comply with this unwritten code of honor.

This is a deeply rooted tradition. Corruption and misconduct are promoted and sustained by the culture and structure of police organizations themselves. As part of a national survey of 925 police officers in 121 precincts in 2000 conducted by the National Institute of Justice (NIJ), over half of the respondents reported that it is “not unusual for officers to turn a ‘blind eye’ to improper conduct.”¹⁵ Further, two-thirds of respondents agreed that “officers who report misconduct are likely to receive a ‘cold shoulder,’”¹⁶ and one-third believed that blowing the whistle was not worth it.¹⁷

There is tremendous pressure to protect fellow officers. “[Reporting] on other cops is, in some sense, a betrayal of that cultural imperative to support and protect each other,” notes Seth Stoughton, associate professor of law at the University of South Carolina School of Law, and a former Tallahassee, Florida police officer.¹⁸ This is not just the perception of critics. In 1992, New York City Mayor David Dinkins appointed retired Judge Milton Mollen to lead The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department. Officer Michael Dowd, a key police witness before the Commission, explained that violence against suspects and others was a “bonding ritual that strengthened loyalty and the code of silence” and that he “consciously initiated newcomers into an escalating scale of deviant activities.”¹⁹

When the only witnesses available are fellow officers holding the police accountable – criminally and professionally – it becomes uniquely difficult, even in cases involving blatant misconduct. The lack of whistleblowers in law enforcement underlines the strength of this culture of silence— one that protects bad officers and prevents good ones from speaking out. The “Blue Wall of Silence” punishes whistleblowers, stifles reform, and promotes impunity. More than just a select group of corrupt individuals or “bad apples,” it represents a form of established group behavior that is grounded in the culture and structure of police work and institutions themselves.

“This is social behavior, conducted in groups within organizations, that is powerful enough to override the officer’s oath of office, personal conscience, departmental regulations and criminal laws.”²⁰ This phenomenon of occupational norms that hinder the reporting of colleagues out of fear of retaliation needs to be vigorously addressed as part of the reform process. The current system protects bad cops more than the good ones who speak out against them.

Retaliation and the Law Enforcement Whistleblower Paradox

Most police departments have official policies that enable officers to report misconduct. Officers found guilty of misconduct face discipline and, in some cases, even prosecution. In practice, however, the formidable “Blue Wall of Silence” and a lack of credible anti-retaliation protections make whistleblowing in law enforcement particularly rare. When it comes to the identity of whistleblowing cops, however, the “Blue Wall of Silence” becomes strangely porous.

Police whistleblowers face various forms of retaliation common to those experienced by whistleblowers in other employment sectors, but also unique to law enforcement. Classic examples include actions such as: making the position part-time, changing the job title, reducing salary, and denying promotions or raises; inciting isolation or “mobbing” harassment by peers; attempting to terminate the employee; increasing or decreasing the employee's workload; abolishing the whistleblower's position; giving poor performance reviews; and/or accusing the whistleblower of the same misconduct he or she is disclosing.²¹ Retaliation unique to policing can include failing to provide back-up or abandoning the whistleblower who is under attack. It is not unheard of for such officers to be abandoned in shoot-outs or left to die, a consequence Frank Serpico and other law enforcement whistleblowers have faced.²²

Harassment usually begins with first-line supervisors who are in a position “to interpret, explain, and enforce policies and decisions enacted by top leaders.”²³ Hierarchically positioned between their superiors who direct the department and officers who implement their orders on a daily basis, supervisors are often “caught between their responsibility to superior officers and their responsibility for subordinate officers.”²⁴ First-line supervisors thus have a unique role in “shaping beliefs, values, and behaviors of front-line personnel,” and often view whistleblower reports of misconduct as a poor reflection on their leadership and ability to maintain order.²⁵

The first formal reaction is generally a retaliatory investigation to find a pretext that can be used to attack the whistleblower. The whistleblower's past record and personal life are examined relentlessly. Typical charges against whistleblowing officers include a history of “dissatisfaction with a superior” over a period of time; being away from work while on duty; failure to appropriately carry out duties; failure to provide back-up when called; lack of cooperation with others; “inappropriate attitude toward work and other employees”; tardiness; lack of leadership; failure to “fulfill the responsibilities of office”; and failure to report. In cases where the investigation turns up empty, supervisors may even falsify records.²⁶

Other forms of retaliation can take place against third parties associated with the whistleblower, such as family members, friends, partners, or close co-workers. In these cases, an employer may impose adverse employment actions, or peers may ostracize or harass a friendly third-party due to their connection with the whistleblower.

Retaliation can also be career-ending. Denying or revoking security clearances can effectively prohibit officers from conducting their work due to lack of access to information. Agencies have nearly unlimited discretion regarding granting security clearances, and employees are not currently entitled by law to an independent due process hearing to challenge a decision.²⁷ After whistleblowers are forced out, lack of clearance locks in blacklisting them from finding other employment by warning potential employers not to hire them.

Several of the major commissions that have investigated police misconduct specifically mention issues police whistleblowers face when reporting misconduct. The Rampart scandal involved widespread corruption in the 1990's by 70 Los Angeles police officers in the Community Resources Against Street Hoodlums (CRASH) anti-gang unit of the Los Angeles Police Department. The misconduct ranged from violence to drug dealing to bank robberies.²⁸ After the scandal, Professor Erwin Chemerinsky criticized the discipline system of the Los Angeles

Police Department (LAPD) as “an arbitrary, demeaning system of entrapments that burns whistleblowers, fails to stop the big abuses like Rampart, and yet assiduously prosecutes officers for ‘micro-infractions.’”²⁹

The New York City Mayor's Commission to Combat Police Corruption found that police whistleblowers there “had no place to turn within the Department for guidance, support or redress.”³⁰ The Mollen Commission also reported similar findings that current systems addressing police misconduct were weak because they “never aggressively solicited information from [police]; . . . did not reward courageous officers who came forward with valuable information; or penalized those who failed to report evidence of widespread or serious corruption about which they had personal knowledge. And it did nothing to try to educate its members as to why reporting and not tolerating corruption is essential to the Department and to them.”³¹

The Experiences of Nine Law Enforcement Officers

Designing effective whistleblower protection laws for law enforcement officers requires understanding both the “Blue Wall of Silence,” and the real risks associated with retaliation. From baseless terminations to harassment, mark-ups, and demotions, police whistleblowers are subject to various forms of retaliation from supervisors, who see them as a poor reflection on their ability to maintain order, as well as peers, who see them as traitors that do not deserve support and protection on the field. The following stories of Frank Serpico, Cariol Horne, Javier Esqueda, Matthew Fogg, Austin Handle, Brittany Iriart, Norman A. Carter Jr., Shannon Spalding, and Lt. Kamil Warraich offer a glimpse into the retaliation police whistleblowers face when they break through the “Blue Wall of Silence.” They summarize interviews conducted in June and July 2021 by Government Accountability Project investigators. As seen by the scope of these case studies, the “Blue Wall” has been solid for decades and remains intact.

Frank Serpico

Frank Serpico, a retired NYPD detective, has for over 60 years spearheaded an ever-growing national movement for law enforcement officers to “light the lamp”—a term he’s personally coined for whistleblowing. Famed for exposing and testifying on decades of rampant corruption and bribery in the New York Police Department (NYPD), Serpico remains the epitome of courage and unwavering morals.

After joining the NYPD as an officer in 1959, Serpico grew increasingly disillusioned with the number of fellow officers who were accepting bribes from criminals to turn a blind eye to their illegal enterprises. Corrupt cops, protected by both the “Blue Wall of Silence” and a complicit department that refused to investigate them, were making more than \$1 million a year from these shady dealings. It was “worse than the mafia” recalls Serpico, “because you would expect it from the mafia.”³² Serpico, who refused to take part in the entrenched corruption, instead blew the whistle, alerting the Mayor, Inspector’s Office, and even the District Attorney. After each individual and office refused to investigate his numerous complaints and allegations, Serpico went to the New York Times, which published his story on the front page in 1970. His testimony revealed systemic corruption and long-standing abuses of power that had become a way of life at the NYPD.

But Serpico’s role in shedding light on the widespread abuses of power on the force had its price. While working undercover in the narcotics division in 1971, he led a drug raid that was widely believed to have been a setup, where he was shot in the face by a suspect and left for dead, bleeding alone in the hallway. His police colleagues, Gary Roteman, Arthur Cesare, and Paul Halley refused to call in a “10-13,” or “Officer Down” dispatch to get him an ambulance, and Serpico was only narrowly saved by an elderly man next door who made the call to the hospital. Despite (barely) surviving the gunshot, he remains deaf in the ear where the bullet remains lodged, and he continues to suffer from chronic pain. No formal investigation followed the incident, and 40 years later, Serpico still receives hate mail from police officers. “To them, I’m no whistleblower,” he said, “they still consider me a traitor.”³³

Serpico was awarded the Medal of Honor in 1972, the department’s highest award for bravery in action, but never received the accompanying certificate and recalls the award being handed to him like a “pack of cards.” In 1973, Serpico testified before New York’s Knapp Commission, appointed by the New York City Mayor John V. Lindsay in response to Serpico’s disclosures, about the need for an independent body to investigate police misconduct, stating “[w]e must create an atmosphere in which the dishonest officer fears the honest one and not the other way around.”³⁴ Today, the Knapp Commission serves as an external mechanism responsible for monitoring and investigating allegations of police corruption and misconduct.

Decades later, police whistleblowers across the country are still at risk.

Cariol Holloman-Horne

Cariol Holloman-Horne, a former Buffalo police officer, has held firm for fourteen years that she did the right thing when she stopped officer Greg Kwiatkowski's chokehold on a handcuffed suspect, David Neal Mack. Fired for standing up to a white colleague using excessive force on a Black suspect, Horne's decade-long fight for vindication and a full pension has only recently come to an end.

In 2006, before the era of cellphones and body cameras, Horne and Kwiatkowski responded to a dispute between a woman and her ex-boyfriend, David Neal Mack, then 54, whom she accused of stealing her Social Security Check. As the officers brought Mack into custody, Kwiatkowski placed Mack in a chokehold. Horne intervened to stop Kwiatkowski from choking Mack, and the two began fighting and throwing punches at each other in the driveway of Mack's home. "Neal Mack looked like he was about to die," Horne recalls, "So had I not stepped in, he possibly could have. He was handcuffed and being choked."³⁵

Horne was offered a four-day suspension, which she turned down, instead demanding that her case go to a public hearing—a first in the department's history. The internal investigation cleared Kwiatkowski of all charges and Horne remained on leave after the incident, facing departmental charges as well as shoulder injuries and migraines from the altercation. In a rare and lengthy disciplinary hearing, Mack testified against Kwiatkowski, crediting Horne with saving his life. Even so, Horne was fired in 2008 after being found guilty on 11 of 13 departmental charges. With 19 years on the job, the mother of five was fired just months short of qualifying for a full police pension, which requires 20 years. Forced to work odd jobs and rely on subsidized housing, child support, and food stamps, Horne says the department made her life a "living hell." The same year, Officer Kwiatkowski was promoted to lieutenant.

As her story garnered renewed national media attention in June of 2020, the Buffalo Common Council unanimously approved a move to ask the new State Attorney General to reinvestigate Horne's case. Horne sued again, along with Mack and the help of attorneys Ron Sullivan and Intisar Rabb, this time seeking \$20 million from the city. The New York State Supreme Court vacated the previous ruling in April of 2021; Horne is now eligible for back pay and benefits through 2010, worth at least \$800,000. In his ruling, Judge Ward invoked the deaths of George Floyd and Eric Garner, writing that "the City of Buffalo has recognized the error and has acknowledged the need to undo an injustice from the past. The legal system can at the very least be the mechanism to help justice prevail, even if belatedly."³⁶ Kwiatkowski was sentenced to four months in prison in 2018 for a 2009 incident where he used excessive force against four black teenagers.³⁷

Horne went on to support the Buffalo Common Council in crafting the Duty to Intervene Law, or Cariol's Law. This legislation requires and protects police officer intervention when a colleague is using excessive force or acting inappropriately. Horne hopes that this law will gain traction across the nation and establish a registry of bad police officers. She is considering the idea of becoming Buffalo's next Police Commissioner and says, "My vindication comes at a 15-year cost, but what has been gained could not be measured. I never wanted another police officer to go through what I had gone through for doing the right thing."³⁸

Matthew Fogg

In his 32 years of outstanding public service beginning in 1978, former Chief Deputy U.S. Marshal Matthew Fogg led an elite enforcement team that tracked down over 300 of America's most-wanted fugitives charged with prison escape, murder, rape, narcotics trafficking, and other heinous domestic and international crimes.

At the same time, Fogg suffered substantial racial bias. For example, he described how his white colleagues on the fugitive task force deserted him without his supervisory permission just before he and other officers arrested two heavily armed suspects, including Michael Lucas, who was charged with murder and prison escape and was also featured on the television show "Americas Most Wanted."³⁹ According to Fogg in the 1997 New York Post Investigation "Bigots With Badges," Lucas attempted to pull a gun on him, explaining "[t]he white deputies knew when the bust was coming, but in the end, where were they? They left their posts."⁴⁰ His

colleagues were left unpunished, and no charges were filed; in fact, one of the deputies received a promotion.

Additionally, Fogg alleged that he and other African American officers had been denied promotions, received fewer desirable assignments tied to their duties, and endured disproportionately harsher punishments for infractions. For instance, when Fogg started a Title VII discrimination case in 1984, he was denied promotion and assigned to a “dead-end” desk job. His superiors threatened him with further retaliation if he didn’t drop his complaint. As such, Fogg stated, “[t]he stress got too much for me, and I filed a Workers’ Compensation Board claim—stress-related disorder caused by discrimination and retaliation in the workplace.” Though the board upheld Fogg’s claim, when Fogg and his physician said he was not ready to return to work, his superiors dismissed him from the United States Marshals Service (USMS) for insubordination while he continued receiving workers’ compensation benefits.

When Fogg presented his complaints in 1985 to the Department of Justice (DOJ), it took seven years for an investigation to be completed and 13 years before a 1998 Title VII trial where Fogg won \$4 million on the assertion that African Americans were systematically discriminated against based on race by the USMS. The jury found the entire USMS was a hostile environment for all African American Deputy U.S. Marshals before and after 1994. However, the District Court capped the compensatory damages for federal employees at \$300,000 dollars.⁴¹

As the lead Class Agent in *Fogg, et. al. v. Garland*, Fogg represents over 700 Deputy Marshals in discovery nationwide.⁴² He co-chaired the coalition responsible for the passage of the No FEAR Act of 2002, which increased federal agency accountability for violations of anti-discrimination and whistleblower protection laws and continues to speak out against racial discrimination in the USMS and other federal agencies as a leader in numerous law enforcement civil rights organizations. His continued whistleblowing exposes how racism not only targets the public, but poisons police ranks internally.

Javier Esqueda

Javier Esqueda is a 28-year law enforcement veteran who was a field training sergeant for the Joliet, Illinois police force until he blew the whistle in 2020. He had not been disciplined before blowing the whistle internally and publicly, challenging the cover-up of police violence in connection with the 2020 death of a suspect, Eric Lurry. In response, Sergeant Esqueda was stripped of his badge, placed on administrative leave, and charged with four felonies that could lead to 20 years imprisonment.

The incident in question concerned the January 2020 arrest of Mr. Lurry, who was suspected of having drugs in his mouth. Police slapped the suspect, shouted profanity, squeezed his nostrils for 98 seconds and shoved a baton into his mouth to cut off air. Mr. Lurry passed out and subsequently died. The Will County coroner ruled that it was a drug overdose.

Because one of his trainees was in the arrest, Sergeant Esqueda had to review the Daily Observation Report, but it did not include any of the above information. Other officers, however, began talking about a disturbing video of the arrest which he should review. Sergeant Esqueda then viewed the video of Eric Lurry, which exposed the grotesque abuse by the officers. Because other officers, including a lieutenant, expressed horror at the contents, Esqueda held off making a formal complaint, hoping that the concerns were sufficiently widespread for the department to act. However, the only action was for the training captain to call him in for questioning, asking why he had accessed the video and to order Esqueda to write an explanatory memo. Sergeant Esqueda explained that it was his duty to determine the facts when allegations of misconduct arise from a trainee. When Sergeant Esqueda tried to discuss the contents of the video that demonstrated brutality, the captain repeatedly said he did not want to hear it and cut him off. Sergeant Esqueda began agonizing over the proper response, consulting with colleagues, and praying.

Word of the video’s existence was becoming widespread, and City Council members requested to see it. The police department’s response was for the former chief to call in members of the media and a political ally on

the council to see an edited version of the video. The edited version camouflaged the police misconduct, was interspersed with police editorial commentary justifying taped behavior, and had the audio cut out.

For Sergeant Esqueda, this was the last straw. Authorities had not even included Mr. Lurry's family in the event to rewrite the history of what had happened. He decided to release the video to the media, where it was widely covered, led to calls for the Attorney General to investigate, and sparked the mayor's appointment of private counsel for an independent investigation. The primary offending officer was suspended for seven days. The Lurry family has filed a lawsuit for damages.

The police force responded to Sergeant Esqueda's public whistleblowing by stripping him of his badge and placing him on administrative leave. It also began shopping for a prosecutor to file criminal charges and found one in neighboring Kendall County, which in December 2020 obtained indictments for four felonies based on the allegation that Sergeant Esqueda had accessed the video tape while off-duty in his car while in Kendall County. Each count can lead to five years imprisonment. His case currently remains pending.

Austin Handle

Austin Handle, a former police officer with the Dunwoody Police Department in Georgia, has become an activist phenomenon for law enforcement reform after using his platform on TikTok to blow the whistle on deep-rooted discrimination, misconduct, and sexual harassment. Shortly after posting his first video on May 4th, 2020, he was fired on May 11th for "untruthfulness" and speeding with his lights and sirens on. Handle commented, "Let's talk about why good cops don't say anything. They do. They do, and then they're harassed."

Handle noticed a problem with the force long before he stumbled upon nearly a decade's worth of rampant corruption. Frequently targeted by his supervisors, Lieutenant Fidel Espinoza and Major Oliver Fladrich, Handle recalls being relentlessly scrutinized and accused – often falsely – of policy violations. In one instance, Handle was investigated for having too many positive citizen commendations in his file. Major Fladrich, in a desperate attempt to write Handle up for submitting his own commendations, even tracked down submission IP addresses to verify the identities of each citizen. Throughout his time at the department, Handle was relentlessly harassed and unfairly disciplined, often forced to do odd tasks like scrubbing Major Fladrich's carpet on his hands and knees or collecting clothing for a homeless youth program that did not exist. Handle's employment was frequently threatened.

What sparked the harassment? When Handle joined the Dunwoody Police force in 2018, he could not avoid witnessing abuse of authority. Lt. Espinoza oversaw recruitment and later was found to have a practice of hiring new officers based on his own sexual preferences. Lt. Espinoza hand-selected officers he felt would be willing to participate in sexually exploitative relationships without resistance. To maintain control, Espinoza wanted to get rid of people like Handle whom he hadn't personally hired and who weren't falling in line. As administration lieutenant, Espinoza used his position of power to coerce nine other officers into a sexting ring where sexual favors and illicit pictures were exchanged for positive commendations, extra high-paying shifts and protection. Known internally as "Guardians," these reviews and commendations led to work benefits like raises and promotions—which Handle perceived as one quid pro quo after another.

Handle, along with several of the other officers harassed by Espinoza, submitted several formal complaints that were ignored and are now involved in ongoing lawsuits against the city and department. Despite being named as a defendant, Police Chief Billy Grogan personally conducted the internal investigation, determining most of the claims against Espinoza unfounded and clearing himself of all wrongdoing. Handle's testimony and evidence were completely omitted from the investigation and Grogan's report. Espinoza has since voluntarily resigned and admitted to sharing nude pictures, but he and Grogan insist that the alleged abuses were all consensual and not tied to "any expectation of preferential treatment." The documented messages tell a very different story.

The lesson learned from Handle's whistleblowing complements that from Matthew Fogg. The breeding ground

for abuses of power against the public is abuses of power within law enforcement organizations.

Handle currently serves as Vice Chair of the Lamplighter Project, a nonprofit working to encourage whistleblowing activity in law enforcement, and he is the founder of Apollo A.I., a tech startup that uses artificial intelligence to assist first responders. He has over 171,000 TikTok followers (more than three times the population of Dunwoody) and has been filming an independent short film titled “Rogue Blue: The Life After Whistleblowing,” which portrays stories of law enforcement whistleblowers fighting to take back their mental, emotional, financial, and personal wellbeing. Handle has spoken to law enforcement officers across the country and receives new contacts and requests weekly. He hopes his story and platform will continue to inspire others in law enforcement to blow the whistle on corruption inside of police command structures.⁴³

Brittany M. Iriart

Brittany Iriart, a veteran who served nine years as a special agent, joined the civilian branch of Denver’s Public Integrity Division as an internal affairs investigator. The branch was created in December 2018 after several inmate deaths suggested that the Denver Sheriff’s Department was unable to conduct effective internal investigations. The Public Integrity Division was intended to be completely separate from the Denver Sheriff’s Department, but the chain of command was riddled with conflicts of interest, leading to ethical issues.

In 2020, Iriart received a case for a 61-year-old inmate who had been released from the hospital with several medical issues. The Sheriff’s department came to pick him up, handcuffed and leg ironed him, and put him in a wheelchair. The deputy reported that the inmate spat in the direction of the officers, and video footage shows the deputy strike the inmate twice, knocking over the wheelchair. Iriart saw this as a clear case of excessive use of force. When Iriart conducted her interview, the deputy denied ever striking the inmate. Lying in an internal affairs investigation is normally an automatic termination.

Iriart remembers that the draft discipline report was legally sound. However, when Chief Elias Diggins intervened to openly defend the deputy officer during his discipline hearing, Iriart contacted the Office of the Independent Monitor (OIM), to express concern. The OIM notified Iriart that Denver was attempting a full exoneration of the deputy despite the evidence. When she closed out the case, the draft discipline report was missing, and the final report omitted several pages of facts. Iriart went to a supervisor about the changes and was instructed to “mind her own business, stay in her lane, and keep her mouth shut.” From then on, modifying reports to protect officers from being fired or disciplined became commonplace in the department.

Iriart decided that it was time to speak up about the broken process. She consulted her attorney, and they developed a plan for her to speak to the media and before Congress. Iriart was placed on administrative leave while an investigation took place into allegations that she had violated her confidentiality agreement by commenting on the investigation. Three months later, Iriart received her contemplation of discipline report with multiple allegations that were never discussed in her HR interviews. In her hearing, she refuted these allegations with facts. Despite this, the final report of discipline upheld all the refuted allegations. Iriart was then terminated, and though she appealed the termination, she finally agreed to resign, unable to afford legal appeals with a projected cost of \$30,000.⁴⁴

Iriart is passionate about expanding anti-retaliation whistleblower protections for officers, explaining that, “You have to meet very specific requirements to even get protection, and even when you do qualify, how does it really protect you?”

Norman A. Carter Jr.

Norman A. Carter, Jr. joined the Philadelphia Police Department in 1967 and retired after 25 years. In 2016, he authored “The Long Blue Walk,” a memoir about his years on the force.⁴⁵ Carter remembers starting the job with a high standard of integrity for true leadership.

On his first assignment he learned otherwise, when he was ordered not to ticket a speeder who had organized

crime connections. Carter soon found himself at further odds with his colleagues after refusing to ignore a scandal that involved police officers protecting, getting kickbacks from, and participating in a local burglary ring. Carter reported it to the Internal Affairs Bureau (IAB) and was subsequently blackballed by members of the force who began to surveil him and refused to support him in field operations. One day, they wrote him up after he called out sick, claiming he never answered the door for a sick check. Carter asked for a hearing to avoid a 10-day suspension for the phony violation. Through all the fabricated violations, the department was trying to establish a pattern of behavior which would allow them to fire him. Carter had never had disciplinary problems in his career prior to going to the IAB.

Carter was offered representation from the Fraternal Order of Police, whose attorney assumed that he would plead guilty to quell the abuse or take the firing. But he persisted. He sought representation from an African American police association. During the hearing, when the sergeant who wrote him up for the sick leave violation testified, he could not accurately describe the door he supposedly knocked on. Carter was still suspended for 10 days.

During his suspension, Carter filed another complaint against his department through the IAB, this time with a fellow police officer. Carter described the retaliation against him. The officer accompanying Carter suggested that he be transferred for his own protection, but IAB was clear that could not happen until they took the investigation to the police commissioner, who would make that decision. Twenty minutes after returning home, Carter was transferred.

Eventually Carter received help through a federal connection to execute a raid and break up the burglary ring. This resulted in the seizing of millions of dollars of guns and merchandise and the burglary ringleader being sentenced to five years in federal prison. Several of the police officers involved were transferred. Many others, including the District Commander, were later arrested.

Carter went on to supervise the narcotics unit as a Police Corporal and continued to advocate for transparency. Even after Carter retired, he remained a target for retaliation and harassment, which forced him to leave Philadelphia.

When writing his memoir, Carter said he relived the psychological burdens of his experience: “I relived the sense of abandonment which goes on over and over again with other police officers who have been in the same situation.”

Shannon Spalding

In 2007, Chicago Police Officer Shannon Spalding started working in a joint task force with the FBI to expose a criminal extortion ring in the Department. Initially Spalding was unaware that the ring was being run by Officer Ron Watts, who obtained a badge to further his criminal enterprise. Watts, despite ongoing Federal and internal investigations by the FBI, DEA, and Chicago PD, was promoted to Sergeant and given his own team in a specialized unit operating in some of America’s poorest housing developments, where society’s most vulnerable resided.

Spalding and her partner Daniel Echeverria gained credible information during narcotics related intelligence debriefings regarding Watts and his team’s illegal involvement in the narcotics trade. Spalding and her partner feared for their futures as officers, but felt they had no choice but to report the internal corruption to their supervisor in the Organized Crime, Narcotics Division. Unfortunately, when they did, their supervisor ordered them to quash the allegations.

Shortly after, Spalding was informed by federal agents that “Big Shorty,” a well-known drug dealer caught up in a homicide investigation, offered up Watts and his team in an attempt to strike a deal. Big Shorty confessed to the DEA that he paid a “tax” to Watts and his team for protection, which allowed him to sell narcotics without fear of prosecution. Big Shorty was subsequently shot and killed. Spalding recalls that officers and

supervisors in the Homicide Detective Division of the department openly discussed how they could not believe Watts was still on the force after murdering Big Shorty and that the bosses were covering up for him. With no formal investigation into Watts, the case went cold. Spalding and her partner decided to go to the FBI, but high-ranking city officials wanted the investigation to disappear and began targeting them.

Spalding and Echeverria were reassigned back to the Chicago Police Department for desk duty, then sent to the police academy and separated. They were forced to lose touch with their informant in the investigation. The DOJ was brought in, and the Chief of Internal Affairs attempted to groom Spalding into committing perjury, but she refused. The Chief of Internal Affairs told Spalding, “I can’t – and I won’t – protect you.” Spalding was told by her immediate supervisor in the Fugitive Apprehension Unit, “I’d hate to one of these days have to be the one to knock on your door and tell your daughter you’re coming home in a box.”⁴⁶

Spalding filed a whistleblower lawsuit, believing that would stop the severe retaliation. Spalding recalls, “it was like pouring gasoline on a fire. It didn’t stop – it ignited it.” The day after Spalding and her attorney called a widely viewed press conference, Spalding ended up being arrested on phony federal charges. Spalding, who continues to help others who have been falsely arrested through the Exoneration Project, is currently on extended leave due to complex PTSD from blowing the whistle and the retaliation she endured. Her department is being investigated by the DOJ. Spalding says about her experience as a whistleblower, “I never want another officer to have to walk in my shoes.”⁴⁷

Lt. Kamil Warraich

Lt. Kamil Warraich joined the Asbury Park Police Department (APPD) in 2004 and served on and off in numerous capacities as the first Pakistani American and second Muslim officer in the history of APPD. In 2009, Warraich was assigned to APPD’s Narcotics and Gang Unit, where he became a leading officer in narcotics and firearm arrests.

In 2016, Lt. Warraich reported to his department executives that an Internal Affairs Investigator was backdating investigations. Lt. Warraich continued to run his complaints up the chain of command to the Monmouth County Prosecutor’s Office (MCPO), which failed to investigate them, even those with criminal implications. Warraich’s complaints were returned to the department to investigate. MCPO and the department retaliated against Warraich and covered up the allegations. At the same time, Lt. Warraich reported a coworker for racist conduct. Again, Warraich received retaliation and the matter was covered up without proper investigation. Lt. Warraich then went to the Office of the Attorney General (OAG), which returned his complaint to MCPO to investigate themselves.

The harassment and retaliation continued as Lt. Warraich kept reporting multiple instances of wrongdoing, including the practice of targeting minority neighborhoods and allowing officers not to report use of force. Instead of investigating his allegations, the department initiated multiple Internal Affairs investigations against him seeking a twenty-day suspension, an arbitrary demotion, and termination by unjustly utilizing the fitness for duty evaluation (FFDE) process. Lt. Warraich has been on Paid Administrative Leave since May 2019, even though he has been cleared for work by the FFDE.

In late 2019, Lt. Warraich filed two complaints with the OAG, one reporting the retaliation against him and violations of the Internal Affairs Guidelines. The other complaint was submitted as a whistleblower disclosure and alleged Internal Affairs (IA) complaints filed by citizens against police officers from 2014 to 2019 were not investigated by the IA’s Commander. In addition, he charged that the IA Commander forged many official rulings for five years on cases that were not uninvestigated—they had been dismissed over the objection of Lt. Warraich. Once again, the OAG sent the complaint back to MCPO with no regard to the existing conflicts of interest. MCPO conducted a botched investigation for the second time, and again accommodated a cover-up for APPD.

Warraich’s perseverance and resilience paid off. It took him two years of proceedings to clear his name. Now he

has a Civil Rights Violation and Whistleblower Retaliation complaint pending against the APPD in a Civil Court. The entire law enforcement chain of command in the state has failed Lt. Warraich as a whistleblower.

He has also reported the misconduct to the state lawmakers, city elected officials, State Commission of Investigations, Office of the Comptroller (Inspector General), FBI and numerous civil rights groups, all to no avail. He suffered severe backlash for trying to hold the department accountable.

These case studies illustrate the deeply rooted, long tradition of enforcing the Blue Wall of Silence: loyalty to the force trumps loyalty to the law. It does not matter whether the misconduct is racism, corruption or violence. The first principle is to sustain the freedom to abuse by denying any misconduct and avoiding accountability. There always will be profiles in courage who are exceptions to the rule, like Serpico, Horne, Esqueda, Fogg, Handle, Iriart, Carter Jr., Spalding, and Warraich. However, they almost certainly must sacrifice their professional lives and can risk their lives, period. As long as this culture remains, the truth will be the exception to the rule.

Whistleblower Protection Laws

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.”⁴⁸

Public employees retain their First Amendment rights in public and in private, particularly where statements relate to “matters of public concern.”⁴⁹ Public employees, including police officers, enjoy free speech rights so long as the speech does not “impair the administration of the public service in which he or she is engaged.”⁵⁰

A 1989 case involving a police officer outlined a four-step analysis used in cases where an employer denies terminating an employee due to exercise of free speech.⁵¹ Step one of the analysis requires the court to determine whether the topic of the police officer’s speech was a matter of public concern. This is accomplished by reviewing the “content, form and context” of the speech.

Second, the employee’s First Amendment interests are weighed against the interest of the state. This is known as the Pickering balancing test, which weighs the benefits from speech on public concerns with the disruption to efficient government operations,⁵² inquiring “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”⁵³ In other words, they are only protected if a court decides the benefits to the public are greater than the disruption for the government.

Once the first two steps are completed, the judge then considers retaliation, determining whether the employee has met the burden of proof for a prima facie case by showing that the speech was the “predominant, motivating factor” in the decision to take adverse action against the employee. Finally, even if the employee establishes the prima facie case, the state can still prevail by proving through a preponderance of the evidence that the adverse action would have been taken anyway, even if the employee had remained silent.⁵⁴

As a result, constitutional rights exist in theory, but they are nothing to rely on. The whistleblower does not even know if the First Amendment applies until a court rules that the speech was a public concern of greater import than the disruption to the employer. Then the whistleblower must not only prove retaliation was the primary reason but defeat the employer’s innocent, alternate explanation. That legal gauntlet is not a safe channel to risk a career.

Even more fundamental, constitutional rights are still typically unavailable due to *Garcetti v. Ceballos*.⁵⁵ *Garcetti* functionally canceled most relevant First Amendment protections with the “duty speech” loophole, holding that public employees who make statements pursuant to their official job duties are not protected by the First Amendment and may be subject to discipline by their employers. Richard Ceballos was a Deputy District Attorney who wrote a memo highlighting misrepresentations made in an affidavit used to get a search warrant, which called a criminal case into question. Because he had a duty to report violations, Ceballos submitted the memo to his supervisors recommending that the case be dropped. They proceeded with the prosecution anyway and retaliated against him. The key distinction here is that to be protected by the First Amendment, the speech should be exercised by the person as a citizen, rather than as a part of his or her official duties as an officer. Because Ceballos wrote the memo as part of his official responsibilities as a prosecutor on the case, the speech was not protected by the First Amendment.

The Court was careful to qualify that First Amendment protections are not completely precluded and that there may be circumstances where speech inside the workplace as part of official duties may warrant protection.

Restrictions on employee speech should encompass only those “necessary for their employers to operate efficiently and effectively.”⁵⁶ Because there was no dispute that Ceballos wrote the memo as part of his duties, the Court stopped its analysis after the first half of the two-part Pickering test. In short, the Court ruled that constitutional First Amendment rights of government employees could be unavailable in the most common scenario to communicate misconduct. With qualifications discussed below, Garcetti remains the controlling doctrine.⁵⁷

However, the dissenters were quick to counter that government employees are in a position to know “what ails the agencies for which they work,”⁵⁸ which is exactly why they should be free to speak up publicly or in private. The dissent advocated adherence to the Pickering balancing test approach, without a loophole for speech when part of job duties. Employees, the dissent noted, do not forego their citizenship by taking a job with the government, nor should their rights be diluted by doing so. The holding in Garcetti does not overrule free speech protections under the First Amendment where whistleblowing is not an obligation or duty as part of employment.⁵⁹

While the Garcetti exception remains the law, some courts have been wary of applying it to disclosures of police abuses. In *Dahlia v. Rodriguez*, for example, 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.⁶⁰ The court framed the issue of First Amendment whistleblower protections for government employees as whether the adverse action is “reasonably likely to deter employees from engaging in protected activity.”⁶¹ It reasoned that as a general rule “the state has no legitimate interest in covering up corruption and physical abuse;” therefore as a matter of public policy, the First Amendment “protects public employee whistleblowers from employer retaliation.”⁶²

Dahlia spoke up about tactics used by investigating officers who threatened robbery suspects with guns and beat them to obtain information about the whereabouts of other suspects not yet in custody. After reporting the misconduct to his supervisor, Dahlia was told to “stop sniveling” and was excluded from subsequent interviews of the suspects.⁶³ Internal Affairs interviewed Dahlia about the incident three times. Dahlia was harassed by other officers, warned not to reveal anything to the Federal Bureau of Investigation (FBI), and threatened that other officers would “put a case on him” to put him in jail.⁶⁴ Four days after reporting the retaliation to the Police Association President, Dahlia was placed on administrative leave, an adverse employment action that rendered him unable to take the sergeant’s exam and required him to forfeit his pay. The court held that because Dahlia spoke out in contravention of his superior’s orders, his speech was protected under the First Amendment.

The Dahlia court rejected the argument that police officers are “unique for the purposes of First Amendment retaliation claims,” overruling *Huppert v. City of Pittsburg*,⁶⁵ an earlier case which denied protections based on an officer’s duty to cooperate with the FBI and testify in court.⁶⁶ The court explained that these duties applied to the Fifth Amendment right against self-incrimination, not First Amendment protections for free speech.⁶⁷ The judges in Dahlia also warned that Huppert’s failure to protect such reports of police misconduct under the First Amendment is “dangerous.”⁶⁸

Dahlia established three factors to determine whether speech falls within the scope of official duties: “1) 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.”⁶⁹ Dahlia discussed *Christal*, a case that stated police officers have a “duty to disclose such facts to their superiors.”⁷⁰ However, it would not be part of a police officer’s duty as a public employee to disclose information about misconduct to individuals outside the chain of command.⁷¹ In addition, if a police officer speaks out against a supervisor’s orders, such speech “may often fall outside the speaker’s professional duties.”⁷² Most importantly, there are situations, like those caused by the Blue Wall of Silence, in which disclosure to those outside the chain of command may be more likely to address the misconduct.

Yet Dahlia's chain of command analysis still creates a choice between two evils for police officers—"violate their duty to report to their supervisors and receive First Amendment protection or adhere to their duty and expose themselves to employment retaliation."⁷³ As discussed above, the public interest and an officer's self-interest in his job are at odds in scenarios where officers observe misconduct of fellow officers or biased policies at play.

A 2015 decision, *Matthews v. City of New York*,⁷⁴ has further expanded First Amendment protections for police officers who speak out about police department policies. Officer Matthews spoke out to supervisors about a quota system which required officers to conduct a certain number of arrests, summonses and stop-and-frisk for the Bronx precinct. He believed the quota system was contrary to the NYPD's core mission and by "causing unjustified stops, arrests, and summonses," that "officers felt forced to abandon their discretion in order to meet their numbers," and that it "was having an adverse effect on the precinct's relationship with the community."⁷⁵ After raising concerns about the policy, he was given poor performance reviews, humiliated by supervisors, separated from his partner, and denied overtime, leave and assignments.⁷⁶

While officers are required to report misconduct, the court ruled that Matthew's speech was covered by First Amendment protections because voicing his concerns about precinct policy did not fall within his official duties, and when "he elected a channel with a civilian analogue to pursue his complaint, he spoke as a citizen."⁷⁷ The court held that critiquing police department policies is not part of an officer's job description or everyday responsibilities.⁷⁸ In addition, it explained that an officer does not have a duty to monitor his supervisors' conduct.⁷⁹ Matthews raised broad policy concerns rather than violations of the law. Any citizen could have raised the same policy concerns with the Captain of a police department regarding its quota system. Although he went through the chain of command to voice his concerns, the same channel would be available to any citizen who attended the Captain's monthly community meetings.⁸⁰ The fact that "the same or a similar channel exists for the ordinary citizen" is what matters for such analysis rather than the level of access.⁸¹ This is called the "civilian analogue" exception.

Both state and local police whistleblowers and victimized citizens have court access to defend these First Amendment rights when protected speech is established. The Civil Rights Act of 1871 outlawed acts committed under state law that deprive others of constitutional rights, particularly the Ku Klux Klan's racist vigilantism. 42 U.S.C. § 1983 reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.⁸²

This applies to law enforcement officers outside the federal government, as well as citizens generally.⁸³ It means they have access to federal court jury trials, where justice will be determined by the citizens they purported to defend with their disclosures.

A plaintiff must prove that "constitutional or other federal rights have been violated and that the named defendant is legally responsible for that violation by virtue of either his direct participation in the asserted wrongdoing or his authorization or toleration of such misconduct by his subordinates."⁸⁴ A plaintiff must demonstrate that: "(1) the defendant participated directly in the alleged constitutional violation; (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong; (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom; (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or (5) the defendant exhibited deliberate indifference to the rights of [the plaintiff] by failing to act on information indicating that unconstitutional acts were occurring."⁸⁵ Claims against supervisors can be sustained where supervisors "exhibit[] deliberate indifference to the rights of [the plaintiff] by failing to act on information indicating that unconstitutional acts were occurring" or by having "created a

policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, [or was] grossly negligent in supervising subordinates who committed the wrongful acts.”⁸⁶

Under current legal doctrine, police whistleblowers must survive a gauntlet of legal obstacles to gain protection. It is a major gamble for police officers to prove that they are eligible for constitutional protection, that their speech is worthy, not too disruptive, and caused retaliation, and that they wouldn't have gotten fired anyway.

Whistleblower Protection Act (WPA) 5 USCS § 2302 and the Whistleblower Protection Enhancement Act (WPEA)

The Civil Service Reform Act of 1978, reinforced by the Whistleblower Protection Act (WPA) of 1989, covers federal employees who report waste, fraud, and abuse. In 5 USC § 2302(b)(8), the WPA protects employees disclosing what they reasonably believe is any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, with the exception of disclosures "specifically prohibited by law."⁸⁷ Although federal employees are covered by the WPA, intelligence agencies are excluded from coverage by statute.⁸⁸ The statutory rights for federal law enforcement authorities come at a price. In *Bush v. Lucas*,⁸⁹ the Supreme court ruled that the statutory rights substitute for court access to challenge First Amendment violations.

To meet the elements of a claim under section 2302(b)(8), whistleblowers must have: "1) a protected disclosure, 2) a personnel action taken, threatened or not taken after to the protected disclosure, 3) the accused officials knew of the protected disclosure; and 4) a causal connection between the disclosure and the personnel action."⁹⁰

The employee can establish a prima facie case by a much lower standard than with constitutional claims. Initially, there is no balancing test for protected speech. If the whistleblower reasonably believes a disclosure evidences misconduct listed in section 2302(b)(8), by statute the balancing test favors the exercise of free speech rights. The nexus test to prove a link between whistleblowing and a challenged action also is far less difficult. Instead of proving that dissent was a predominate, motivating factor, the whistleblower only must demonstrate that it was a "contributing factor," or relevant to the personnel action.⁹¹

For its affirmative defense under the WPA, an agency then must show by "clear and convincing" evidence that it would have taken the challenged actions even in the absence of protected disclosures.⁹² Clear and convincing evidence is a far tougher burden for the employer than a mere preponderance, which only requires a majority of the evidence. In *Chambers v. Dep't of Interior*, the court looked at several factors to determine whether the agency would have implemented the adverse action absent the disclosure including 1) the strength of evidence presented by the employer regarding the reason for the personnel action 2) the motive of the decision-makers 3) and whether similar adverse actions have been taken against similarly situated non-whistleblower employees.⁹³

In 2012, Congress unanimously passed the Whistleblower Protection Enhancement Act (WPEA), which strengthened whistleblower rights for federal employees originally created by the WPA in 1989, including restoration of free speech rights by closing judicially-created loopholes that had arbitrarily excluded protection.⁹⁴ For instance, the WPEA expanded protections for federal employees even if they "are not the first person to disclose misconduct; disclose misconduct to coworkers or supervisors; disclose the consequences of a policy decision; or blow the whistle while carrying out their job duties."⁹⁵

FBI whistleblowers have "separate but equal" rights for internal disclosures without independent due process to those for other federal employees in the WPA.⁹⁶ Presidential Policy Directive (PPD) 19, instituted by U.S. President Barack Obama in 2012, "prohibits retaliation against whistleblowers in the intelligence community who make internal disclosures and requires intelligence agencies to establish a review process for claims of retaliation consistent with the procedures in the WPA."⁹⁷ While this reform created intra-agency freedom of speech in principle, it also does not include independent due process rights for FBI or other intelligence officers to challenge retaliation.

State-Specific Whistleblower Protection Rights

Four basic types of state whistleblower laws provide statutory rights to seek reinstatement.⁹⁸ Some require that whistleblowers report to specific external recipients. Other states require internal disclosures. A third group of states don't specify such requirements. Fourth, some enable whistleblowers to disclose misconduct internally or externally.

Most states use administrative processes rather than courts and limit the remedies available to whistleblowers.⁹⁹ As a rule, these statutes are so weak that whistleblower rights attorneys argue not to file claims which almost certainly will rubber stamp the retaliation. Exceptions include the District of Columbia and California, where state employees and contractors (in DC) are entitled to a jury and monetary damages in civil trials.¹⁰⁰ New Jersey and Florida also have stronger protections compared to other states.¹⁰¹ In 2020 Illinois also passed a precedent-setting law enforcement whistleblower law, protecting both witnesses and police, with court access to seek reinstatement and damages.¹⁰²

Common law remedies also are a possibility. Most states have a "public policy exception" to the prevailing "at will" employment doctrine.¹⁰³ If the motivating factor for the employee's discharge violates public policy, a whistleblower may be entitled to damages. However, the scope of protected speech varies widely, and relief is limited to monetary damages without the chance of reinstatement.

Recommendations for Reform

The core lesson to learn from police whistleblowers' experiences is unavoidable—whatever the ground rules for conduct, there will never be justice without a clear channel for the truth about police abuses of power. That legally safe channel must be available to all who witness abuses, whether other police officers, citizen witnesses, or victims. Legal rights alone cannot overcome cultural bias and hostility, but they are the first step toward changing attitudes. Most significant, it means that those who want to communicate the truth for the first time will have credible legal rights to defend themselves. Below are the four cornerstones for how to break down the Blue Wall of Silence in favor of real accountability:

- 1) Anti-retaliation rights for all who provide evidence, whether law enforcement officers, citizen witnesses, victims, media, or organizations.
- 2) Protection against all forms of retaliation, including a whistleblower defense against civil and criminal liability.
- 3) Best practice legal standards to enforce those rights, including burdens of proof, administrative and judicial remedies, protection against gag orders and adequate relief for those who prevail.
- 4) Independent investigations of disclosures with best practice confidentiality shields and action free from conflicts of interest, so the truth makes a difference.

Legislation recently introduced in Congress by Representative Gerald Connolly, the Special Inspector General for Law Enforcement Act, honors all these principles with best practice provisions for legitimate reform. It was developed after in-depth consultation with law enforcement officers, civil rights groups, and whistleblower organizations.

Conclusion

To address police accountability is to recognize that the rule of law also applies to those who enforce it. Departments across the nation need better protections – that is, incentives – for officers to prioritize their duty to the public over loyalty to their colleagues. A rigorous legislative commitment to transparency and accountability is the first step in replacing the “Blue Wall of Silence” with the “Blue Wall of Integrity.” This, in part, means setting in place policies that credibly protect the testimony of police whistleblowers.

Since 1998, the federal government has provided funding to equip police officers with body armor capable of protecting their person from an assailant’s bullet. These same officers report to work entirely unprotected from whistleblower retaliation which stands to threaten their reputation, livelihood, physical safety, and mental wellbeing. Until there is federal legislation capable of shielding good apples from the bad, whistleblowing in law enforcement will remain an entirely anomalous event. Whistleblowing for law enforcement is “committing the truth” because they are treated as if they had committed a crime. But the truth, the whole truth and nothing but the truth is the foundation for legitimate reform. There can be no higher priority than protecting those who provide it.

Most fundamental, however, is that anti-retaliation rights should apply to all who expose the truth, against whatever form of retaliation is used to attack them. It does not matter whether repressive tactics to enforce secrecy come from job actions or a hostile cultural environment. The truth is equally essential for justice, whether the witness is a law enforcement officer, a citizen witness, or a victim.

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