

Secret Police and the Mysterious Case of the Missing Tort Claims

MARC L. MILLER AND RONALD F. WRIGHT†

Sometimes police officers get it wrong. They got it wrong in a Chicago neighborhood in 1997, when officers obtained a search warrant for a single-family residence where they believed that “Troy,” a 30-year-old man, was selling large amounts of cocaine base. When they arrived at the address on the warrant they discovered that it was split into three apartments and the woman living on the first floor said that nobody named Troy lived in the building. She mentioned instead that a man named Jacobs lived in Apartment Two, and had recently returned home after a stay in the hospital. Nevertheless, the officers proceeded to Apartment Two and broke down the door without knocking.

The police found Jacobs, a 60-year-old man, standing inside. An officer pointed a gun at his head and asked if he was Troy. Jacobs said he was not, and added that nobody named Troy lived in the apartment while showing his identification to the officers. For the next ten minutes, while one officer kept his gun pointed at Jacobs’ head, the others began to search the apartment. Encouraged by their discovery of a small amount of cocaine in the dresser located in the bedroom where Jacobs’ grandchildren slept, they called drug dogs and continued to search the apartment for three hours. The officers damaged Jacobs’ furniture and other property, but found no further drugs or evidence. Ulti-

† Professor of Law and Associate Dean for Faculty and Scholarship, Emory University School of Law; Professor of Law, Wake Forest University School of Law; Editors, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (2d ed. 2003). We thank Virginia Iglesia, Bradley Gardner, Stacy Gomes, and Ilana Mark for superb research assistance. We appreciate suggestions from Jennifer Collins, Kay Levine, Pam Karlan, and Robert Schapiro. The catalyst for this essay came from comments by Bob Weisberg in print (in this journal) and in conversations asking whether we believed (as our casebook materials implied) that tort remedies have little role in constraining police departments. See Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 *BUFF. L. REV.* 909, 927-928 (2001).

mately, the government filed no charges against Jacobs or his grandchildren.¹

What is the best legal response to police misbehavior of this sort, something serious but preventable? There are three standard options. First, police are regulated by the Fourth Amendment to the United States Constitution and analogous state constitutional provisions, and these constitutional constraints are enforced largely by excluding the ill-gotten evidence from any criminal trial of the person who was improperly searched. Second, police abuse is limited by tort claims—the traditional remedy for such claims before exclusion became the national norm.² Third, police behavior is reviewed by internal affairs divisions, and sometimes internal or external police review boards, supplemented by public scrutiny through the media and the ballot box.

Occasional modern legislative and academic proposals give tort suits a more central role in regulating police misconduct.³ Such proposals provoke swift and certain scholarly responses: they will never work, it is said, because various legal doctrines and litigation realities prevent tort suits from ever becoming a reliable technique to regulate police misconduct.⁴ The trouble with these claims and counterclaims is their blissful ignorance about the numbers, kinds, and outcomes of actual tort suits against police, which are maddeningly hard to pin down. Do tort suits offer a viable remedy at all, or should they be dropped from the list of options?

This essay highlights the difficulty of determining what role tort suits do play—and therefore what role they can play—in regulating police abuse. The goal of this essay is to highlight a mystery—a set of seemingly inconsistent facts about tort suits against police officers and police departments. The mystery emerges from an effort to answer the

1. See *Jacobs v. City of Chicago*, 215 F.3d 758 (7th Cir. 2000).

2. While popular opinion assumes that exclusion was adopted as a remedy for illegal searches and seizures in *Mapp v. Ohio*, 367 U.S. 643 (1961), the remedy of exclusion was applied earlier within the federal system in *Weeks v. United States*, 232 U.S. 393 (1914), and in some states. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 335-50 (2d ed. 2003).

3. See AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-58.

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

following simple question: how often are tort claims filed against police officers and police departments, and with what results?

One logical starting point would be a search for published judicial decisions describing and affirming civil judgments against police officers or police departments. In the first act of our mystery, we see that it is quite rare to find any published decisions demonstrating that civil claimants ever win judgments against police officers or police departments. What published decisions reveal is extremely (some would say absurdly) high doctrinal barriers to tort suits against the police. This doctrinal picture is echoed in active scholarly debates about the proper scope of tort immunities. The picture is also confirmed by a host of hard-boiled realists (including plaintiff's attorneys) who say that jurors will always side with cops over criminals. In sum, the published caselaw, scholarly debates and the view from the field bolster a simple conclusion to the simple question: tort suits against police officers are rare, they are usually dismissed at an early stage, and they hardly ever result in successful verdicts for plaintiffs.

Not so fast, Inspector Clouseau. In the second act of today's mystery, we sample newspaper reports of civil settlements by police departments for abuse claims against officers and departments. These news stories report significant and sometimes immense sums being paid out to settle abuse claims, as well as payment for many smaller claims. And there are other clues that tort suits may be an important component in the remedies for police abuse, even though this reality hides between the lines of government litigation statistics and out of sight in official public records. The discoverable sources typically reveal only the bare fact that lawsuits have been filed and resolved, and sometimes the gross amount of the settlement. The sources remain silent or slippery, however, when it comes to the detailed basis for the claim and the terms of the settlement.

A few scholarly articles (a minor slice of the total literature on tort suits against police) hint at regular tort claims against police. Some attorneys even hold themselves out as specialists in police abuse cases—Johnnie Cochran made a national reputation with such a practice, long before O.J. assembled his legal Dream Team. In other words, the widespread belief that tort suits against police are difficult and

rare, and a trivial part of the “remedy” pie is wrong—it is a myth.

In our third act, we interrogate the documents, facts and perceptions about tort litigation. We consider why the published cases seem so out of line with news accounts of successful tort actions, and muse on why the perceptions of both lawyers and scholars seem so far from the realities of practice.

The myth of virtually non-existent tort suits fits most of the readily observable facts. While the full explanation for the creation of any complex myth would involve a close study of how collective beliefs emerge and take hold, we think this myth is best explained by the absence of ready public information and by the decision of those who know better not to share this knowledge. One possible reason for the silence of the documents is the decision by the parties to seal litigation documents, including settlement arrangements. Another possibility is that some (and perhaps many) claims are settled before a complaint is filed. But the silence of the documents would not be much of a problem if the parties could speak. Unfortunately, the parties (with the puzzling cooperation of the judge and the media when lawsuits are filed) often keep the details of tort claims hidden. There is a conspiracy to protect the myth.

Thus, the myth stands largely unchallenged, with the most important and revealing features of litigation against the police hidden in the dark: who pays, and who is held accountable for the payments? Are payouts a significant portion of the police budget, or do settlements come out of the general revenues for the city? And even if settlements are a significant expenditure, are there mechanisms to translate judgments into changes in policy or personnel? So long as tort actions against the police remain secret, the myth is likely to stand.

The investigative trail leads to two strong policy implications. First, legislatures should make it illegal for courts or any city agency or agent (including the city’s lawyers) to seal any settlement of a tort suit or potential claim against police officers and police departments. Second, legislatures should require annual reports from police departments and cities, listing the number of civil complaints and their status, any agreements made under the threat of litigation, a list and totals of any funds paid out, and policy changes made in settlement of a claim. Our Epilogue suggests how

some heroes of the law can destroy the harmful collective conspiracy of the “secret police” and the harmful myth the conspiracy has sustained.

ACT I

THE CASE OF THE MISSING CASES

Until the middle of the twentieth century, tort suits were the remedy of choice in the United States for official wrongdoing such as unlawful searches and seizures.⁵ Yet an available remedy does not necessarily make an effective remedy, and there were reasons in the middle of the twentieth century to suspect that few plaintiffs filed civil suits against police officers and even stronger reasons to suspect that the suits did not succeed.

The rarity of successful tort suits gave some courts a reason to shift towards a different remedy for police misconduct, the exclusionary rule. In *People v. Cahan*,⁶ decided six years before *Mapp v. Ohio*⁷ and relied upon by the United States Supreme Court,⁸ California Supreme Court Justice Roger Traynor explained that the court was “compelled” to adopt an exclusionary rule

because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers. . . . Experience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. . . . [R]eported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent.

Even when the Supreme Court enshrined the exclusionary rule as the primary remedy for police wrongdoing, tort suits remained available as an option. Tort suits remained especially important where the exclusion remedy was irrelevant because the plaintiff was not charged with a crime.⁹

5. See *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765).

6. 282 P.2d 905 (Cal. 1955)

7. 367 U.S. 643 (1961).

8. *Id.* at 651, 682.

9. See *id.*

But while tort suits remain available in theory, many barriers have been created, mostly by the U.S. Supreme Court, to civil claims in general, and to claims under 42 U.S.C. § 1983 in particular. The legal barriers to tort suits against the police stack up to make a successful climb for plaintiffs very difficult. Individual officers benefit from qualified immunity, a doctrine that allows recovery only for clear violations of settled law.¹⁰ Recovery from the police department itself is limited in state court by traditional sovereign immunity doctrine, which insulates the government from liability unless it waives the protection.¹¹ Meanwhile, in federal court, suits against local governments and police departments cannot succeed based only on one incident of wrongdoing by individual officers: the plaintiff must prove an unlawful policy or practice by the department.¹²

On top of these legal difficulties, plaintiffs in police misconduct cases face the practical challenge of asking a jury to favor the factual claims of a person who was a suspect in a criminal investigation over the competing version of events offered by a police officer. Plaintiffs also must call police officers as key witnesses to the events in dispute and these witnesses are not eager to provide damaging testimony against their fellow officers, and indeed may provide false testimony.¹³ The damages for violations of privacy and proper police procedure can be difficult for juries to value, leading to nominal payouts in some of the rare successful

10. See *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Hope v. Pelzer*, 536 U.S. 730 (2002); see generally Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995). Claims against individual officers were not available in federal court under 42 U.S.C. § 1983 until *Monroe v. Pape*, 365 U.S. 167, 187 (1961), which held that individual officials could be acting "under color of law" within the meaning of the statute, even when their conduct also violated state law.

11. The waivers exist, but they are quite narrow and do not typically reach many actions of individual police officers. See MILLER & WRIGHT, *supra* note 2, at 391-92.

12. In federal court, respondeat superior liability is not available against the employer of tortfeasor officers. See *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

13. COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMM'N REPORT 36 (1994) (known as the Mollen Commission Report, and famously asserting that police perjury in New York was so common that it has become known as "testilying"). See generally Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004).

cases. Such practical challenges in the police misconduct cases make it hard to find an attorney who is willing to take such cases on a contingent basis.¹⁴

In light of these settled doctrines and widely acknowledged practical hurdles, one might predict that tort suits against police officers or police departments will be rare events. We set out to learn how often civil suits are filed against the police, and with what results; we quickly found that the question is simply stated, but not simply answered.

Where would reports of successful judgments against police departments be found? One obvious and familiar source would be published decisions, either from the trial court or on appeal. While published decisions would reflect only a small slice of actual practice, the significant interests at stake ought to generate plenty of reported cases.

Despite the long history of tort actions to remedy unconstitutional and excessive police action, it is extremely difficult to find any reported cases that confirm actual payouts to plaintiffs. Indeed, there are significantly more law review articles discussing tort actions than reported decisions that affirm judgments for plaintiffs.

Granted, the reported opinions do not reflect a complete shutout of plaintiffs. There are a handful of decisions reporting favorable jury verdicts for claimants, as in the 1995 decision in *Urena v. City of New York*.¹⁵ In *Urena*, residents of an apartment filed the suit after the police entered their dwelling without a warrant, and the jury awarded \$40,000 in compensatory damages.¹⁶ But the *Urena* opinion illustrates a feature that undermines the power of the rare plaintiff victories appearing in the pages of judicial reporters: the opinions about successful claims too often deliver a thin account of the facts. They leave us with only a sketchy idea of what the police officers did wrong, or what the department did (or failed to do) to contribute to the problem.¹⁷

14. See Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 164-65, 199-200 (1993); 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 (1993).

15. 1995 U.S. Dist. LEXIS 3837 (S.D.N.Y. Mar. 28, 1995).

16. *Id.* at *1.

17. See *Gaytan v. Kapus*, 181 F.R.D. 573 (N.D. Ill. 1998) (false arrest and intentional infliction of emotional distress); *Lewis v. Goodie*, 798 F. Supp. 382 (W.D. La. 1992) (excessive force, beating suspect); *Johnson v. Suffolk County*

Given this feature, these opinions are both too infrequent and too conclusory to allow any judgments about the extent of policing problems or the effectiveness of the tort remedy.

A different problem afflicts those exceptional opinions that offer a richer factual basis to explain a plaintiff victory. Too many of these opinions describe police misconduct so extreme and blatant that it is difficult to draw any general lessons about recurring problems with police behavior.¹⁸ Opinions describing such shocking events sound idiosyncratic and offer few lessons about preventing common policing problems.

Other reported decisions that qualify as judgments for plaintiffs reveal the meager payoff for victory that awaits many plaintiffs. The cases mention nominal damages awarded to plaintiffs, or show appellate courts ready to reduce the amount of an award obtained at trial.¹⁹ For example, in *Hygh v. Jacobs*,²⁰ after a successful trial outcome for the plaintiffs, the trial judge granted the defendants' mo-

Police Dep't, 665 N.Y.S.2d 440 (N.Y. App. Div. 1997) (unlawful arrest); *Evans v. Walker*, 187 So. 189 (Ala. 1939) (assault and battery).

18. See *Brown v. Bryan County, Okla.*, 219 F.3d 450 (5th Cir. 2000) (Plaintiff recovered "extensive" damages for improper use of force, causing severe knee injuries, by reserve officer who was riding along with full-time officer and was not trained in proper technique for arrest; plaintiff was stopped after turning around to avoid a roadblock.); *Kennell v. Gates*, 215 F.3d 825 (8th Cir. 2000) (woman arrested based on mistaken identification; mistake discovered by fingerprint identification section of department, but plaintiff not released from jail for over two days; jury awarded \$10,000); *Martinez v. Gonzalez*, 152 F. Supp. 2d 1050 (N.D. Ill. 2001) (gymnastics instructor arrested by off-duty officer after scolding officer's son for playing on equipment; jury awarded \$28,000); *City of Birmingham v. Thompson*, 404 So. 2d 589 (Ala. 1981) (prisoner beaten by police officers for refusing to change into prison uniform, award of \$25,000); *Blackwood v. Cates*, 254 S.E.2d 7 (N.C. 1979) (mayor ordered police to arrest a man who had consensual sexual intercourse with the mayor's daughter; jury awarded \$120 in actual damages and \$70,000 in punitive damages).

19. See *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir. 2000) (city not liable for punitive damages); *Ermine v. City of Spokane*, 23 P.3d 492 (Wash. 2001) (jury awarded one dollar in nominal damages, court affirmed award of fairly substantial attorneys' fees to plaintiffs); *Fisher v. Rumler*, 214 N.W. 310 (Mich. 1927) (reducing damages for false imprisonment and assault and battery from \$1000 to \$600); *City of Miami Beach v. Bretagna*, 190 So. 2d 364 (Fla. Dist. Ct. App. 1966) (award of \$900 reduced to \$750); Peter Geier, *Prince George's Cops Must Pay for Prank*, THE DAILY RECORD (Baltimore, Md.), Aug. 27, 2002, at 1B (discussing a case regarding remittitur from \$647,000 to \$240,000).

20. No. 88-CV-406, 1990 U.S. Dist. LEXIS 15499 (N.D.N.Y. Nov. 16, 1990) (affirming \$216,000 for excessive force and granting new trial on false arrest unless plaintiff accepts reduction from \$108,000 to \$1,000 in damages).

tion for a new trial on the false arrest claim, but stated that the verdict for the plaintiffs could stand if the plaintiff accepted a reduction of damages from \$108,000 to \$1,000.

Much more common than any of the caselaw varieties described so far are the published opinions that rule for plaintiffs who lost at the pre-trial stage, granting those plaintiffs the opportunity to make their factual claims to a jury, however dubious those factual claims might appear to the court.²¹ The *Jacobs* case from Chicago, described at the start of this essay, falls into this category. Despite the compelling facts, the plaintiffs faced a serious fight in the Seventh Circuit just to establish their chance to take the case to trial. Pre-trial winners such as *Jacobs* virtually never appear later in the reported cases with an actual verdict and damage award in hand. Potential but unrealized victories for plaintiffs are especially common in federal litigation because the parties can file interlocutory appeals on questions such as the availability of immunity for some defendants.²²

Most common of all are the plaintiffs who lose their claims in the reported decisions, most of them with claims dismissed before they ever reach trial.²³ Many lose when defendants file motions to dismiss or motions for summary judgment based on claims of qualified immunity.

The story told in the published cases is largely echoed in the scholarly literature. Academic surveys of reported police tort cases note that the judicial opinions discussing the plaintiff's right to a future trial are far more common

21. See, e.g., *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988) (allowing abused ex-wife to take to trial her claim that police failed to detain her police officer ex-husband, who later raped and stabbed her); *McKelvie v. Cooper*, 190 F.3d 58 (2d Cir. 1999) (remanding because the detention of 19 patrons of bar for 50 minutes on floor during execution of search warrant, including groping of crotch, "might have been unconstitutional"); *Miller v. Smith*, 220 F.3d 491 (7th Cir. 2000); *Berg v. County of Allegheny*, 219 F.3d 261 (3d Cir. 2000); *Miller v. Kennebec County*, 219 F.3d 8 (1st Cir. 2000); *Shipp v. McMahon*, 199 F.3d 256 (5th Cir. 2000).

22. See *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000) (denying defendants' interlocutory appeal on immunity issue); *Moore v. City of Harriman*, 218 F.3d 551 (6th Cir. 2000); *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000) (denies defendant interlocutory appeal on immunity issue), *overruled on other grounds* by 258 F.3d 867 (8th Cir. 2001).

23. See *Semple v. City of Moundville*, 195 F.3d 708 (4th Cir. 1999); *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000); *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000).

than cases evaluating a past verdict for the plaintiff.²⁴ The extensive scholarly debates over the scope of qualified and sovereign immunity happen against a consistent belief that those doctrinal barriers are high.

Lawyers, too, share a widespread belief that tort suits against police departments and officers are difficult to win. In addition to the doctrinal issues, lawyers in many jurisdictions describe a sympathy on the part of judges and juries for police officers and a suspicion about any tort claimant who was engaged in illegal behavior. Few lawyers describe tort cases against police as a profitable practice.

If victorious tort suits against police departments and officers are rare, as the published caselaw and popular wisdom suggest, then the attention of scholars and policy-makers concerned with police abuse and remedies should either invigorate current tort remedies, design new tort remedies, or look to other remedies as the only realistic options. Not all of the evidence, however, suggests that tort suits against police overwhelmingly fail. An important but outdated empirical study and newspaper reports suggest that there are a fair number of such suits. The next part of this essay considers that evidence, and the additional mysteries it generates.

ACT II

"FOLLOW THE MONEY"²⁵

A. News Stories

News reporters tell a different story from judicial reporters. While judicial opinions about successful tort suits are rare, newspapers regularly carry stories of settlements or jury verdicts in civil suits dealing with officer miscon-

24. See Seth Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 496 (1997) (published cases "did not so much announce final dispositions as set the stage for future settlements or trials"); Victor E. Kappeler et al., *A Content Analysis of Police Civil Liability Cases: Decisions of the Federal District Courts, 1978-1990*, 21 J. CRIM. JUST. 325 (1993); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 793 (1979) (covering reported cases from 1970 to 1977).

25. ALL THE PRESIDENT'S MEN (Warner Studios 1976).

duct. Indeed, the stories suggest that suits against the police are routine matters in many cities, and that city budgets make room for a steady stream of settlement payments to plaintiffs.²⁶

The most thorough stories in many newspapers about lawsuits against the police deal with spectacularly large payments to the plaintiffs. Juries make some of these awards,²⁷ but more commonly (as with any civil litigation in a world of disappearing jury trials) the awards grow out of settlement negotiations between the parties. For instance, attorneys for the City of Miami settled a claim in 1993 for over \$7.5 million, based on allegations that officers beat a black man and choked him into a coma.²⁸ The largest cases tend to involve serious physical injuries or sexual misconduct by officers. The bigger payments also occur when officers act based on racial prejudice or some personal hostility to the plaintiff.²⁹

Although the larger payouts occasionally attract the full attention of news reporters, a steady stream of news ac-

26. The news stories also confirm the ongoing health of a specialized legal practice in this field. See Kevin Flynn, *How to Sue the Police and Win*, N.Y. TIMES, Oct. 2, 1999, at B1 (discussing "growth industry").

27. See Margaret Cronin Fisk, *Cops Take Beating in Suits As Juries Turn Distrustful*, FULTON COUNTY DAILY REP., June 27, 2001 (\$7 million jury verdict for wrongful shooting of teenage suspect); John Caher, *Police Brutality Case Gives Schenectady Another Beating*, TIMES UNION (Albany, N.Y.), Sept. 22, 1994, at B1 (arbitrator awards \$1.67 million to plaintiff).

28. See *\$7.5 Million for Brutality Victim*, PITTSBURGH POST-GAZETTE, July 1, 1993, at A1 (\$7.5 million current payment and agreement to pay all future medical bills, possibly totaling \$34 million); Diana Marrero, *Three Women Sue Miami-Dade, Say They Were Strip-Searched*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 6, 2004, at 1B (likely settlement of claims relating to strip searches at jail after arrest); Patrick McGreevy, *City Settles Excess Force Lawsuit*, L.A. TIMES, Mar. 31, 2004, at B8; *Judge OKs Settlement in 2000 Convention Suit*, L.A. TIMES, Cal. Metro Desk, June 17, 2004, at B3; Benjamin Weiser, *New York City Agrees to Pay in Death Suits*, N.Y. TIMES, Oct. 2, 1998, at A23 (\$2.9 million settlement in police choking case).

29. See Louie Gilot, *City OKs Settlement for Police Abuse Suit*, EL PASO TIMES, Jan. 3, 2003, at 1B (sodomized suspect); Heather McDonald, *Police Brutality Case Ends in Settlement: Family to Receive \$450,000 for Christmas Eve Incident*, OAKLAND TRIBUNE, Mar. 22, 2004 (officers called to party on noise complaint allegedly beat family members, made racial slurs, and invented charges); *A \$325,000 Settlement Approved by the Finance Committee*, CHICAGO SUN-TIMES, May 21, 2004 (plaintiff alleges he was shackled in his cell and beaten by officers); Steve Duin, *Even Blind Old Ladies Terrify the Cops*, OREGONIAN (Portland), Apr. 25, 2004 (\$145,000 settlement for pepper-spraying and Tasing of 71-year-old blind woman who did not follow police orders).

counts depicts a more prosaic reality about tort suits against the police. These stories describe only limited details about the alleged police misconduct and mention relatively small verdicts or payments.³⁰ In some states, statutory damage caps keep the verdicts small.³¹

For those of us interested in the overall role of tort cases in regulating police conduct, the most useful news stories do not merely recount the facts in a single case, but track trends across time. The overview stories confirm that police tort suits add up to a major public expense, even though the amount involved in any single case might be relatively small.³² In San Francisco between 1990 and 1994, the city settled 25 cases out of court for \$1.54 million, usually in amounts of \$10,000 to \$20,000. As for the 31 cases contested in court, city attorneys won all but two, and the city paid \$234,600 to the two successful plaintiffs.³³

The trend stories also tell us that practice varies around the country. The unadorned numbers show some large total payments in cities such as Los Angeles, Miami, Philadelphia, and New York City, and much smaller total payments elsewhere.³⁴ From 1994 to 1996, for example, New

30. See Lawrence Buser, *Judge Rules Police at Fault for Injuries*, COM. APPEAL (Memphis, Tenn.), July 3, 2004, at B1 (\$35,000 award to plaintiff with broken cheekbone cause by officer putting his foot on arrestee's shoulders, neck or face when he was on ground being handcuffed).

31. See Lawrence Buser, *Germantown Police Negligent in Fatal Chase*, COM. APPEAL (Memphis, Tenn.) Jan. 20, 1998, at A1 (statutory cap at \$130,000); Dan Christensen, *Blood Pending Police Misconduct Cases*, BROWARD DAILY BUS. REV., Nov. 5, 2001, at A1 (city liability in Florida limited to \$100,000 per person; average recovery after trial in Miami for brutality claims was \$26,000).

32. See 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., May 1996, at 62; *Broken-Kneecaps Policing: Police Ethics in New York*, 269 THE NATION 3 (Oct. 11, 1999); Editorial, *The Cost of Police Brutality*, N.Y. TIMES, Apr. 22, 1995, at A22 (settlements and judgments cost New York City \$87 million over five years).

33. See Dennis Opatrny, *Little Danger of Sudden Wealth in Suing the SFPD, City Fights Claims for Misconduct Hard, Rarely Pays Much*, SAN FRANCISCO EXAMINER, June 11, 1995.

34. See Curriden, *supra* note 32; Jamison S. Prime, *A Double-Barrelled Assault: How Technology and Judicial Interpretations Threaten Public Access to Law Enforcement Records*, 48 FED. COMM. L.J. 341, 352-53 (1996) (discussing increase in payments by Los Angeles during 1980s); Christensen, *supra* note 31 (Miami paid \$17.8 million from 1990 to 2001 to resolve 110 federal and state lawsuits against police); Kevin Flynn, *Legal Claims Filed Against Officers Decline Sharply*, N.Y. TIMES, July 21, 2000, at A1 (city paid \$40 million to resolve police tort claims in 1999); HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE:

York City paid about \$70 million as settlements or judgments in claims alleging improper police actions. In 1993, Detroit spent more than 8 percent of its operating budget, or \$27.5 million, on police misconduct damages. By contrast, San Jose, California, paid only \$27,500 in settlements and judgments involving police misconduct cases in 1993 and \$71,500 in 1992.³⁵

Trends in the police tort litigation, especially those dealing with the smaller cases, receive attention both in traditional news sources and in reports from advocacy groups.³⁶ The trends are crucial to identifying police misconduct that deserves the greatest attention during training and management. Until the public assembles the information available from a mosaic of cases, how else can it identify renegade officers, or patterns and practices that the department must change? Similarly, pattern information should help lawyers and the public assess whether the plaintiffs have real complaints or are filing lawsuits for their nuisance value.

The news stories reveal a far more active world of tort litigation than we find pictured in judicial opinions. But certain details about the litigation tend not to appear in the news stories, details that could help us judge whether the litigation is effectively regulating the police. Some of the details deal with the nature of the police conduct: while some stories give a full account of the incident leading to the plaintiff's complaint, others simply place the police conduct within a general category such as "false arrest."

An even more important gap in the stories involves the exact terms of the settlement. Stories commonly report a total amount but offer no details about who will pay the amount.³⁷ Does any of the award come out of the officer's pocket? Do any payments flow directly out of the police department budget, giving the department a vivid reason to re-evaluate its training and supervision of officers? A good number of stories mention payments to be made by the city, but only a few offer details about the relevant budget lines or insurance policies that cover the payments to plaintiffs.³⁸

POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), *available at* <http://www.hrw.org/reports98/police/toc.htm> (survey of cities).

35. Opatrny, *supra* note 33.

36. See HUMAN RIGHTS WATCH, *supra* note 34.

37. See Buser, *supra* note 30.

38. See Janine DeFao, *Oakland Settles "Riders" Suits: Record \$10.5 Million*

These aspects of tort litigation hold the key to the mystery of whether the litigation is effective at all in changing police misconduct, and readers of the newspaper cannot solve the mystery.

B. *Empirical Studies*

If the stories in newspapers leave important gaps in what we can see about the overall effect of the litigation, perhaps court-maintained statistics (and scholarly reviews of those statistics) can fill the gaps. For all of the substantial literature on remedies for police abuse and tort remedies (especially section 1983 claims) in particular, few scholars have tried to assess just how many cases are filed, or the outcomes of those cases. A notable exception is Professor Theodore Eisenberg, who conducted a series of empirical studies in the 1980s on civil rights claims in federal court.

In a path-breaking 1982 article Eisenberg set out to assess the "widespread perception that section 1983 cases are overwhelming the federal courts."³⁹ Eisenberg looked at cases in the Central District of California (which includes Los Angeles) in 1975 and 1976. He concluded that "the sheer volume of section 1983 cases poses no serious threat to the federal court system. Section 1983 cases neither place unbearable burdens on the courts nor direct massive resources to relatively minor claims."⁴⁰

From our perspective, what is striking about Eisenberg's findings is not the relatively small amount of civil rights claims compared to all civil filings, but the high proportion of civil rights claims made against police departments. Eisenberg found that "[o]f the 276 non-prisoner cases, 117 alleged unlawful arrest, assault or battery by the

Payout—Police Reforms Required, S.F. CHRON., Feb. 19, 2003, at A1; Mike Fuchs, *City Appeals Landmark Verdict*, GREENSBORO NEWS & RECORD, Oct. 1, 2003, at B1 (regional insurance pool to pay \$1.5 million judgment); Rene Sanchez, *L.A. Eyes Tobacco Windfall to Pay Police Corruption Liabilities*, WASH. POST, Feb. 18, 2000, at A4 (Mayor proposed that the city spend most of the \$300 million that the city would receive from settlement of litigation with tobacco companies to pay for expected liabilities in police misconduct suits arising out of Rampart scandal.).

39. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 483 (1982).

40. *Id.* at 524.

police, and/or unlawful search and seizure.”⁴¹ Eisenberg treated the presence of a significant number of cases against the police as a validation of the use of federal civil rights laws:

Looking beyond the face of the complaint to ascertain more about the nature of section 1983 cases reinforces the conclusion that section 1983 cases usually involve important constitutional claims. The litigants and courts take most seriously those cases involving deprivation of rights by the police. The 117 police misconduct cases generated thirty-three settlements or trials and nineteen dismissals by stipulation.⁴²

Eisenberg conducted a follow-up study with Stuart Schwab providing more detailed information than the original study and incorporating additional data collected in the same district for 1980-81.⁴³ Again, Eisenberg and Schwab found that a significant proportion of all non-prisoner federal civil rights cases were actions against the police:

In numbers of cases filed, actions against the police dominate. During the three years studied, they constituted 170 out of 464 (37%) of nonprisoner constitutional tort cases. Police actions were more than twice as numerous as actions in the next highest category, employment, of which there were 76 cases (16%).⁴⁴ No other category accounted for more than 16% of those filed

41. *Id.* at 536. Eisenberg describes the remainder of the 276 non-prisoner cases as follows:

Another twenty-four cases alleged malicious prosecution or judicial error in earlier proceedings. Plaintiffs in twenty-one cases asserted first amendment violations and forty-six charged employment discrimination or some other form of discrimination. Challenges to the constitutionality of ordinances, statutes, or similar policies (a category that overlaps with other categories) arose in eighteen cases. Thirty-three cases involved due process claims and twenty-seven fell into the inevitable “miscellaneous” category.”

Id. at 536-37.

42. *Id.* at 537.

43. Theodore Eisenberg & Stuart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 658 (1987).

44. *Id.* at 690-91. Eisenberg and Schwab found that police cases were one of two categories that showed the most “progress” through various procedure steps: “[A]mong categories with substantial filings, police and employment cases had the highest rates of answers, interrogatories, pretrial conferences, depositions, and trials.” *Id.* at 691.

Eisenberg and Schwab expanded their study still further by incorporating results from two additional districts outside of California for the same time period (1980-81).⁴⁵ Again, they found that "cases brought against the police are the largest and most successful class of constitutional tort litigation."⁴⁶

Despite finding that "[a]ctions against the police account for about thirty percent of all constitutional tort claims,"⁴⁷ Eisenberg and Schwab suggest their own skepticism about constitutional tort actions against the police as a significant remedy for police misbehavior:

Interestingly, [our study] reveals a modest number of nonprisoner actions against the police, yet constitutional tort actions figure prominently in the debate about alternative mechanisms for enforcing the fourth amendment. Crude extrapolation from [our study] suggests that nonprisoners annually file roughly 2,000 constitutional tort actions against the police in federal court. This must be a tiny fraction of all contested fourth amendment issues. If this extrapolation accurately depicts the low number of constitutional tort actions against the police, their possible role as an alternative to the exclusionary rule needs reevaluation.⁴⁸

Though we admire the work of Eisenberg and Schwab, we do not agree that the importance of tort remedies turns on the proportion of such claims to "all contested fourth amendment issues." Exclusion is much easier to pursue, and will for some defendants satisfy their legal needs. Many fourth amendment claims will offer little basis for tort

45. Stuart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988).

46. *Id.* at 734.

47. *Id.* at 777. Eisenberg and Schwab note that a substantial fraction of the civil rights cases against the police are based on claims for false arrest or loss of liberty.

48. *Id.* at 735. One more recent study looking at a nationwide sample of section 1983 litigation in 1991 suggested a total number of federal claims against police at about the same level estimated by Eisenberg and Schwab. See ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEPT OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (Dec. 1995). Hanson and Daley concluded that cases alleging assault by an arresting officer constituted 6 percent of all 1983 suits filed. That percentage would amount to about 1,500 of the then roughly 25,000 section 1983 filings. Cases alleging assault by an arresting officer take longer to process than any other type of section 1983 claim (an average of 721 days). The study concluded that plaintiff success on these claims is relatively rare but is difficult to pinpoint.

claims even were immunity doctrines more welcoming. Potential damages for many fourth amendment claims will lead civil rights lawyers to take such claims only in strong cases.

But the behavior shaping function of tort claims may exist so long as there are a decent number of successful cases. We read the combination of news stories about payments for claims against police and the Eisenberg studies to suggest that civil rights claims against police may be a very substantial part of the remedy story—exactly the opposite of visible case law and hard-to-interpret federal data. Remember that Eisenberg's study looked only at federal claims: state tort claims against police officers and departments might add considerably to the total.⁴⁹ A handful of additional scholars have found non-trivial levels of tort suits against police, but these observations have yet to dent the scholarly understanding, much less popular legal culture.⁵⁰

The news stories on payments by government bodies for claims against the police and the few scholarly studies recognizing that tort claims may not be rare suggest a new collection of mysteries: how could claims against police succeed on regular occasion and yet be almost invisible in published decisions? How can successful tort claims co-exist with a strongly held belief among scholars, judges and practitioners that tort suits are well nigh impossible? If the impossibility of tort claims is a myth, why has that myth developed and survived?

The disconnect between published decisions and the actual practice of tort suits is the easier puzzle to explain. There are many reasons why litigated and published decisions may systematically reflect a very different picture than the realities of litigation. The overwhelming propor-

49. See Wayne S. Fisher, et al., *Civil Liability of New Jersey Police Officers: An Overview*, 10 CRIM. JUST. Q. 45, 56 (1989); David E. Rovella, *States Are New Venue to Sue Cops*, NAT'L L.J., April 20, 1998, at A1.

50. See Mary M. Cheh, *Are Law Suits an Answer to Police Brutality?* in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 233, 250 (William A. Geller & Hans Toch eds., 1995) (1700 to 2600 police tort suits filed per year in federal court); ANTONY M. PATE & LORIE FRIDELL, 2 POLICE USE OF FORCE: OFFICIAL REPORTS, CITIZEN COMPLAINTS, AND LEGAL CONSEQUENCES app. B, at tbl. B-37 (1991 survey of police departments, 2558 pending cases alleging excessive force); Kreimer, *supra* note 24, at 499 (survey of Lexis Verdicts database, finding 31 plaintiff verdicts in federal court for 1994, and 43 plaintiff verdicts in state court).

tion of civil cases are settled (just as the overwhelming proportion of criminal cases are resolved through guilty pleas and plea bargains, not trials). Scholars have discussed the interests of "repeat players" in both the resolution of individual claims and the way the law develops that lead to published decisions reflecting a constricted and defendant-oriented view of the law (and perhaps a reason why litigation may be inherently limited as a tool of reform).⁵¹ It is easy to see why lawyers for police departments and cities would make strong claims "invisible" through settlement.

The etiology of the larger "police tort impossibility" myth among lawyers is harder to explain. We do not claim to have a simple or complete explanation but we have a strong suspicion about what has protected and sustained the myth. A myth may retain vitality until competing knowledge or a competing myth destroys it. Conversely, the lack of readily available information about suits against police in published case documents or data from government sources protects and even strengthens the myth.

It is interesting to know that governments pay out non-trivial sums for police abuse, but to challenge the myth it is essential to know more about the abuse that led to the payments. It is useful to know that claims against police are a significant portion of the federal civil rights caseload, but this information is an isolated factoid without further information about how those cases were resolved. Accountability requires far more information than either available federal data or news stories provide. The next section considers the mechanism that has allowed the myth of the impossible police tort suit to thrive.

51. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 872, 901 (1999) ("The paradox of losing by winning . . . is that the experiences of individuals who win through settlement, trial, or other legally invisible means are not reflected in the judicial determination of rights."). A related point emerges in the literature of alternative dispute resolution, assessing the ways in which claimants might lose by the more formal or full litigation of rights. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727 (2001).

ACT III

EYES WIDE SHUT

In the first act we found a surprising absence of public records on the existence and results of civil suits (or settlements in anticipation of litigation) against police departments and police officers. In the second act we found indirect evidence, in the form of newspaper reports of monies paid out by cities, counties and police departments for such lawsuits and settlements, and a few studies of aggregate court data, suggesting a fair number of claims against police under 42 U.S.C. § 1983. The mystery addressed in this act is how the silence of the records on claims, judgments and settlements can be aligned with the the echo from successful claims heard in aggregate statistics and press reports.

Essentially, the answer appears to be that many civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements.⁵² In some places, it has become standard litigation strategy for cities to negotiate an agreement that binds the parties not to discuss the judgment and asks the judge to seal the discovery documents and the settlement agreement.⁵³ Plaintiffs, wary of facing juries sympathetic to po-

52. See Maya Blackmun, *Gresham Reaches Settlement With Former Police Captain; Multnomah County Judge Seals Agreement and City Attorneys Refuse to Disclose Details*, THE OREGONIAN (Portland), Oct. 18, 1990, at C2; Ruben Castaneda, *Putting the Screws to Police Brutality: Prince George's Lawyer Racks Up Wins*, WASH. POST, Aug. 4, 2003, at B01 (sealed settlement, worth five figures); Kenneth Heard, *Case Alleging Police Abuse on Videotape Nearing Deal*, ARK. DEMOCRAT-GAZETTE (Little Rock), Feb. 16, 2000, at B1 (parties agree not to divulge amount of settlement); Jack Leonard, *Beating of Jail Inmate Could Bolster Other Brutality Suits*, L.A. TIMES, Apr. 8, 2001, at B1; Milan Simonich, *Boxer Drops Suit Against Police in Four Suburbs*, PITTSBURGH POST-GAZETTE, Feb. 5, 2004, at A1 (sealed settlement terms, plaintiff to receive up to \$50,000).

53. See Ruben Castaneda, *Police Abuse Suits Cost Prince George's \$7.9 Million*, WASH. POST, Jan. 3, 2003, at A1 (Maryland law requiring disclosure of total settlement costs written in response to concern's about county's "long-standing policy of secrecy" in police misconduct suits); George Flynn, *County Policy Mum on Suit Settlements*, SAN DIEGO UNION-TRIBUNE, May 28, 1989, at B1.

lice, are willing to settle and claim a great victory. Plaintiffs' counsel often work on contingency, and this may encourage such outcomes as well. In cities with more hostile relations between the police and the public, the defendants might want to avoid facing a jury.

Courts treat civil claims against police departments like most other private actions, leaving the form of settlements and decisions about secrecy or release to the parties. Recall the Sherlock Holmes story about the dog in the stables who was on friendly terms with the horse thief, leaving Holmes with the crucial clue—silence. Similarly, the parties involved in police tort litigation make no noise about the terms of settlement.⁵⁴

The use of secret settlements and sealed judgments should raise problems for scholars concerned about secret settlements in civil litigation more generally, for scholars of tort theory, for reporters, and for political theorists concerned with open government. So far, none of these groups seems to have reacted loudly to the problem.

A. *Undercover Cops: Secret Settlements in Suits Against the Police*

It is surprising that secret settlements of civil actions against the police have not become an issue for academics, who have created an active debate on the general topic.⁵⁵ A substantial literature on sealed settlements has emerged over the past few years, largely in response to reports about lawsuits to recover damages for injuries sustained when Firestone tires burst and Ford Explorers rolled over, and lawsuits against Catholic priests for child sexual abuse.⁵⁶

54. See Arthur Conan Doyle, *The Adventure of Silver Blaze*, in *THE STRAND MAGAZINE: AN ILLUSTRATED MONTHLY*, July-Dec. 1892, at 645, available at <http://etext.lib.virginia.edu/toc/modeng/public/DoyBlaz.html>.

55. Theodore Eisenberg, a leading empirical student of Section 1983, noted that "some settled cases in this study do not reveal the terms of settlement and some cases dismissed on plaintiffs' requests or by stipulation undoubtedly were the subject of out-of-court settlements not reflected in the district court records." See Eisenberg, *supra* note 39 at 527.

56. See, e.g., Roselyn Bonanti et al., *The Message of the Ford/Firestone Tragedy*, 37 *TRIAL*, April 2001, at 52; Avedis H. Seferian & James T. Wakley, *Secrecy Clauses in Sexual Molestation Settlements: Should Courts Agree to Seal Documents in Cases Involving the Catholic Church?*, 16 *GEO. J. LEGAL ETHICS* 801 (2003).

Current legal reforms also draw attention to the general topic of sealed settlements. In 2002 the federal judges of the District of South Carolina barred secret settlements in cases affecting “the public interest” or “public safety.” The court ordered that in such cases “No settlement agreement filed with the court shall be sealed”⁵⁷ Chief Judge Joseph Anderson of that court has written that sealed judgments and settlements pose “a discernable and troubling trend in civil litigation in the United States.”⁵⁸

Increasingly, litigants are requesting that courts “approve” a settlement (often in cases where court approval is not required by law) and, as part of the approval process, enter an order restricting public access to information about the case and its procedural history. Litigants in such cases, not content simply to agree between themselves to remain silent about the settlement, prefer to involve the trial judge in a “take it or leave it” consent order that would bring the might and majesty of the court system to bear on anyone who breaches the court-ordered confidentiality called for in the consent order. Trial judges, often struggling under the crush of burgeoning case loads and eager to achieve a settlement, all too frequently acquiesce in the request for court-ordered secrecy because they are told by counsel that to deny the request means the settlement will disintegrate and the case will go to trial.⁵⁹

Other courts and some legislatures have started to limit the ability of courts to order or approve sealed settlements or judgments.⁶⁰ In particular, statutes and court rules in a

57. DIST. S.C. LOCAL R. 5.03(C), available at <http://www.scd.uscourts.gov/Rules/Mar2003/CV2003.pdf> (last visited Oct. 6, 2004). The absolute language of the rule is not so absolute: another local rule allows any local rule to be suspended “for good cause shown.” See Joseph F. Anderson, Jr., *Hidden From the Public By Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 723 (2004) (discussing court-ordered secrecy). The South Carolina Supreme Court has followed the illustration of the local federal district court, and issued its own rule limiting sealed settlements. See Jean Hoefer Toal & Bratton Riley, *The New Role of Secret Settlements in the South Carolina Justice System*, 55 S.C. L. REV. 761 (2004). Notably, the South Carolina court has banned sealed settlements in cases involving “a public body or institution.” See S.C. R. CIV. P. 41.1(c).

58. See Anderson, *supra* note 57, at 712.

59. *Id.* at 712-13.

60. See *id.*; Tyler Sande, *Who Should Ban Secret Settlements? An Institutional Analysis of the Incomplete Attempts of the Courts and Legislatures to Limit Secrecy in Settlement* (2003) (unpublished manuscript, on file with the authors); ROSCOE POUND INSTITUTE, MATERIALS OF SECRECY PRACTICES IN THE COURTS: STATE ANTI-SECRECY MEASURES 101-03 (July 29, 2000) (listing state

few states limit the power of the court to seal discovery documents and settlement agreements in cases involving a public entity as a party.⁶¹

Striking in the sealed settlements literature is how generic the arguments have been, especially given the specific kinds of cases that have generated concerns. The generalization of arguments extends both to criticism of sealed judgments and to their defense.⁶² A partial list of the typical arguments in favor of court-enforced secrecy includes:

- the protection of privacy and other confidential information;
- a general preference for private agreements over government regulation;
- an assertion that sealed settlements are relatively rare, and that many agreements only seal the amount of a settlement;
- a worry that that a ban on secret settlements will decrease settlements and increase trials and other litigation expenses;
- the prospect that banning secrecy may disadvantage individual plaintiffs (or put another way “secrecy has market value”);
- a belief that liberal discovery rules have disclosed far more information than in the past and that secrecy can counterbalance that discovery effect;
- a belief that allowing judicial discretion about sealing settlements provides sufficient protection from inappropriate confidentiality;
- an assertion that private parties can simply enter confidentiality agreements without the agreement or enforcement of the court; and

statutes and rules restricting sealed settlements), available at <http://www.roscoepound.org/new/00mats.pdf>.

61. See, e.g., N.C. GEN. STAT. § 132-1.3 (2003); OR. REV. STAT. § 17.095 (2003); Comment, *State Payoffs Must be Public*, ALLENTOWN MORNING CALL, Aug. 15, 1996, at A18 (noting that Commonwealth Court requires all settlements involving tax dollars remain open).

62. An early, highly cited, and particularly good illustration of the generality and emptiness of many arguments about sealed judgments—here in defense of such judgments—was offered by Professor Arthur Miller. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991). It is important, as well, to distinguish the separate justifications for sealing participation documents or testimony, which have different and far more targeted justifications, and which are reviewed by judges on a document-by-document basis.

- an observation that increased electronic access to court files and documents has exposed to the public information that de facto has been relatively private, and requires secrecy as a corrective.⁶³

Among the typical arguments against secret settlements are the following:

- they undermine values of open government;
- they hide repetitive misbehavior;
- they are unethical because they allow bad actors to buy silence;
- public courts should not be asked to validate or enforce the arrangements of private parties; and
- private parties seek to convert their private agreements into public agreement when they seek approval or enforcement of settlement by a court.⁶⁴

Brief reflection reveals that the problems with sealed judgments vary across different kinds of cases. It is therefore striking that the vast bulk of the secrecy and sealed settlements literature does not address the relevance of each argument to specific types of claims.⁶⁵

63. See generally Anderson, *supra* note 57, at 731 (critiquing some of these arguments, and mocking the idea that “secrecy has market value”); Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 119 (1990); Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, 55 S.C. L. REV. 785 (2004); Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 303 (1999); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995); Miller, *supra* note 62.

64. See generally Anderson, *supra* note 57; Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 123 (1999); David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807 (2003); Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237; David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217; Abner J. Mikva, *The Role of Judges in Secret Settlements*, 55 S.C. L. REV. 773 (2004); Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979). A large debate was spurred 20 years ago by a seminal article by Owen Fiss challenging the overwhelming habits of civil settlement more generally. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

65. *But see, e.g.*, Seferian & Wakley, *supra* note 56.

Even more strikingly, scholars have not separately identified the particular problems and interests at stake in sealed settlements in civil cases against police departments. Yet the public interest in barring such settlements or sealing of judgments seems as strong for civil claims against the police as for sexual abuse by priests or for any other class of civil suit.

The public interest in police litigation is confirmed by the public actor on one side of the lawsuit; correspondingly few privacy interests are at stake. Saying that a ban on secret settlements of claims against the police will simply lead parties to enter into private deals out of court is no answer: at least with regard to police departments a public actor is involved in every case, and a ban could apply as easily to pre-litigation claims as to settlements approved or enforced by courts after litigation commences.

The strongest arguments in favor of secrecy in civil suits against the police are that a ban might decrease settlements and increase trials, or lower the settlement value for plaintiffs. But these arguments elevate the compensatory function of tort law in a group of cases where the public's competing interest in the power of tort law to deter future misconduct should be especially powerful.

In the case of civil suits against the police (or any unfiled claim that is the basis of a settlement), the public should demand more than the usual amount of information about the litigation outcome. The public and the public's agents (including legislators and reporters), advocates, and experts need to know far more than just the fact that a suit has been filed, or settled, or even the dollar amount of any settlements. Other critical questions include who pays any monetary settlement or judgment, what efforts (if any) the parties made to link the settlement to future police practices, and whether patterns or bad practices emerge involving individual officers or units in a department. This type of information is critical under basic assumptions of tort theory, considered in the next section.

B. Tort Theory and Mechanisms of Deterrence

The many reasons to be hostile to secret settlements for civil actions against the police based on officer or department misbehavior are bolstered by the theory about the behavior-shaping goals of tort suits.

One traditional view of the tort regime is that lawsuits are intended to encourage optimal behavior. If successful tort claims against police departments impose fines or other constraints when those departments or officers behave unreasonably, then the departments should internalize those costs. If cases are hard to bring then exemplary or punitive damages and attorneys fee provisions can help systems attain more optimal behavior. The monetary penalties should lead the police to reduce the improper behavior to an appropriate level (or at least an efficient level, whatever that might mean for, say, police use of deadly force, or intentional violations of constitutional rules).

There is a spirited debate over whether monetary liability affects government actors differently than private actors. Professor Daryl Levinson argues that governments respond differently to monetary incentives than individuals, and that political costs (and therefore political rather than economic theory) best explains government misbehavior and the most effective avenues for reducing that behavior.⁶⁶ Levinson argues that “[i]f the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse.”⁶⁷ Other commentators such as Myriam Gilles favor the use of tort remedies in general, or constitutional torts in particular, arguing that economic incentives matter even though deterrence for government actors comes from more complex mechanisms than in the case of private parties.⁶⁸

In either case—whether departments respond to monetary incentives, political incentives, or both—for tort judgments to shape institutional and individual behavior the defendants must bear the cost of the misbehavior. It does not appear that this happens in police tort cases because the monetary cost of judgments against police are not always fully or directly born by police departments or by individual officers. Civil judgments come out of city or county

66. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). See also James J. Park, *The Constitutional Tort Action As Individual Remedy*, 38 HARV.-C.R.-C.L. L. REV. 393 (2003).

67. Levinson, *supra* note 66, at 345.

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

funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers. Municipalities indemnify officers in many cases.⁶⁹ It is city council members, county boards, and city and county administrators who bear the financial and political cost. While those actors might pass the political and financial costs back to police, they may not—indeed, they may even reward police with larger budgets, since the political returns for higher police funding and appearing tough on crime may be worth the budgetary cost.

The same barriers to disclosure of the nature and outcome of individual suits against the police also create a barrier to understanding who bears the cost of such suits. News stories often fail to point out the source of funds used to pay for successful civil suits or corresponding remedial effects such as sanction of individual officers, internal affairs investigations, or changes in internal policy.⁷⁰ Limited available information about Who Pays is disheartening for those who want a direct monetary burden imposed on departments for violations: settlements often appear to come out of general funds rather than from the police budget.⁷¹

69. See Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000) (study of New York City concludes that state municipalities indemnify “police officers in an overwhelming majority of civil rights cases,” regardless of “whether they acted intentionally, recklessly, or brutally; whether or not they violated federal or state law; or whether or not they violated the rules and regulations of the New York City Police Department (“NYPD”).”); Marin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209 (2001) (discussing indemnification for compensatory and punitive damages for section 1983 violations by police officers and concluding that “[i]n short, states and municipalities commonly have policies authorizing indemnification of compensatory damages, with some even authorizing indemnification of punitive damages.”).

70. For some exceptional stories that do point out the linkage (or lack of linkage) between the lawsuit and a change in police policy, see Christensen, *supra* note 31 (Miami keeps no records correlating litigation with police disciplinary action.); Kevin Flynn, *Record Payout in Settlements Against Police: Officials Cite Sharp Rise in Cases Resolved This Year*, N.Y. TIMES, Oct. 1, 1999, at B1, B5 (letter from city Comptroller to Police Commissioner says department “should make a stronger effort to analyze the data culled from these suits to determine an officer’s propensity to commit acts of excessive force”).

71. See David C. Anderson, *Policing the Police*, AM. PROSPECT, Jan. 1, 1999, at 49 (“In New York, as in other cities, settlements and jury awards are paid out of general city revenues, rather than out of the police department’s budget.”); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not*

Full disclosure of the nature and outcome of all civil claims against the police and settlements in anticipation of litigation, including Who Pays, is necessary to test competing theories of deterrence, and to determine the optimum mix of remedies. Civil suits against police departments and officers (and settlements in anticipation of lawsuits) can reveal patterns and practices that would lead to internal or external investigations, the creation of review boards, investigative reporting, or additional lawsuits. Given the doctrinal importance of proving a “pattern or practice” of illegal police conduct to win federal tort claims against police departments and local governments, it is little wonder that defendants want to prevent future plaintiffs from connecting the dots between past incidents and the wrongdoing in their own cases.

Moreover, each remedy for police misbehavior and abuse operates in the light of other remedies. Even decisions about exclusion of evidence may be informed by civil suits or wider investigations, which may tell courts, for example, about the “good faith” of magistrates or of officers. Conversely, suppression may illuminate unconstitutional behavior that may be a basis for a tort suit or internal or external review. Patterns and practices disclosed by internal administrative review might be the basis for exclusion or tort suits. Thus, whether the principal mechanism for shaping police department behavior is direct monetary costs, or political costs to departments and local governments, or the result of symbiotic pressures from multiple remedies for police misbehavior, public disclosure of civil suits and their outcomes makes sense.⁷²

Information about the nature of civil claims against police, the outcome, and Who Pays will also help to explain the decisions of two actors—impassioned plaintiffs and reporters—who might seem immune, at least some of the time, to marginal payment in return for secret settlements.

Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution, 28 *FORDHAM URB. L.J.* 587 (2000) (municipalities indemnify police officers in an overwhelming majority of civil rights cases); Marin A. Schwartz, *Should Juries Be Informed That Municipalities Will Indemnify Officer's 1983 Liability for Constitutional Wrongdoing?* 86 *IOWA L. REV.* 1209 (2001).

72. News accounts give a hint of what fuller disclosure might reveal. In Pittsburgh, annual civil judgments and settlements exceeding \$1 million between 1990 and 1996 convinced the city council to create a citizen police-review board. See Opatrny, *supra* note 33.

Some plaintiffs, driven more by outrage than by desire for compensation, might refuse to enter secret settlements.⁷³ We wonder if such plaintiffs receive either a sufficient additional payment to overcome their passion, or excessive pressure from their counsel to settle and to seal?

It is also surprising that secret settlements and judgments have not become a hot-button issue for reporters who occasionally write about the dramatic circumstances of claims against the police, and even about the size of some individual and annual payouts by governments for such suits. Stories sometimes note a court order to seal documents, but news organizations do not highlight and fight this limit on public access as they do, for instance, when a judge limits public access to trial proceedings. Where is the public's self-defined watchdog, the press, when courts follow party recommendations to seal a judgment?

Reporters may not notice the significance of having settlements sealed, since the parties would not alert them. Perhaps this essay will help reporters to see the importance of this question and to flag it loudly for the public.

Finally, for thoughtful citizens (much less scholars, lawyers, policy-makers and journalists) the absence of readily available data about lawsuits against police departments and police officers should be shocking. Citizens—including lawyers!—should have no trouble determining how many civil actions have been filed against a police department and officers, for what claims, and with what results. This information should be available for individual departments (whether the department operates at the city, county, state, or federal level), and as aggregate figures for each state.

EPILOGUE

REMEDIES

So how do we kill the “police tort impossibility” myth, and improve the reality?

73. For a discussion of the professional ethics of attorneys accepting “gag orders” as part of a settlement agreement, see Joel S. Newman, *Gagging on the Public Interest*, 4 GEO. J. LEGAL ETHICS 371 (1990).

Justice Brandeis observed that “Sunlight is said to be the best of disinfectants.”⁷⁴ He phrased a corollary of the principle this way: “electric light [is] the most efficient policeman.”⁷⁵ We share his insight, which seems especially applicable when police departments are the institutions that need watching. While we believe the more global arguments for limiting secret settlement generally have the stronger side of the debate, the anti-secrecy position has overwhelming force in the police suit context. Specific arguments about privacy and efficiency all appear easy to resolve when the claim is that agents of the public violated constitutional norms.

Advocates of tort remedies for police misbehavior and abuse have hoped, for over a century, that it would not be light, but heat (in the form of tort judgments) that would shape the behavior of departments. Open settlements do not fulfill that hope, but we hope they can inform it. The problem illuminated by our three act play speaks mostly to the many harms of hiding information with great public value. Left for further study, in light of better information, is the role civil claims against police play (or might play) in shaping police behavior.

Our first remedy, therefore, seeks to illuminate the story of tort claims by banning the practice that appears to have kept those stories from being told: secret judgments and settlements. If the doctrinal and practical barriers to tort suits make them extremely rare—as the direct evidence explored in the first act of our play would suggest—then civil actions should be dropped from the menu of remedies seriously considered as a response to police abuse. But even if civil suits against police departments (or pre-filing claims) are fairly common, and result in payments to plaintiffs some of the time, the invisibility of these claims and the outcomes make them only a hint of a remedy.

Proponents of each standard remedy for police misconduct should agree to bar secret settlements in civil actions against the police. Secret settlements bury information essential to evaluating the effectiveness of exclusion, internal and external review and administrative sanctions, suits by

74. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (Nat'l Home Libr. Found. ed., 1933), *quoted in* *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

75. *Id.*

government agencies, consent decrees, and civil actions.⁷⁶ To assess each of these remedies and the interaction among them, the records describing all civil claims against the police should be open to public review. Information should include the original complaint and, if the complaint does not so state, a detailed recital of the facts that are the basis for the claim, and a detailed record of the process through which the complaint was resolved. This record should include dismissed claims, specification of the source of funds for any monetary judgment, and a record of any non-monetary actions agreed to as part of settlement or ordered as part of judgment following trial.

The ban on secrecy might extend beyond courts to all government offices and agents, including the city attorney's office and police counsel (for those departments with a separate legal staff). The goal should be to limit consensual suppression of any resolution of claims against the police for abuse or other misbehavior.

A ban on secret settlements might include a strong presumption against the sealing of any document or statement filed during civil litigation against the police. A hard and fast mandate that all documents must be public may sweep wider than necessary to achieve the goals of informing and improving remedies for police abuse. Use of a presumption can prevent opponents from attacking and undermining a generally wise policy with anecdotal (but valid) exceptions.⁷⁷

Who could make this reform happen? Over the past few years bans on secret settlements have sometimes been imposed by courts and sometimes by legislatures.⁷⁸ City or police attorneys—or the plaintiff's bar as a whole—could in effect implement their own ban by refusing to enter into secret settlements.

Our own recommendation is that legislative bodies, either on the local or state level, take the lead in promulgating such bans. The arguments for and against disclosure of specific kinds of claims will require development of information and policy judgments that may be most suitable for

76. See, e.g., Laurie Levinson, *Police Corruption and the New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 3 (2001).

77. Cf. Eisenberg, *supra* note 39 (noting that some of the doctrinal and practical problems with constitutional torts under section 1983 come from the vast possible range of issues and interpretations the short and cryptic text addresses).

78. See *supra* notes 60, 61.

legislatures or city councils (and to the kind of reports and investigation that committees do best). Moreover, legislatures or city councils can specify with far greater detail the kind of information that should be collected and reported by courts (and their clerks) and by institutions such as police departments and city attorneys.

As is true for most areas of civil practice, the overwhelming proportion of police misconduct claims are likely to be resolved without trial. Legislative bodies can require that specific information be included in any settlement or judgment stemming from civil suits against the police, or from settlements made in anticipation of litigation. Such settlements should include the kind of substantive, process and outcome facts discussed above.

Legislative bodies should be interested as well in the consequences of individual civil suits beyond the immediate resolution of the plaintiff's claim. Thus, they should require a report from the police department specifying all additional responses in terms of internal review, administrative sanctions, or changes in policy stemming from each civil suit. (In the absence of legislative direction, police departments can and should produce such reports on their own, and can gain credibility and political credit for doing so.)

Banning secret settlements in civil actions against the police and requiring the collection of case-specific information would be a good start, but is not alone sufficient to inform the important policy and scholarly debates over remedies for police abuse. Legislative bodies should also care greatly about the patterns revealed by civil suits and their outcomes.

Legislatures, city councils, or county commissions should require an annual report from the police department specifying the total number of civil complaints filed against the department and against individual officers, the status of those complaints, and the outcome of all civil cases resolved or settled in the prior year.⁷⁹ Such reports might in-

79. Cf. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1167-94 (2000) (listing "mandatory recordkeeping" along with crime mapping and other examples of techniques to promote more transparent policing); Rob Yale, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841 (1997) (proposing a national registry of complaints against police officers). A selective examination of web sites for seven major city departments (Los Angeles, San Francisco, New York, Chicago, Miami, Dallas, and Houston) and for four smaller departments in Florida (North Miami, North Miami Beach, Miami

clude a description of any policy changes in the department, the outcome of internal investigations, and, in conjunction with the local district attorneys, the number of cases generated by the police agency where evidence was excluded (as well as an indication of how many cases were ultimately dismissed entirely as a result of the excluded evidence).⁸⁰ The best reports will include information on the patterns of claims and responses over time.

The prominence of federal claims under section 1983—based on concerns that local district attorneys may not aggressively prosecute police abuse⁸¹ and that local courts and juries may be overly protective of the local police—might suggest that a national database or federal reports are in order. The experience with the data collected by the Administrative Office of the United States courts on federal civil rights claims is not encouraging. Despite serious faults of over-aggregation with this data described by Eisenberg and Schwab more than 15 years ago,⁸² the Administrative Office has continued to report only the grossest of categories.⁸³ Civil rights claims are not hard to divide into somewhat finer categories. Lawsuits against police departments are easy to identify. At an absolute minimum, the Administrative Office should separate the information about these claims, and if the AO will not itself make this inexpensive

Beach, and Fort Lauderdale) revealed that most included no information on police misconduct or at most a contact number for the internal affairs division. Only two (Los Angeles and Chicago) included additional information on police misconduct—in both cases as a result of a federal consent decree. Most the police department web sites do highlight “top cops.”

80. See David Kocieniewski, *In Brutality Case, Penalty Was Lost Vacation*, N.Y. TIMES, Apr. 23, 1998, at C24 (departmental tribunal penalized detectives in excessive force case by loss of 20 vacation days, despite prosecutor recommendation of dismissal from department).

81. See Erwin Chemerinsky, *The Role of Prosecutors in Dealing With Police Abuse*, 8 VA. J. SOC. POL'Y & LAW 305, 305 (2001) (“For obvious reasons, prosecutors are reluctant to alienate the very officers that they must work with and rely on in their cases”); Ralph Blumenthal, *Rarely Used Courts Investigate El Paso Police and District Attorney*, N.Y. TIMES, June 4, 2004 (State Court of Inquiry convened to determine if district attorney and police department conspired to shield officers accused of brutalizing people in six cases).

82. Eisenberg & Schwab, *supra* note 43 at 660-668 (discussing, critiquing and criticizing the Administrative Office statistics on civil rights cases, but not suggesting improvements).

83. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. C, at tbl. C-4 (Mar. 31, 2003), available at <http://www.uscourts.gov/caseload2003/tables/C04Mar03.pdf>.

correction in the reporting of information already on hand, then Congress should order it to do so.

There is nothing wrong with a national agency such as the FBI or one of the Department of Justice research agencies collecting better information, especially if the federal reports include data on state claims. But a focus on national data misses essential points about the administration of police agencies. Police administration is a local responsibility, and the issues of concern will vary by locality and by the size of the department.

Whatever national data is collected, it should reflect local experience. Standardized reports issued under a federal mandate may not produce the information that will most help the actual institutions involved with police behavior in each jurisdiction most effectively play their role. For example, reports produced after crises in police departments sometimes specify that a small group of officers (sometimes named) or particular units are the source of a large number of complaints. This was the case for the Christopher Commission report following the assault on Rodney King in Los Angeles, where the report identified a short list of problem officers, including one officer who would later contribute to the O.J. Simpson debacle.⁸⁴ National reports aggregating abstract data will miss exactly this kind of jurisdiction specific information and obscure appropriate responses.

Regularized annual reports on civil claims of police abuse might be combined with a description of any prosecution of police officers and of the activities of police review bodies (such as a citizen review board) and the complaints they receive. Together these sources of information should paint a fairly clear picture of police-citizen relations in each city and county. These reports may be damning in some places—it is hard to imagine they would not be eternally

84. See William Christopher et al., *Report of the Independent Commission on the Los Angeles Police Department* ("Christopher Commission Report") (1991), in LOUIS A. RADELET & DAVID L. CARTER, *THE POLICE AND THE COMMUNITY* 548, 549-50 (5th ed., 1994) ("Of approximately 1,800 officers against whom an allegation of excessive force or improper tactics was made from 1986 to 1990, more than 1,400 had only one or two allegations. But 183 officers had four or more allegations, 44 had six or more, 16 had eight or more, and one had 16 such allegations." One of the 44 "problem officers" was Detective Mark Furhman.); Jim Woods, Jodi Nirode & Mark Ferenchik, *Issue of Abuse Remains, Say Black Leaders*, COLUMBUS DISPATCH, Sept. 5, 2002, at A1 (After settling lawsuit over hogtying of suspect, department changed policy but did not discipline any officers.).

damning in a place like Los Angeles—but the reports may also provide comfort and support to many departments. As with video-taped interrogations, significantly greater information about police-citizen (and police-suspect) interactions has as much capacity to mollify as to incite the public. This fact—that the truth can be both a sword and a shield—should lead thoughtful departments, officers and police unions to call for (rather than to oppose) our suggested reforms.

Some of the surprising heroes in our story are local reporters writing stories about civil claims and their outcomes. Without news reports of payouts by cities and counties for civil claims against the police, the mystery examined in this article would remain largely hidden. Reporters have on occasion noted when judgments or settlements were sealed, making the confidentiality a part of the story. We encourage reporters following police beats and their editors—for both the stories that claim national headlines and those appearing on page 5 of the metro section in the local paper—to describe the basis for the claims, report on the process of their resolution, highlight any secrecy in the final resolution, and ask questions of the police and supervisory agencies about any changes in policy or practice that result either from individual suits or over time. Reporters should also pay special attention to the source of any funds that are paid to plaintiffs. News stories are themselves part of the dynamic of oversight and debate, and, to their credit, reporters and editors around the country seem to have recognized this role.

Our mystery ends, therefore, without a satisfying review of the clues, an impressive body count, or an arrest of the butler (though we do highlight the need for a better candlestick!). We cannot declare civil actions against police to be either common or non-existent, either the key to regulating police or largely irrelevant. Our primary recommendation is for legislative bodies, not courts, to discourage secret settlements. To add some zing to our proposals, we also suggest more disclosure, more information, more data, and more reports. We offer sincere praise of journalists, offering only gentle encouragement for more journalists to follow the leaders. We try to alert other scholars to issues that they have either rarely addressed (the number, content and visibility of civil claims against the police) or hidden

beneath the cloak of over-generalization (secret settlements).

But while our short mystery and its implications may lack a punchy theatrical ending, the incidents that lead to our recommendations are filled with drama. It is hard to think of many points of intersection between government agents and citizens as fraught with tension or drama. That makes the regulation of police and the information that exposes the fault lines in relations between citizens and police questions worth keeping in the public limelight.

