

The Howard University School of Law, Civil Rights Clinic respectfully submits this brief, as *amicus curiae*, to address the important jurisprudential issues presented in this appeal, specifically whether all records related to an internal affairs investigation which concluded that a police officer acted wrongly in using a racial slur against a Maryland citizen should be exempt from disclosure under the Maryland Public Information Act, MD. CODE ANN., STATE GOV'T § 10-611 *et seq.*

### **INTEREST OF AMICI**

The Civil Rights Clinic at Howard University School of Law engages in trial and appellate litigation in the service of human rights, social justice and economic fairness. The Clinic provides pro bono services to indigent, prisoner and pro se clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, government transparency, racial discrimination, police brutality and unconstitutional prison conditions. Central to the Clinic's work has been its involvement in cases which concern public access to government records, particularly when government misconduct has occurred. Among other things, the Clinic regularly submits public information requests to police agencies in Maryland, Virginia and the District of Columbia. Because of the important issues in this case regarding government accountability, as well as the disturbing, racially insensitive nature of the police conduct alleged, the matters raised in this case are of substantial concern to the Clinic.

### **QUESTION PRESENTED**

- 1) WHETHER ALL RECORDS RELATING TO AN INTERNAL AFFAIRS INVESTIGATION SUSTAINING AN INDIVIDUAL'S ALLEGATIONS OF MISCONDUCT BY A POLICE OFFICIAL ARE EXEMPT FROM DISCLOSURE TO THE COMPLAINING PARTY UNDER THE MARYLAND PUBLIC INFORMATION ACT?

### **STATEMENT OF FACTS**

On November 3, 2009, Sergeant John Maiello, a police official with the Maryland State Police (MSP), called Teleta S. Dahsiell, whom he believed was a witness in a case he was investigating, and left her a message in which he used a racially derogatory slur.

Sgt. Maiello began the message by introducing himself and requesting that Ms. Dashiell return his phone call. However, after believing that he had hung up the phone, he stated:

Why, that's what I think about it, and I need to hear shit like that . . . That's when I say to myself, 'Oh my God' . . . I'm listening to some God dang nigger's voicemail play for 20 minutes.

Compl., Para. 14. Before Sgt. Maiello finished the message, he used the racial slur "nigger" a second time, while another officer in the background laughed.

On November 5, 2009, Ms. Dashiell filed a complaint with MSP Lieutenant Krah Plunkett regarding the voicemail message Sgt. Maiello left on her phone. Dashiell provided an oral statement to Plunkett, which Ms. Dashiell alleges Plunkett recorded. MSP subsequently assigned the complaint to Detective Sergeant Kristi Meakin of MSP's Internal Affairs Section.

MSP allegedly concluded its investigation sometime during the second week of February 2010. On February 17, 2010, MSP Captain Kristina Nelson informed Ms. Dashiell, by letter, that an "investigative file" had been compiled in response to her complaint; MSP had confirmed her complaint regarding Sgt. Maiello; and that "the appropriate disciplinary action was taken against [him] and documented in his personnel file." Letter from Captain Kristina Nelson, Maryland State Police to Teleta Shavon Dashiell, Feb. 17, 2010. At the conclusion of the letter, Captain Nelson invited Ms. Dashiell to contact MSP if she had any further questions or concerns or needed "further explanation" regarding the investigation. *Id.*

In addition to MSP's letter, numerous news sources confirmed that an investigation had occurred and that Ms. Dashiell's complaint had been sustained. Ben Nuckols, *ACLU Sues Maryland Police Over Trooper's Racial Slur*, ASSOCIATED PRESS, Oct. 27, 2010, available at <http://www.legalnews.com/detroit/755993> (last viewed May 19, 2012). Like the letter, most reports indicated that Sgt. Maiello had been disciplined, but provided no further details, beyond stating that MSP continued to employ him. *See e.g.*, Peter Hermann, *Crime Scenes: ACLU Targets Police "Personnel Records"*, BALTIMORE SUN, Nov. 3, 2010, available at <http://articles.baltimoresun.com/2010-11-03/news/bs->

md-hermann-police-personnel-20101103\_1\_state-police-maryland-aclu-chapter-police-agencies (last viewed May 20, 2012). WBAL Television, a local television station in Baltimore, reported that MSP had demoted Sgt. Maiello and placed him on desk duty because of Ms. Dashiell's complaint. *Voice Mail Records Trooper Making Racial Slur*, WBALTV.com, Nov. 30, 2009, available at <http://www.officer.com/article/10233053/voice-mail-records-md-trooper-making-racial-slurs> (last viewed May 20, 2012).

Given the vague nature of MSP's response, the conflicting news reports and the letter's invitation for further inquiry, Dashiell sought additional information. On March 2, 2010, she, with the assistance of the American Civil Liberties Union of Maryland (ACLU), mailed a written request to MSP seeking clarification as to what action, if any, the agency had taken in response to her complaint against Sgt. Maiello. Specifically, Dashiell and the ACLU requested information as to what facts the agency had gathered during its investigation, copies of any documents obtained or created during the investigation, the complaint control card, the results of the internal investigation, and the results of the agency's review of the investigation. As the MPIA provides, MD. CODE ANN., STATE GOV'T § 10-614(b)(3)(iii), Dashiell and the ACLU asked that if MSP redacted parts of the records, MSP provide them with any reasonably severable portion. The letter, however, was returned to the ACLU, stamped "addressee unknown," as, presumably, MSP, upon receipt, failed to forward the request to its newly placed custodian of records. *See* Letter from Deborah A. Jeon, Legal Director, American Civil Liberties Union of Maryland to Captain Kristina Nelson, Investigations Division, Department of Maryland State Police and Captain John Greene, Internal Affairs Division, Department of Maryland State Police, Mar. 11, 2010.

On March 11, 2010, Dashiell and the ACLU again requested in writing, by mail, the aforementioned information. However, as MSP had returned the original request without identifying the party to whom it should have been addressed, Dashiell and the ACLU mailed the second request, along with a copy of the original, to several MSP captains and Ronald M. Levitan of the Maryland State Attorney General's Office. On

April 15, 2010, MSP responded refusing to provide any further documents related to the investigation; in effect, denying Dashiell and the ACLU's request in its entirety.

On June 7, 2010, Dashiell and the ACLU again requested the aforementioned information, seeking at a minimum an index of the requested information, a summary of each document, and the exemption that MSP believed protected each document from disclosure. The requestors reasoned that even if the documents themselves would be too intrusive, the provision of these materials would at least prove that MSP had conducted a thorough investigation and provide Dashiell and the ACLU some basis as to why MSP had denied their request. Nonetheless, MSP again denied the request, failing to provide any further information as to the investigation or its results. MSP justified the denial on the grounds that the Law Enforcement Officers Bill of Rights, MD. CODE ANN. PUB. SAFETY § 3-104, and the "personnel records", "investigatory records", and "intra-agency memoranda" exemptions to the MPIA protected the records from disclosure. MD. CODE ANN. STATE GOV'T § 10-616(i), § 10-618(b), § 10-618(f).

On October 27, 2010, Dashiell filed suit in the Circuit Court of Baltimore County alleging that MSP's failure to provide the documents she and the ACLU had requested violated the MPIA. In her complaint, Dashiell specifically cited MD. CODE ANN., STATE GOV'T § 10-613, which provides "except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." In terms of relief, Dashiell again requested that the court order MSP to provide the requested documents.

The parties subsequently filed cross motions for summary judgment. On June 24, 2011, the Honorable Patrick J. Cavanaugh denied Dashiell's motion and granted the state's respective cross-motion, finding that the MPIA's mandatory exemption from disclosure for "personnel records" covered the records sought. In an unwritten opinion, issued from the bench, Judge Cavanaugh stated:

These Internal Affairs Investigation Records are clearly personnel records under Section 10-616, the State Government section of the annotated code. It clearly states they shall deny – unless you got a criminal case involving Constitutional issues usually related to the Sixth or Fourteenth Amendment.

There's no question in my mind based upon Ms. Dashiell's attorneys request, they are looking for the result of an internal investigation by the Maryland State Police, and everything they are looking for is personnel records which are confidential and are protected. Therefore, I'm granting the motion for summary judgment.

Tr., Hearing on Motion to Dismiss and/or Summary Judgment, Circuit Court, Baltimore County, June 24, 2011, at 32-33.

Ms. Dashiell filed a timely motion appealing Judge Cavanaugh's decision to this Court.

### **SUMMARY OF ARGUMENT**

Police misconduct is a persistent, multifaceted problem that, as of yet, no city has been able to permanently solve. *See* THE N.Y. CITY COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCS OF THE POLICE DEPT, NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994, (Gabriel J. Chin ed., 1997) (noting the many sources of corruption and brutality). The effect of such misconduct, particularly on minority communities, is discouraging and undisputed. Left unchecked, police misconduct frequently triggers racial tension as "poor people of color bear the brunt of police abuse." SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 4 (2001); Terry Carter, *Cops in the: A Little-Used Statute Puts White Police Officers Involved in Violent Incidents With Blacks Under the Gun Over Use of Deadly Force*, 86 A.B.A.J. 58 (2000) ("Relations between African-American communities and police tend to be edgy in big cities. . . . The problems continued in the 1990s with racial profiling, excessive force and questionable internal affairs investigations."). Given the potentially dangerous nature of such conduct, it is not surprising that various means have been tried to curb police abuse.

Unfortunately, unique problems have plagued each of these methods. While 42 U.S.C. § 1983 creates a cause of action for victims who have been the subjects of police abuse that violates the United States Constitution or federal law, several practical and procedural impediments limit the amount of relief victims may gain through such suits

and the deterrent effect they may have on future misconduct. For many plaintiffs, finding an attorney may be the most difficult challenge, given the length of such suits and the likelihood that plaintiffs may not have independent resources with which to pay their legal counsel. In the event that an individual is able to attain representation, before she may actually present the merits of her case, she will have to prove that the various federal and state immunities that limit liability for official misconduct do not bar her case. Even if she is able to present her case, the jury which hears it may fail to believe her story or refuse to impose a significant damages judgment. Finally, given that officers as well as the agencies for which they work are insulated from the actual financial cost of a judgment, unless political pressure results from civil liability, even a large damages reward may have little or no effect.

Likewise, while federal or state prosecutors may, in egregious cases, seek to hold police officials criminally liable for their misconduct, such prosecutions are unlikely. The potential of alienating the individuals on whom they frequently rely to collect evidence and testify often deters prosecutors. Even if they muster the strength to bring such suits, political considerations may impede their plans, given the general unpopularity of such prosecutions. Finally, even if a prosecution has the necessary support, given the strong fraternal nature of police departments, a “wall of silence” may confront prosecutors and thus inhibit the state’s attorney from gathering sufficient information to effectively carry out the prosecution.

Given the general ineffectiveness of civil or criminal liability to deter police misconduct, internal affairs investigations and the discipline that results from them remain one of the few viable means to hold police officials accountable for their misconduct and, thus, deter future misconduct. Unfortunately, the lack of public access to such investigations and their results often creates a culture in which complaints are never properly investigated or punished. In some cases, the complaints themselves are never recorded or misfiled. In other cases, the complaints are never fully investigated. Finally, even when an officer is found to have acted wrongly, his punishment may not be

significant enough to deter future misconduct. The end result is a process, which even when it works properly, victims of police abuse and the public mistrust.

Given the strong public interest in making the result of and records compiled during internal investigations public, it is not surprising that the majority of states that have addressed the issue – including a significant number with personnel exemptions similar to Maryland’s – have concluded that such records can and should be released to the public. We urge the Court to follow the lead of these states and reverse the decision of the trial court.

## ARGUMENT

### **I. THE THREAT OF CIVIL OR CRIMINAL LIABILITY IS NOT AN EFFECTIVE DETERRENT TO POLICE MISCONDUCT.**

While there is the potential for civil suits brought by individual victims or the government or criminal prosecutions led by federal or state prosecutors to deter police abuse, each, for a variety of reasons, fails to act as a sufficient deterrent to police misconduct. For example, plaintiffs may hesitate to bring such lawsuits given their long and costly nature, the myriad of federal and state immunities that protect police officials or because they simply lack standing to seek the injunctive relief necessary to ensure such violations do not occur again. Furthermore, in the unlikely event that they surmount these challenges, the effectiveness of any relief they gain may be limited by the small amount which they are awarded and the rules which insulate officials as well as the agency from liability. Likewise, federal or state prosecutors seeking to hold police officials accountable for misconduct often face the potential of alienating the officers on whom they rely for most of their criminal prosecutions; the political consequences, often negative, for pursuing such prosecutions; as well as the code of silence which pervades police departments when prosecutors seek information to prosecute police misconduct.

#### **A. Civil Liability Fails to Act as an Effective Deterrent to Police Misconduct.**

Pursuant to 42 U.S.C. § 1983, an individual may bring a private cause of action against another person or entity who, under color of state law, deprives the person of

rights, privileges, or immunities the United States Constitution secures or federal law confers. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). In addition to § 1983, multiple state constitutions, including the Maryland constitution, grant victims of police misconduct the right to seek relief from their aggressors if the conduct violated a provision of the state constitution. *See e.g., Prince George's County v. Longtin*, 19 A.3d 859, 883-88 (Md. 2011) (affirming that persons may bring suits against police officials for violations of Article 24 of the Maryland Constitution); *Corum v. University of North Carolina*, 413 S.E.2d 276, 290 (N.C. 1992) (“This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights.”).

However, merely because an individual may bring a suit to seek appropriate relief, does not mean that she will. Several factors may inhibit a victim from seeking redress.

As an initial matter, victims of police misconduct may be unable to find persons to undertake their representation. “Plaintiffs’ attorneys in civil rights cases are generally paid on contingency, out of the proceeds won by the plaintiff.” Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 868 (2012). Accordingly, if the recoverable damages are low or there is a small likelihood of prevailing, a victim may have a difficult time obtaining representation.

The situation may be made more difficult if the individual seeks to hold the municipality, as well as the individual officer, accountable for the misconduct the victim has suffered. For an individual to hold a municipality liable under § 1983, it is not enough for her to prove that the locality employed the individual at fault, but she must show that officers the locality employed have engaged in a pattern or practice of abuse. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Unfortunately for plaintiffs, pattern and practice suits are very difficult to win. “To establish the city’s liability, a plaintiff must prove that a pattern and practice demonstrates ‘deliberate indifference,’” which generally requires overwhelming evidence on the part of the plaintiff. Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 *HASTINGS L.J.* 753, 776 (1993). In many cases, individuals with



legitimate claims are unable to meet even the requirement of an initial evidentiary showing that is required to proceed with such a case beyond the summary judgment stage:

Courts have huge caseloads, and a pattern and practice suit is an enormous case for the court. A judge will want to scrutinize pattern and practice evidence because [the court] is giving up a lot of time if it allows this case to go forward. . . . Judges adopt the ‘smoking gun’ theory. In other words, they want hard evidence of the city’s and the police department’s support [of the brutality or other misconduct]. There is rarely this kind of [‘smoking gun’] evidence. So after months and months of discovery battles, the judge will sometimes rule that there’s not enough evidence of pattern and practice. [The attorney] can go on with the suit against the individual officer, but the city and the police department [defendants] are dropped.

*Id.* at 799 (citing Telephone Interview with Randy Baker, Attorney in Berkeley, California (Feb. 11, 1992)) (quotation marks omitted). The net effect of this requirement is that pattern and practice suits, even those which do not ultimately proceed to trial, can be “very long, difficult and costly.” *Id.* at 799. Accordingly, “while the effect of a pattern and practice suit can be powerful,” the length, cost and difficulty of such suits serve as a further disincentive for private attorneys to undertake representation of victims of police misconduct. *Id.*

Even if an individual is able to obtain representation, various procedural burdens may impede her from seeking relief. To the extent an individual seeks to not only recover damages for the harm she has suffered, but seeks to prevent similar misconduct in the future, she may seek injunctive relief. Unfortunately, the Supreme Court has held that individual victims of police misconduct lack standing to seek such redress. In *Rizzo v. Goode*, the United States District Court for the District of Pennsylvania issued an injunctive order requiring the city of Philadelphia to overhaul its procedure for handling civilian complaints of police misconduct, as a result of the city’s failure to deal adequately with several instances of misconduct by its officials. 423 U.S. 362 (1976). Though the district court found constitutional violations by police officers to be “unacceptably high” in number and too frequent to be “dismissed as rare, isolated

instances,” *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973), the Supreme Court ruled that the plaintiffs lacked the requisite personal stake in the outcome to pursue injunctive relief because past exposure to illegal conduct does not demonstrate a likelihood of future harm. 423 U.S. at 372-78.

Likewise, even if an individual suit seeks only damages, one of the several federal immunities that protect police officials even when they have acted wrongly may bar the victim’s suit. In the federal context, police officials are immune from liability for unconstitutional conduct so long as the conduct did not violate clearly established law of which a reasonable official would have been aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). While the Supreme Court has, in the past, stated that a court need not have held that the precise misconduct committed by the official is unconstitutional, *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), lower courts’ decisions reflect a growing reluctance to impose liability unless this is the case. See John C. Jeffries, Jr., *What’s Wrong With Qualified Immunity*, 62 FLA. L. REV. 851, 858 (2010) (“[T]he Fourth Circuit’s demand for precedent precisely on point reduces the search for clearly established law to something like a snipe hunt.”).

Similarly, statutory immunities limit the scope of liability of Maryland state and local officials from suits brought pursuant to the Maryland constitution as well as state tort actions. The Maryland Tort Claims Act, MD. CODE ANN. STATE GOV’T, §§ 12-101 *et seq.*, as well as the Local Governmental Tort Claims Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 5-401, *et seq.*, provide that if an individual fails to notify the entity employing the individual who has abused him within 180 days of the misconduct if he is a local official, and 1 year if he is a state official, he will be barred from obtaining relief. MD. CODE ANN. STATE GOV’T § 12-106; MD. CODE ANN., CTS. & JUD. PROC. § 5-304. Accordingly, in the likely event that an individual is unable to obtain representation and is unaware of the notice requirements imposed by Maryland state law, her claim may very well be barred. Both acts, likewise, protect officers from liability for intentional and constitutional torts, committed during the course of employment, so long as the state official acted without “malice” or “gross negligence” and the local official acted without

“actual malice.” MD. CODE ANN., CTS. & JUD. PROC. § 5-522, § 5-302. While both laws substitute the state or local entity in place of the official, the switch ensures the officer will not be held liable and, thus, will not have an incentive to correct his conduct in the future.

Assuming an individual is able to obtain representation and provide the requisite notice in a timely manner, it may be several years before an individual collects damages, if any. If the individual is asserting a pattern or practice claim, substantial discovery as well as trial proceedings will be required. In the event she is successful, the decision will likely be appealed. *See The Endless Cycle of Abuse*, 44 *Hastings L.J.* at 799 n.253 (“Pattern and [p]ractice suits can go on for years, what with discovery, appeals and retrials.” (quotation marks and brackets omitted)). Not surprisingly, “officials in the police departments . . . recognize that lawsuits are a trailing rather than a leading indicator of police misconduct that may not be concluded until several years after the conduct that gave rise to the lawsuit.” *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* at 883 (quotation marks and brackets omitted).

Furthermore, in the event that an individual is able to wait for the discovery process as well as the trial to be completed, she may find a jury either unwilling to believe her allegations or doubtful of the degree of harm she has suffered. *See Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform*, 62 *STAN. L. REV.* 1, 9 (2009) (“[V]ictims of police misconduct often make problematic witnesses; and . . . juries frequently believe and sympathize with defendant officers.”). This may particularly be the case if the cop suspected the individual to be the suspect behind a crime:

When it comes down to whose story to believe – the criminal suspect or the police officer – in situations unlikely to involve other witnesses, the officer has a distinct advantage. . . . [T]hat the victim is viewed as unsympathetic and unreliable contributes to jurors’ natural reluctance to brand a police officer a criminal[.]

Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 466 (2004).

Even when victims of police misconduct are successful in their lawsuits, the lawsuits rarely work to hold police departments or individual officers accountable for their actions. Laws across the country protect individual police officers from paying legal fees or damages in misconduct cases, transferring liability to the municipality so long as the officer is deemed to have acted in good faith. *See, e.g.*, N.Y. GEN. MUN. LAW § 50-k(3); CAL. GOV'T CODE ANN. § 825; PA. STATE ANN. TIT. 42, § 8550; CONN. GEN. STAT. § 7-465; NEV. REV. STAT. § 41.0349. In practice, municipalities virtually always determine that an officer's conduct met the requisite standard. *See The Endless Cycle of Abuse*, 44 HASTINGS L.J. at 756 n.13. Studies show that departments are not forced to internalize the costs of such suits and, accordingly, in the absence of independent political pressure, the outcomes of civil suits have a similarly minimal impact on many police departments. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005) (“If government does not care about maximizing the size of its treasury . . . then there is no reason to expect that forced financial outflows in the form of compensation payments will change its behavior in any predictable way.”). For example, from 1986 to 1990, the city of Los Angeles paid 20 million dollars in damages as a result of excessive force cases alone. INDEP. COMM'N ON THE L.A. POLICE DEPT', REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 56 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]. Similarly, from 1987 to 1992, New York City paid approximately 50 million dollars in damages as a result of “police misconduct.” PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 101-02 (1995). “Yet, in both cities, the police department made no institutional or policy changes to response to these suits. In fact, despite the substantial sums of money involved, neither city even bothered to monitor civil suits.” Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 156-57 (1998).

Nor do civil suits seem to have any effect on internal investigations. This is in part another latent effect of the length of civil suits. “Because internal investigations of complaints are usually completed within sixty days to twelve months, long before a suit

is decided, the internal affairs and oversight committees can not take lawsuits into account at the time of the investigation.” *The Endless Cycle of Abuse*, 44 HASTINGS L.J. at 783.

However, the lack of effect may not be merely the result of circumstance. “Police departments strongly advocate that the outcome of lawsuits should have no bearing on internal discipline.” *Id.* According to one lieutenant, “even if an officer was exonerated by the internal affairs investigation and then found liable in a civil suit, this would result in no change in the internal affairs outcome. We have never opened up an old complaint as a result of a civil suit.” *Id.* (quotation marks omitted). Accordingly, though an individual may be finally able to gain some recompense for the abuse he has suffered, it may only be a matter of time before she or someone else in her community is victimized.

#### **B. The Threat of Criminal Prosecution Has Little or No Deterrent Effect on Police Abuse.**

In addition to civil suits by victims of abuse, federal, as well as state prosecutors may attempt to hold police officials criminally liable for misconduct that violates federal or state law. However, in practice, such suits are few and far between. Several factors, such as political pressure, a desire not to alienate officers on whom prosecutors regularly rely, and a lack of resources deter both federal and state officials from bringing such prosecutions. Furthermore, in the event that such suits are brought, they are often hindered by the code of silence that pervades police departments, as well as in the federal context, the high standard that must be met before an officer can be convicted.

As noted, criminal prosecutions, at the local level, rarely occur. For example, the Los Angeles Times conducted a study of 442 police shootings that occurred between 2001 and 2005. Andrew Blankstein, *Police Are Rarely Prosecuted Unless Case Is Bulletproof*, L.A. TIMES, Dec. 9, 2005, <http://articles.latimes.com/2005/dec/09/local/me-da9> (last viewed May 19, 2012). The Times found that Los Angeles County District Attorney Steve Cooley failed to bring a single criminal case, despite several shootings that involved questionable circumstances. *Id.* Likewise, the same report found that “only 3 of 314 alleged excessive-force cases examined in the same period spurred criminal

charges.” *Id.* Los Angeles’ experience is not unique. Professor Louis Schwartz of the University of Pennsylvania analyzed the outcomes of approximately twenty-five police violence complaints filed by civilians with the Philadelphia District Attorney’s office, concluding that “the District Attorney’s office has not been, and, in the nature of things, could not be, an effective instrument for controlling police violence.” Louis B. Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney’s Office*, 118 U. PA. L. REV. 1023, 1024 (1970). According to Human Rights Watch, a New York based international human rights organization, “punishments of specific abusive officers . . . tend to occur only when the local news media or high-profile court cases focus public attention on the problem.”<sup>1</sup> HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES OF AMERICA, SUMMARY AND RECOMMENDATIONS: POLICE ACCOUNTABILITY AND TRANSPARENCY (1998), <http://www.hrw.org/legacy/reports98/police/uspo06.htm> (last viewed May 19, 2012).

Several factors may account for the lack of prosecutions. Chief among them is that “local prosecutors’ offices face a hopeless conflict-of-interest in handling police violence complaints: the District Attorney’s office must investigate the defendant’s allegations of brutality against the police while simultaneously investigating the police charges against the defendant.” *Complaints Against the Police*, 118 U. PA. L. REV. at 1023-24. The prosecution’s reliance is not limited to the investigative phase of a prosecution. Once a prosecutor’s case proceeds to trial, he expects to rely on officers’ testimony for the purpose of rebutting the stories of the suspect and any supporting witnesses for the defense.

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<sup>1</sup> As Human Rights Watch noted in its report, part of the difficulty of assessing the prevalence and effectiveness of criminal prosecutions on the local level is that information regarding the number of criminal prosecutions local prosecutors bring against police officials is not always readily available. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES OF AMERICA, SUMMARY AND RECOMMENDATIONS: POLICE ACCOUNTABILITY AND TRANSPARENCY (1998), <http://www.hrw.org/legacy/reports98/police/uspo06.htm> (last viewed May 19, 2012).

The potential political blowback from pursuing criminal charges against police officials may further deter a prosecutor's office. In many jurisdictions, local prosecutors are elected officials who, during the course of their campaigns, rely on endorsements from politically powerful police unions. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES OF AMERICA, POLITICAL CONSIDERATIONS AND AGGRESSIVE POLICING (2008), <http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspo.html/uspo16.htm> (last viewed May 19, 2012). Accordingly, many prosecutors fear the loss of union support in retaliation for the prosecution of a law enforcement officer. *Id.* The political ramifications of such suits are not limited to merely the district attorney's office; mayors and city council members are also affected. Elected municipal officials are often hesitant to publicly support prosecutions or publicly criticize aggressive and abusive police tactics, particularly when segments of the public may credit such tactics for drops in crime rates. *Id.*

In the unlikely event that the district attorney's office chooses to pursue such charges, it may have difficulty gathering the necessary evidence on account of the "code of silence" that pervades police departments when an official is subject to criminal charges. The Code manifests itself in two ways, each of which make it difficult for prosecutors to pursue charges. First, the Code requires that officers on a "scene," recite identical version of events, regardless of what they witnessed. Christopher Cooper, *Yes Virginia, There is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture*, 45 CRIM. L. BULLETIN 277, 287 (2009). This is "the sanction of the code which demands that fellow officers lie to provide an alibi for fellow officers apprehended in unlawful activity covered by the code." Elaine Stoddard, *The Informal "Code" of Police Deviancy: A Group Approach to "Blue Coat Crime,"* 59 J. OF CRIM. L., CRIMINOLOGY AND POLICE SCIENCE 201, 203 (1968).

Relatedly, the Code “dictates that when an investigation is underway, whether by the internal affairs unit or prosecutor's office, officers who are prospective trial witnesses should adhere to the Code by not saying anything that is contrary to the position taken by the officer or officers under investigation.” *See There is a Police Code of Silence*, 45 CRIM. L. BULLETIN at 295. This often results in false testimony. According to the report of the Christopher Commission, which was responsible for investigating the Los Angeles Police Department, “the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten code of silence, [which] consists of one simple rule: an officer does not provide adverse information against a fellow officer.” CHRISTOPHER COMMISSION REPORT, *supra*, at 168.

Even if the district attorney is able to gather the necessary information, he may be confronted with a jury hostile or unwilling to indict or convict police officials. “Historically, most jurors have . . . a presumption in favor of the police officers. In most cases, jurors go into a case looking for reasons to convict. In police misconduct cases, they are searching for reasons to acquit.” Mark Curriden, *When Good Cops Go Bad: The Justice Department Has a New Weapon to Fight Police Brutality. The Question is, How Will the Government Use It?*, 82 A.B.A.J. 62 (1996). Accordingly, even when prosecutors have been armed with overwhelming evidence, “juries have often been reluctant to find officers guilty of criminal conduct, particularly when the incident occurred while they were on duty.” HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES OF AMERICA, LOCAL CRIMINAL PROSECUTIONS (2008), <http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspo.html/uspo31.htm> (last viewed May 19, 2012). Furthermore, in some jurisdictions, the jurors’ decisions may be further swayed by special procedural protections for police officers that allow them to access and persuade the jury. For example, in Georgia, unlike other defendants, police officers are allowed to be present with counsel at grand jury proceedings, and the defendant police officer is allowed to make a statement in his or her defense to jurors. O.C.G.A. § 17-7-52; § 45-11-4.



The failure of state district attorney's offices to successfully pursue such cases would not be as damaging were it not for the parallel hesitancy of federal prosecutors to initiate prosecutions of police officers. According to numbers the government provided, the Department of Justice prosecutes less than one percent of complaints it investigates. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES OF AMERICA, LOW RATE OF FEDERAL PROSECUTIONS (1998), <http://www.hrw.org/legacy/reports98/police/uspo34.htm> (last viewed May 19, 2012).

This may in part reflect the political priorities of the executive branch. Partisan politics may have stifled the Justice Department's pursuit of such suits during the Bush administration. In a speech to the Fraternal Order of Police, then President George W. Bush stated he did not believe the "Justice Department should routinely seek to conduct oversight investigations, issue reports or undertake other activity that is designed to function as a review of police operations in states, cities and towns . . . [and he did] not believe that the federal government should instruct state and local authorities on how police department operations should be conducted, becoming a separate internal affairs division."<sup>2</sup> Kami Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Reform*, 62 ALA. L. REV. 351, 374 (2011).

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<sup>2</sup> The Administration's hesitancy to become involved in local civil rights issues was reflected in its inclination to not pursue civil actions against troublesome localities. In 2005, the Bush administration replaced the lead statistician responsible for writing a report on racial profiling because he alleged that senior political officials at the Justice Department were trying to undermine the report's findings on disparities in the way police treated African-Americans and Hispanics. Eric Licttblau, *Profiling Report Leads to a Demotion*, N.Y. TIMES, Aug. 24, 2005, available at <http://www.nytimes.com/2005/08/24/politics/24profiling.html?oref=login> (last viewed May 19, 2012). According to Mary Howell, a veteran New Orleans civil rights attorney, "[u]nder the Bush administration, the Justice Department disappeared here in terms of federal civil rights enforcement." Justin Elliot, *Obama Cracks Down on Abuses by Big-City Police Departments*, SALON, May 30, 2011, [http://www.salon.com/2011/05/30/justice\\_department\\_civil\\_rights\\_police/](http://www.salon.com/2011/05/30/justice_department_civil_rights_police/) (last viewed May 19, 2011). Likewise, Thomas Perez, the current Assistant Attorney General for the Civil Rights Division, told a police oversight association that "there were very few [pattern and practice] cases during the [Bush] administration." *Id.*

In some instances, the relevant branches of the federal government have simply lacked the resources to pursue criminal charges against local officials. According to *Human Rights Watch*, the Criminal Section of the Civil Rights Division throughout most of the 1990s lacked sufficient staffing and funding to adequately prosecute police misconduct cases. See SHIELDED FROM JUSTICE, LOW RATE OF FEDERAL PROSECUTIONS (“[T]he current level of lawyers with little criminal experience has limited our ability to assign these attorneys to work independently on grand jury investigations. . . . The division also explains that high-profile, complex cases overwhelm the resources of the division, with a few cases consuming the time of many of the experienced attorneys.”). In 1991, while testifying before Congress, John R. Dunne, then-Assistant Attorney General for the Civil Rights Division, said, “We are not the front line troops in combating instances of police abuse. That role properly lies with the internal affairs bureaus of law enforcement agencies and with state and local prosecutors. The federal government program is more of a backstop, if you will, to these other resources.” *Police Brutality: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong., 1st Sess. 3 (1992) (testimony of John R. Dunne, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice). While the Obama administration has made some improvements, change has come slowly. As of May 2011, only eight “pattern or practice” cases have been opened under the Obama Justice Department; furthermore, of the eight, only three of these investigations have been of police departments in major metropolitan areas. See Justin Elliot, *Obama Cracks Down on Abuses by Big-City Police Departments*, SALON, May 30, 2011, [http://www.salon.com/2011/05/30/justice\\_department\\_civil\\_rights\\_police/](http://www.salon.com/2011/05/30/justice_department_civil_rights_police/) (last viewed May 19, 2011).

Finally, in the event that the federal government pursues such cases, it may be stifled by an unusually difficult burden of proof. In *Screws v. United States*, the Court addressed the government’s burden under 18 U.S.C. § 242, which criminalizes violations of the United States Constitution or federal law which result in bodily harm or death. 325 U.S. 91 (1945). Though Justice Douglas rejected an interpretation of the statute that

would have rendered it unconstitutional, he read into the statute a willfulness element requiring that the defendant have acted with “a specific intent to deprive a person of a federal right made definite by decision or other rule of law.” *Id.* at 103. According to *Screws*, the statute requires *specific intent* even where the action of the defendant had undeniably deprived the victim of a right protected by federal law; therefore, in order to convict, a jury must find the specific “purpose to deprive the [victim] of a constitutional right.” *Id.* at 107.

## **II. INTERNAL AFFAIRS INVESTIGATIONS, DUE IN SIGNIFICANT PART TO LACK OF TRANSPARENCY, FAIL TO PROVIDE AN EFFECTIVE CHECK ON POLICE MISCONDUCT.**

Given the various practical and political limitations on the effectiveness of civil and criminal suits to deter police misconduct, internal affairs investigations remain the last viable means to protect citizens from rogue officers.<sup>3</sup> However, internal affairs investigations, due in large part to the lack of sufficient oversight and transparency, suffer from limitations of their own. *See The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 790. Studies have shown the regular “failure of internal affairs to properly investigate and discipline officers.” *Id.* at 791. In some cases, “the sole aim of the internal process is to establish the innocence of the officers. In other cases, the matter is never fully investigated.” *Id.* at 790. Furthermore, polls regularly reveal that even when internal investigations are properly handled, given the lack of transparency associated with the process, complaining witnesses and the public are left with the perception that the process was inept.

A basic flaw of the “internal affairs process is its location within and connection to the police department,” largely divorced from public oversight and transparency. *Id.* at 792; *Law and Disorder: Is Effective Law Enforcement Inconsistent With Good Police-Community Relations*, 28 FORDHAM URB. L.J. 363, 395 (2000) (“Although Mayor

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<sup>3</sup> While internal affairs investigations have become common in large cities, smaller cities may use a simpler model under which the investigation and discipline of officers is done on an informal basis by supervisory officers. Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209, 213 (1998).

Giuliani believes that cops can effectively police cops, we've seen no evidence that the Internal Affairs Bureau can police the cops." (statement of Michael Meyers)). The initial hurdle victims complaining of police abuse confront emerges upon their arrival at the police department as internal affairs investigators are frequently not receptive to receiving complaints against fellow officers. "[I]t is common practice that when a person goes to the department to make a complaint, the first thing the investigating officer does is bring up the person's name on the computer to see if there are any outstanding warrants." *See The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 792-93. If the individual is the subject of the warrant, the officer will, rather than recording and investigating the allegation, simply arrest the individual. *Id.* at 793. If the individual is not the subject of an outstanding warrant, the officer may attempt to persuade the victim not to file a complaint. The officer may say, "You don't want to ruin this officer's career, do you?" *Id.* Weary of being arrested or harassed, citizens may simply choose not to complain when victimized.<sup>4</sup> *Id.* *See What Police Learn From Lawsuits*, 33 CARDOZO L. REV. at 862 (noting that only "a very small percentage" of the 664,500 people who suffered police abuse in 2002 filed civilian complaints.)

In the event that the individual is fortunate enough to have his complaint taken, the complaint may be mislabeled or misfiled so as to ensure it is not investigated. *See What Police Learn From Lawsuits*, 33 CARDOZO L. REV. at 867. For example, the Christopher Commission found "complaints of officer misconduct made by the public were often noted in daily activity logs rather than recorded in the official Personnel Complaint Form

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<sup>4</sup> Unfortunately, the problems described are neither sporadic nor of recent origin. For example, the Commission tasked with investigating the 1990 beating of Rodney King in Los Angeles by several police officers noted that were it not for the video, it is likely that police officials would have simply disregarded any complaints about the incident:

Our commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King's brother . . . to file a complaint were frustrated, and the report of the involved officers was falsified.

1.81 that triggers a formal complaint investigation and IAD review.” CHRISTOPHER COMMISSION REPORT, *supra*, at 159. The Department of Justice’s investigations have revealed the use of similar tactics: officers improperly classify misconduct claims so that they will not be investigated by internal affairs. *See What Police Learn From Lawsuits*, 33 CARDOZO L. REV. at 867.

In the event that allegations are actually investigated, the investigations are frequently shoddy or incomplete. Investigators may not look for witnesses, collect evidence, interview police personnel, or reconcile inconsistent statements. *Id.* at 871. “A study of the Chicago Police Department’s internal affairs division concluded that investigations within the department violat[ed] virtually every canon of professional investigation.” *Id.* (internal quotation marks omitted). In particular:

The officer accused of misconduct was interviewed in less than fifteen percent of the cases. When the officer was interviewed - often months after the incident - the “questioning” was in the form of a brief questionnaire that the officer had seven to ten days to complete in writing. It was “not uncommon” to find a complaint unsubstantiated even though several officers submitted virtually verbatim questionnaire responses. Investigators rarely interviewed civilians and witnesses in person. And while the investigators ran background checks on the complainants and witnesses who corroborated allegations of misconduct, the investigators did not review complaint histories of the police officers involved.

*Id.* at 871-72.

Shielded from public scrutiny, several factors may motivate a department’s failure to adequately investigate allegations of police misconduct. Feelings of loyalty, camaraderie or friendship make it almost “impossible for internal affairs officers to be unbiased in their approach to complaints.” *See The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 791. Likewise, “officers are generally more sympathetic to one another because of an unavoidable, subconscious bias.” *Id.* Finally, some officers may simply view “minor instances” of excessive force, such as shoving, grabbing or harshly restraining a witness or subject, as nothing more than “bad style”; perhaps inappropriate, but not worthy of discipline. *Id.* at 791-92. Not surprisingly, internal affairs

investigations “often result[] in a very different conclusion than [that] the public would reach.” *Id.* at 791.

Furthermore, even if the officer investigating the crime takes his task seriously, this does not ensure that the officers he interviews or seeks evidence from will volunteer necessary information. “Possibly the most difficult obstacle to overcome in a police internal affairs investigation is what has come to be known as the ‘Blue Wall of Silence.’” John Joseph Powers, Jr., *Eroding the Blue Wall of Silence: The Need for an Internal Affairs Privilege of Confidentiality*, 5 SUFFOLK J. TRIAL & APP. ADV. 19, 27 (2000); see Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 171, 203 (2003) (“They face similar problems to those faced by the state district attorneys. If police officers are going to stonewall efforts to investigate, then they will do that to the Federal Bureau of Investigation or Internal Affairs.”). In some localities, internal rules creating a buffer period after an event before an internal investigation can begin serve the role of allowing officers who witnessed the event to align their stories with the officer likely to be charged with misconduct. See U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, ch. 4 (2000) (criticizing New York Police Department rule requiring forty-eight-hour delay before internal affairs investigators can question suspect police officers because it “creates opportunities for subject officers to corroborate their versions of the alleged misconduct incident”).

Finally, in the event that the complaint is properly investigated, the officers are forthcoming and the investigation concludes that the officer acted wrongly, he may suffer little or no consequence for his actions. In most departments, the responsibility for disciplining accused officers lies solely with the chief of the department. *The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 792. If a chief refuses to impose discipline or the appropriate degree of it, despite the internal affairs investigation’s conclusion, the chief sends a clear message that brutality or other misconduct is acceptable.

Not surprisingly, the consequences for the public are devastating. For example, in 1998, the Boston Police Department's internal affairs unit attracted national attention after Officer Michael Cox was beaten by four fellow officers who mistook him for a shooting suspect. Brian MacQuarrie, *Two Found Liable in Beating of Fellow Officer, A Third Policeman Also Implicated; Another Cleared*, BOSTON GLOBE, Dec. 23, 1998, at A1. As a result of the Boston Police Department's failure to investigate the matter for four years, the Boston Globe launched its own investigation which revealed "that serious problems of excessive force were compounded by a Code of Silence among Boston police officers." *See Eroding the Blue Wall of Silence*, 5 SUFFOLK J. TRIAL & APP. ADV. at 27-28. The Globe investigation revealed that "three of the officers implicated in the Cox beating had nine prior misconduct complaints filed against them." *Id.* at 28. Boston's police department is not the sole law enforcement agency to face such allegations. *See The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 790 ("In certain police departments throughout California, the internal affairs process is under fire for its failure to discipline officers and to deter violence. The media and city investigations have revealed that certain officers have long histories of violence that were not addressed by internal affairs or the officers' superiors.")

Recognizing the ineffectiveness of internal affairs investigations and the desperate need for additional external oversight and transparency, several cities have established civilian review boards to review internal investigations once completed. "Today, more than thirty of the country's fifty most populous cities have civilian oversight committees." *Id.* at 794. However, despite their regularity, "the inability of most of them to prescribe discipline keeps them from more effectively solving the problem of recurring police brutality." *Id.* at 795. "Many do not have binding authority over the police chief or city manager." *Id.* at 794. Accordingly, like the internal affairs investigations themselves, the effectiveness of COCs may be severely limited if the police chief, city

manager and city council ignore their recommendations.<sup>5</sup> Furthermore, review committees may “suffer from a lack of funding, leadership, and political will.” See *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. at 872. Or simply, “after spending time with police officers – [civilian review board members] may begin to adopt the police officer’s perspective in the same way that internal affairs investigators supposedly do.” Michael P. Weinbeck, *Watching the Watchmen: Lessons for Federal Law Enforcement from America’s Cities*, 36 WM. MITCHELL L. REV. 1306, 1320 (2010).

Given the ineffectiveness of internal affairs investigations, it is not surprising that “most citizens who file a complaint with Internal Affairs simply do not believe any meaningful resolution will occur,” regardless of the process used during or the outcome of the actual investigation. Ryan P. Hatch, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution*, 21 OHIO ST. J. ON DISP. RESOL. 447, 454 (2006). Most complaining witnesses view “Internal Affairs [a]s akin to the fox guarding the hen house.” *Id.* The effect is particularly acute “in communities where police-community relations have been strained by a series of scandals, citizen shootings, allegations of excessive use of force, and/or racial insensitivity.”<sup>6</sup> Steven D.

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<sup>5</sup> After a review of civilian committees in seven cities, the New York Civil Liberties Union (NYCLU) penned a report assessing their strengths and weaknesses and recommending guidelines legislatures should follow when creating such committees:

First, the committee should be independent of the police department, and consist of an all-civilian staff. Independent committees remain free from police department domination and cultivate public confidence. Second, in the committee’s charter, the state legislature should expressly grant subpoena power to compel testimony and information from police officers and police department heads. This clear delegation of subpoena power would curb police resistance.

Ken Takahashi, *The Release Dismissal Agreement: An Imperfect Instrument of Dispute Resolution*, 72 WASH. U. L. Q. 1769, 1795-96 (1994).

<sup>6</sup> Public review of police internal affairs files may also be a prerequisite to fostering the strong community relations that are necessary for effective law enforcement. As one California appellate panel has stated:

It is the attitude of the public toward the police discipline system that will determine the effectiveness of the system as an element of police-community relations. A system can be theoretically sound and objective in practice, but if it is not respected by the public, cooperation between the police and the public can suffer.



Zansberg and Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs File*, 22 COMM. LAWYER 34 (2004).

Such perceptions are only enhanced by the lack of transparency associated with the process. See *Coming Together to Resolve Police Misconduct*, 21 OHIO ST. J. ON DISP. RESOL. at 454-55; *Sunshine on the Thin Blue Line*, 22 COMM. LAWYER at 34 (“Furthering this mistrust is police departments’ routine refusal to make available for public inspection the records of internal investigations into alleged wrongdoing.”); *The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 788 (“Whatever the case, this lack of public information is disturbing to complainants and the public, who want to know that their complaints were taken seriously and that discipline was meted out where deserved.”). Once a citizen files a complaint, he is virtually excluded from the investigative and disciplinary process. The only contact he will have after the initial encounter will likely be “a terse letter from Internal Affairs notifying the citizen that the complaint has been unsubstantiated or unfounded.” *Coming Together to Resolve Police Misconduct*, 21 OHIO ST. J. ON DISP. RESOL. at 454-55. If the individual is less fortunate, he may never hear anything “about the disposition of his or her complaint against the officer.” *Id.* The end result is that “citizens are left unhappy and frustrated because they feel their issues were not adequately addressed.” *Id.* at 455; see Lillian Roe Gilmer, *Japan's Communications Interception Act: Unconstitutional Invasion of Privacy or Necessary Tool?*, 35 VAND. J. TRANSNAT'L L. 893, 919-20 (2002) (noting that a large percentage of the population distrusts police because of numerous scandals, cover-ups, leaks of investigative information, and a low number of disciplinary actions imposed upon police). These perceptions extend beyond internal affairs investigation, attaching to victim views of civilian oversight committees as well:

Community faith in civilian oversight also appears to be hampered by community perceptions of the oversight agencies themselves. Swearing-contest complaints (where both the officer and the complainant allege foul language) often land at civilian oversight agencies, and the complaint often

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*S.F. Police Officers' Ass'n v. Superior Court*, 202 Cal. App. 3d 183, 191 (1988).

comes down to one party's word against the other's. Without dispositive evidence, the agency is reluctant to sustain the citizen's complaint and the agency's record of holding officers accountable begins to look no more impressive than the police department's internal affairs unit.

*Watching the Watchmen*, 36 WM. MITCHELL L. REV. at 1319-1320.

Given the questionable legitimacy of internal investigations as well as the additional scorn that results from the secretive nature of the process, it is no surprise that various interest groups view public disclosure laws as the last legitimate check against the misuse of police power and the growing tide of police misconduct. *See Sunshine on the Thin Blue Line*, 22 COMM. LAWYER at 34 (“The atmosphere of mistrust can only be improved by bringing greater transparency and accountability to police departments.”); *The Endless Cycle of Abuse*, 43 HASTINGS L.J. at 788 (“Whatever the case, this lack of public information is disturbing to complainants and the public, who want to know that their complaints were taken seriously and that discipline was meted out where deserved.”); Susan Sward, *S.F. Faces Tough Police Issues*, S.F. CHRON., Apr. 15, 1992, at A19 (describing a San Francisco task force pushing city to open up complaint process to complainants, claiming it is unfair for an accused officer to have more access to information than the complainant); *Secret Records Harm the Public*, SAN DIEGO TRIB., July 27, 1990, at B10 (“More disclosure [of disciplinary action] . . . would help restore police credibility. . . . The individual police officer's desire for confidentiality must be balanced against the public's right to know.”); *see also Keeping People in the Dark*, L.A. TIMES, Aug. 5, 1990, at M6 (discussing the importance to the public of open disciplinary hearings of police officers); Antonio H. Rodriguez, *So, You Have a Complaint?*, L.A. TIMES, Mar. 14, 1991, at B7; DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 100 (1994) (discussing how confidentiality of internal affairs investigations “affects the externally perceived legitimacy of the internal review system”).

In summary, as one federal judge stated eloquently, “the public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct

have acted properly and wisely.” *Welsh v. City & County of San Francisco*. 887 F. Supp. 1293, 1301 (N.D. Cal. 1995). The public has an “interest in knowing that a government investigation itself is comprehensive, the report of an investigation released publicly is accurate, any disciplinary measures imposed are adequate, and those who are accountable are dealt with in an appropriate manner.” *Stem v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984); *see also Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) (“So long as it is barred from seeing the [internal investigation] report, the newspaper [and the public] is effectively prevented from assessing the reasonableness of the official action.”); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) (“Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist.”); *Daniels v. City of Commerce City*, 988 P.2d 648, 652 (Colo. App. 1999) (“Members of the general public have a compelling interest to see that public entities, when conducting internal reviews of [official misconduct] do so efficiently, and clearly and effectively.”); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 879 (Colo. App. 1987) (“Any possible danger of discouraging internal review is outweighed by the public’s interest in whether the internal review was adequate, whether the actions taken pursuant to that review were sufficient, and whether those who held public office . . . should be held further accountable.”).

### **III. RECOGNIZING THE STRONG PUBLIC INTEREST IN THE AVAILABILITY OF SUCH RECORDS, THE COURT SHOULD FOLLOW THE LEAD OF MOST STATES AND DEEM THEM RELEASABLE PUBLIC RECORDS.**

Given the strong public interest supporting the release of records created during internal affairs investigations, Maryland should follow the lead of most states, which make such records available. That the MPIA includes a personnel records exemption does not counsel against the release of these records as several of the states that release internal affairs records have similar exceptions.

Thirty-two of the fifty-one jurisdictions<sup>7</sup> in the United States have addressed the availability of records produced during internal investigations, either through statute, judicial decision or opinion of the state Attorney General. Of these, the vast majority, twenty out of thirty-two, deem such records publicly available under at least some circumstances. FLA. STAT. ANN. § 119.07(p) (“All complaints and other records in the custody of any unit of local government which relate to a complaint of discrimination relating to race . . . are exempt until a finding is made relating to probable cause [or] the investigation of the complaint becomes inactive[.]”); IOWA CODE § 22.7 (“[T]he following information relating to such individuals contained in personnel records shall be public records: . . . (5) The fact that the individual was discharged as the result of a final disciplinary action[.]”); 30-A M.R.S. § 2702(1)(B)(5) (“If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline.”); MINN. STAT. § 13.43, SUBD. 2(a)(5) (deeming public “the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body”); N.C. GEN. STAT. § 160A-168(b) (“The following information with respect to each city employee is a matter of public record: . . . (11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the municipality”); PA. STAT. ANN. TIT. 43, § 1321 (“[T]he term “personnel file” does not include records of an employee relating to the investigation of a possible criminal offense[.]”); UTAH CODE ANN. § 63G-2-305(9) (stating that “records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes” are public so long as the release does not “interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes”); *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. 2001) (“To

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<sup>7</sup> We have included in the fifty-one jurisdictions the District of Columbia, as well as the United States federal government, but have excluded Maryland.

the extent that [our prior cases] can be read to hold that records of internal investigations into criminal misconduct may be closed under section 610.021, those cases are inconsistent with the current version of section 610.100, and are no longer to be followed.”); *State ex rel. Ohio Patrolmen's Benevolent Assn. v. Mentor*, 732 N.E.2d 969, 974 (Ohio 2000) (“[R]ecords of police officers reflecting the discipline of police officers are not confidential law enforcement investigatory records excepted from disclosure.”); *Great Falls Trib. Co. v. Cascade Cty. Sheriff*, 775 P.2d 1267, 1269 (Mont. 1989) (“[T]he conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know.”); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (“Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life.”); *State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists*, 927 P.2d 386, 407 (Haw. 1996) (“[I]nformation regarding charges of misconduct by police officers in their capacities as such . . . is not ‘highly personal and intimate information.’”); *Burton v. York County Sheriff's Dep't*, 594 S.E.2d 888, 895 (S.C. App. 2004) (“[W]e find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye. . . . [T]he access to information they sought and the trial court granted was focused on the performance of public duties by the Sheriff and his deputies and the response of the Department to allegations of misconduct by the deputies.”); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003); *Fincher v. State*, 497 S.E.2d 632, 635-37 (Ga. App. 1998) (finding that an investigatory report concerning claims of misconduct against an employee of the State Board of Pardons and Paroles was a public record and was not exempt from disclosure); *Obiajulu v. City of Rochester*, 213 A.D.2d 1055, 1056 (Sup. Ct. N.Y. 1995) (“Disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed, however, are not exempt from disclosure . . . [as] ‘personal and intimate details of an employee's personal life.’”); *Lessley v. City of Madison*, No. 4:07-cv-136-DFH-WGH, 2009 U.S. Dist. LEXIS 15695, \*6 (S.D. Ind. Feb.

27, 2009) (“[A]lthough this statute does protect some information from public disclosure, defendants have not pointed to, and the court has been unable to locate, any authority which supports their assertion that a police officer’s disciplinary files must remain confidential under all circumstances[.]”); *Cannon v. Lodge*, No. 98-2859, 1999 U.S. Dist. LEXIS 12358, \*3 (E.D. Pa. Aug. 6, 1999) (explaining that internal affairs reports were not exempted from disclosure under the federal Freedom of Information Act because there was “no ongoing criminal investigation and the information is not covered by other privileges”); *Kirschner v. Freedom of Info. Comm’n*, No. CV 970567162, 1998 Conn. Super. LEXIS 110, \*1 (Conn. Super. Ct. Jan. 15, 1998) (dismissing appeal of Freedom of Information Commission’s decision directing the Department of Public Safety to disclose an internal investigation report relating to the shooting of a civilian by a Connecticut State Trooper); *In re Stewart*, 00-ORD-97 (Kent. 2000) (quoting Op. Att’y Gen. 88-25) (“[I]n weighing the right of individual privacy against the right of the public to monitor the conduct of its servants, . . . complaints of misconduct and consequent disciplinary action, or the decision to take no action, are matters of legitimate public concern which outweigh the privacy rights of the public servant.”).

Courts in these jurisdictions have explicitly rejected the notion that an officer that is the subject of an internal affairs investigation for misconduct that occurred while he was on the job maintains a sense of privacy in records produced as a result. *See State of Haw. Org. of Police Officers*, 927 P.2d at 407 (“[I]nformation regarding charges of misconduct by police officers in their capacities as such . . . is not ‘highly personal and intimate information.’”); *Burton*, 594 S.E.2d at 894-95 (noting that the records requested did not concern the officer’s private sexual conduct, but rather his on the job activities in which the public had a significant interest). As the Montana Supreme Court stated, “the conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should

know.” *Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 859 P.2d 435, 439 (Mont. 1993).<sup>8</sup>

Furthermore, courts in four of these states, in deeming such records releasable, have explicitly rejected the argument that internal affairs records are exempt from disclosure because they are personnel records. Like Maryland, Massachusetts’ public information law explicitly exempts “personnel records” from disclosure, but fails to define what this term precisely covers. In *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, the Chief of Police of Worcester, like MSP, argued that all records produced during internal affairs investigation were personnel files and thus exempt from disclosure. 787 N.E.2d at 605. The Court explicitly rejected this argument explaining:

We reject the city’s contention that, viewed as a whole, the entire internal affairs file is exempt “personnel [file] or information” because it is a “disciplinary report” relative to a specific complaint about a specific police officer’s actions. Definitional alchemy is not a substitute for particularized review. That the internal affairs process might lead to discipline, or even criminal action, does not transmute all materials in an internal affairs investigation into a disciplinary report, disciplinary documentation, or promotion, demotion or termination information. Such a broad construction ignores the essential directive that the legislative term “personnel [file] or information” derives its meaning from the nature or character of the document, not from its label or its repository.

*Id.* at 607-08; *Fincher*, 497 S.E.2d at 635-37 (Ct. App. Ga. 1998) (“[The] Supreme Court of Georgia [has] concluded that placement of the records of GBI investigations of several

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<sup>8</sup> Though not central to these decisions, courts in the context of civil discovery have also rejected the idea that the release of such records might in some way deter officers from honestly discussing allegations of misconduct with investigators. Rather, “the alternative . . . [i.e.] some possibility of disclosure” would more likely incite candor:

In short, officers will feel pressure to be honest and logical when they know their statements and their work product will be subject to demanding analysis by people with knowledge of the events under investigation and considerable incentive to make sure the truth comes out. . . . Thus there is a real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report.

*Kelly v. San Jose*, 114 F.R.D. 653, 665 (N.D. Cal 1987).

employees of the State Farmer's Market in Macon, Georgia, into the personnel files of the investigated employees did not automatically transform the investigation records into personnel records.”); *Guyer*, 38 S.W.3d at 414 (“The City’s . . . proposition that all records of internal investigations of police officers can be closed as personnel records is misplaced.”); *Lessley v. City of Madison*, 2009 U.S. Dist. LEXIS 15695, at \*6-12 (finding that Indiana’s personnel records exemption did not protect internal affairs records from being unsealed and thus made generally available to the public).

The legislature of a fifth state, Pennsylvania, so as to avoid any confusion as to what documents it intended to be classified as personnel records, has explicitly set out that certain classes of internal affairs records are not personnel records. PA. STAT. ANN. TIT. 43, § 1321 (“[T]he term “personnel file” does not include records of an employee relating to the investigation of a possible criminal offense[.]”).

Finally, we note that of the twelve states that have concluded records of internal affairs’ investigations cannot be released, the majority concluded so only after the state’s legislature had explicitly addressed the matter. In the case of seven states, the relevant state statute either defines personnel records to include internal affairs investigations or explicitly discusses them in a separate section of the state’s public information statute. 5 I.L.C.S. 140/7(1)(n) (“providing an exemption for “[r]ecords relating to a public body’s adjudication of employee grievances or disciplinary cases. . . . ”); N.A.C. § 284.718 (excluding from disclosure “information in the file or record of employment of a current or former employee which relates to his [c]onduct, including any disciplinary actions taken against him”); N.J.S.A. 47:1A-10 (“[T]he personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access[.]”); 51 OKL. ST. § 24A.7 (“A public body may keep personnel records confidential . . . [w]hich relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation”); O.R.S. § 192.420 (stating that personnel discipline actions are specifically excluded); R.I.



GEN. LAWS § 38-2-2 (protecting “information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body”); WIS. STAT. § 19.36(10)(b) (exempting “information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.”). In contrast, Maryland’s personnel records exemption, as well as the remainder of the MPIA, is silent as to the release of internal affairs investigation records. Accordingly, given the failure of Maryland’s legislature to speak explicitly to the matter, the MPIA should not be broadly construed to prohibit the release of all internal affairs records – a conclusion we have no reason to believe the legislature intended.

### **CONCLUSION**

For the foregoing reasons, we respectfully request that the Court of Special Appeals reverse the decision of the Circuit Court and order the release of the records requested by Plaintiff Teleta S. Dashiell.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of May, 2012, two copies of the foregoing Motion were mailed, postage prepaid to:

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