Section 1983: Experts

Defending against Expert Claims of a Blue Wall of Silence

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Defending against Expert Claims of a Blue Wall of Silence

Countering, limiting, and excluding claims that the police follow a code of silence

What is the problem?

Civil rights plaintiffs often complain:

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- Police cannot be trusted to testify truthfully against another officer's wrongdoing;

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- Police cannot be trusted to testify truthfully against another officer's wrongdoing;
- Police cover for each other;
- Police retaliate against officers who do not follow this code; and
- Internal Affairs investigations are a part of this cover-up process.

What is the problem?

Why care about this?

Prejudices the factfinder.

Outside of court, it prejudices society.

Various Names of the Problem

Blue Wall of Silence

Blue Code of Silence

Blue Shield

Blue Wall

Blue Curtain

Blue Veil

Code of Silence

Recognizing the "Code of Silence"

Thomas v. City of New Orleans,

Plaintiff alleged discriminatory employment practices leading to wrongful discharge:

> The charges in this case cut deeper than an allegation of discriminatory employment practices. Thomas' complaint alleged a widespread and invidious "blue curtain" within the New Orleans police force, creating a code of silence to shield those who abide by the code and punish those who violate it. Sanctions allegedly ran from giving the "silent treatment" to offenders to orchestrating their separation from the force.

687 F.2d 80, 82-83 (5th Cir. 1982).

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687 F.2d 80, 82-83 (5th Cir. 1982).

Recognizing the "Code of Silence"

Thomas (cont'd):

> If the jury believed the testimony of expert and Police Department witnesses that a "blue curtain" existed within the New Orleans Police Department, they reasonably could have concluded from the evidence showing the unjustified conduct of Caesar in the arrest and the various meetings and actions of defendants which followed that Thomas was the target of sanctions imposed by such a "blue curtain" conspiracy. Our careful reading of the entire record shows sufficient evidence from which a jury reasonably could have inferred that such a conspiracy existed.

687 F.2d at 83.

Recognizing the “Code of Silence”

Barry v. New York City Police Dept.

*P*olice sergeant brought claim under 42 U.S.C. § 1983 alleging retaliation in violation of her First Amendment rights after exposing police misconduct within her unit.

No. 01 Civ.10627 CBM, 2004 WL 758299 at *11 (S.D.N.Y. April 7, 2004)

Recognizing the "Code of Silence"

Barry v. New York City Police Dept.

*P*olice sergeant brought claim under 42 U.S.C. § 1983 alleging retaliation in violation of her First Amendment rights after exposing police misconduct within her unit.

1. Liability Based on Custom of Retaliation

Plaintiff's central hook for establishing municipal liability rests on her claim that the actions taken against her were a manifestation of the NYPD's unofficial policy or custom known as the "blue wall of silence." * * * According to plaintiff, the "blue wall of silence" discourages officers from reporting other officers' mistakes and subjects officers who speak out about police misconduct to retaliation.

No. 01 Civ.10627 CBM, 2004 WL 758299 at *11 (S.D.N.Y. April 7, 2004)

Recognizing the "Code of Silence"

Barry (cont'd):

> "The policy or custom used to anchor [municipal] liability need not be contained in an explicitly adopted rule or regulation." *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 871 (2d Cir.1992). Instead, a plaintiff can show that practices are so persistent, widespread, and permanent that they constitute a custom or usage with the force of law. *Id*. at 871.

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> "The policy or custom used to anchor [municipal] liability need not be contained in an explicitly adopted rule or regulation." *Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 871 (2d Cir.1992). Instead, a plaintiff can show that practices are so persistent, widespread, and permanent that they constitute a custom or usage with the force of law. *Id*. at 871. However, "before the actions of subordinate city employees can give rise to section 1983 municipal liability, their discriminatory practice must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Id*. (internal quotations and citations omitted).

No. 01 Civ.10627 CBM, 2004 WL 758299 at *11.

Recognizing the "Code of Silence"

Baron v. Suffolk County Sheriffs Dept.

Former corrections officer sued under § 1983 for First Amendment violation by retaliatory harassment for breaching code of silence in reporting a fellow officer's misconduct (playing cards with inmates).

402 F.3d 225, 229 (1st Cir. 2005)

Recognizing the "Code of Silence"

Baron v. Suffolk County Sheriffs Dept.

Former corrections officer sued under § 1983 for First Amendment violation by retaliatory harassment for breaching code of silence in reporting a fellow officer's misconduct (playing cards with inmates).

> To prevail on a § 1983 claim based on a violation of his First Amendment rights, a public employee like Baron must show that "(1) his expression involved matters of public concern; (2) his interest in commenting upon those matters outweighed the [government employer's] interests in the efficient performance of its public services; and (3) his protected speech was a substantial or motivating factor in the … adverse employment actions."

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402 F.3d 225, 229 (1st Cir. 2005)

Recognizing the "Code of Silence"

Baron (cont'd):

> The wrongdoing Baron complained of, including officers' violations of prison policy, retaliation for breaching the code of silence, and prison officials' failure to investigate or put a stop to that retaliation, affected not only Baron and his co-workers, but also the prison inmates who were under the Department's control. Accordingly, Baron's speech involved a "legitimate matter of inherent concern to the electorate[.]"

402 F.3d at 234.

Recognizing the "Code of Silence"

Baron (cont'd):

> Baron's attorney then asked [Deputy Superintendent] Feeney to read from his earlier deposition, in which the following exchange took place:
>
> Q: Are you aware of any code of silence between fellow officers reporting violations on each other?
> A: Yes.
> Q: What is it, the code of silence?
> A: Lack of reporting to protect each other.
> Q: When Officer Baron reported Sergeant Curtis, did he violate that?
> A: Yes.
> Feeney was then asked if there would be consequences if an officer were to report another officer. He answered, "There could be."

402 F.3d at 237-38.

Recognizing the "Code of Silence"

Baron (cont'd):

> That other Department employees denied at trial the existence of a code of silence would not preclude a reasonable trier of fact from crediting Feeney's statements as evidence of a custom.

402 F.3d at 238.

Recognizing the "Code of Silence"

Baron (cont'd):

> That other Department employees denied at trial the existence of a code of silence would not preclude a reasonable trier of fact from crediting Feeney's statements as evidence of a custom. The jury could have found that Feeney's statements, together with Baron's testimony that the harassment began almost immediately after he reported Curtis, demonstrated a custom of retaliation to enforce a code of silence.

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>
> * * * In light of such difficulties in corroborating a code of silence, Baron's testimony takes on additional weight and [Deputy Superintendent] Feeney's admission regarding his knowledge of the code is all the more significant.

402 F.3d at 238.

Recognizing the "Code of Silence"

Valentin v. New York City

Former officer with the New York City Housing Authority brought two claims under Section 1983:

1) "sexual harassment and discrimination as part of a hostile work environment, in violation of her Fourteenth Amendment right to equal protection; and

No. 94 CV 3911(CLP), 1997 WL 33323099 at *1 (E.D.N.Y. Sept. 9, 1997)

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Valentin v. New York City

Former officer with the New York City Housing Authority brought two claims under Section 1983:

1) "sexual harassment and discrimination as part of a hostile work environment, in violation of her Fourteenth Amendment right to equal protection; and

2) "First Amendment right to free speech was violated when she was subjected to retaliation following her efforts to seek redress for this harassment and discrimination."

No. 94 CV 3911(CLP), 1997 WL 33323099 at *1 (E.D.N.Y. Sept. 9, 1997)

Recognizing the "Code of Silence"

Valentin (cont'd)

Valentin also alleged "that the Housing Police have an unconstitutional policy or practice of tolerating and condoning the type of sexual harassment and discrimination experienced by plaintiff."

1997 WL 33323099 at *11.

Recognizing the "Code of Silence"

Valentin (cont'd)

Defendants have moved *in limine* to exclude the testimony of plaintiff's expert, Dr. Stephen Leinen. Plaintiff has retained Dr. Leinen to testify in the areas of: . . . 2) retaliation against officers who violate the "code of silence;" . . . .

1997 WL 33323099 at *13.

Recognizing the "Code of Silence"

Valentin (cont'd)

Expert's Qualifications (partial):

Dr. Leinen was a member of NYPD for roughly 23 years: 1966-1988, as a detective or uniformed officer in five precincts.

1966: joined NYPD, initially assigned as a patrol officer
1969: became a detective in 1969
1981: promoted to Sergeant
1985: promoted to Lieutenant
1988: retired

1997 WL 33323099 at *17.

Recognizing the "Code of Silence"

Valentin (cont'd)

> Plaintiff also seeks to introduce testimony by Dr. Leinen on the subject of retaliation against police officers who speak out against the practices of the police department and violate the "code of silence."

1997 WL 33323099 at *20.

Recognizing the "Code of Silence"

Valentin (cont'd)

> Defendants also claim that Dr. Leinen's opinions are unreliable, since He has never compared the NYPD with other work settings, such as The Housing Police, to determine whether the code of silence applies outside of the NYPD. . . . Defendants further argue that Dr. Leinen's testimony about the code of silence is both irrelevant and prejudicial because jurors are "amply equipped to evaluate the credibility of witnesses without expert assistance."

1997 WL 33323099 at *20. Then, following a discussion of FRE 702 & 703 . . .

Recognizing the "Code of Silence"

Valentin (cont'd)

> Dr. Leinen, then, can use the statements of other police officers, as well as his own experiences in the police force, to form the opinion that the "code of silence" dictates retaliation against officers who bring discrimination complaints against their superiors or colleagues.

1997 WL 33323099 at *20.

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Valentin (cont'd)

> Dr. Leinen, then, can use the statements of other police officers, as well as his own experiences in the police force, to form the opinion that the "code of silence" dictates retaliation against officers who bring discrimination complaints against their superiors or colleagues. *See Ariza v. City of New York*, 93 CV 5287(CPS), 1996 WL 118535 (E.D.N.Y. Mach 7, 1996) (allowing the plaintiff to introduce the testimony of experts and fellow police officers on the effect of the "blue wall of silence" when officers speak out and subject the police department to public scrutiny).

1997 WL 33323099 at *21.

Recognizing the "Code of Silence"

Valentin (cont'd)

> Dr. Leinen's testimony on the "code of silence," if believed by the jury, would be sufficient to support an inference that there is a policy or a practice of retaliating against officers who press complaints against their fellow officers. Dr. Leinen's testimony would also be relevant in demonstrating that this policy or practice was the proximate cause of plaintiff's injury.

1997 WL 33323099 at *22.

Recognizing the "Code of Silence"

Valentin (cont'd)

> Plaintiff has presented sufficient evidence, if believed, to suggest that retaliatory acts were taken against her in response to her complaints about the sexual harassment she experienced in her unit.

1997 WL 33323099 at *23.

Recognizing the "Code of Silence"

Valentin (cont'd)

> Plaintiff has presented sufficient evidence, if believed, to suggest that retaliatory acts were taken against her in response to her complaints about the sexual harassment she experienced in her unit. To the extent that Dr. Leinen's testimony proposes to explain the phenomenon of the "code of silence" and its operation in this context, this Court finds that the testimony is relevant and will be helpful to the jury.

1997 WL 33323099 at *23.

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Valentin (cont'd)

> Plaintiff has presented sufficient evidence, if believed, to suggest that retaliatory acts were taken against her in response to her complaints about the sexual harassment she experienced in her unit. To the extent that Dr. Leinen's testimony proposes to explain the phenomenon of the "code of silence" and its operation in this context, this Court finds that the testimony is relevant and will be helpful to the jury. Moreover, this type of evidence is particularly relevant to plaintiff's *Monell* claims of custom and usage against the municipality.

1997 WL 33323099 at *23.

Federal Rules of Evidence Governing Expert Testimony

Rule 702. Testimony by Expert Witnesses

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A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

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A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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(c) the testimony is the product of reliable principles and methods; and

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(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rules of Evidence Governing Expert Testimony

Rule 703. Bases of an Expert's Opinion Testimony

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An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Federal Rules of Evidence Governing Expert Testimony

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Federal Rules of Evidence Governing Expert Testimony

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data.

Federal Rules of Evidence Governing Expert Testimony

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Federal Rules of Evidence Governing Expert Testimony

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Federal Rules of Evidence Governing Expert Testimony

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Federal Rules of Evidence Governing Expert Testimony

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Federal Rules of Evidence Governing Expert Testimony

DANGER:

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Federal Rules of Evidence Governing Expert Testimony

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[BEWARE that under FRE 406, evidence that a Code of Silence is this Department's routine practice is admissible to show that this Department did engage in the Code of Silence in this case.

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[BEWARE that under FRE 406, evidence that a Code of Silence is this Department's routine practice is admissible to show that this Department did engage in the Code of Silence in this case.

Challenge any testimony of an alleged "code of silence" in the "culture of policing" nationwide or in "virtually all major departments" as not falling within this Rule.]

Federal Rules of Evidence Governing Expert Testimony

[BEWARE this alternate means of introducing Code of Silence opinion testimony.]

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

One Expert's Testimony

[Testimony from plaintiff's expert:]

"Q Are you familiar with a phenomenon in law enforcement known as 'the code of silence?'

One Expert's Testimony

[Testimony from plaintiff's expert:]

"Q Are you familiar with a phenomenon in law enforcement known as 'the code of silence?'

"A Very familiar with the phenomenon known as 'the code of silence.' And I've reviewed research on it, seen it in operation, dealt with it over the years.

One Expert's Testimony

[Testimony from plaintiff's expert:]

"Q Are you familiar with a phenomenon in law enforcement known as 'the code of silence?'

"A Very familiar with the phenomenon known as 'the code of silence.' And I've reviewed research on it, seen it in operation, dealt with it over the years.

"Q Please define it.

One Expert's Testimony

[Testimony from plaintiff's expert:]

"Q Are you familiar with a phenomenon in law enforcement known as 'the code of silence?'

"A Very familiar with the phenomenon known as 'the code of silence.' And I've reviewed research on it, seen it in operation, dealt with it over the years.

"Q Please define it.

"A Well it's very simply an unwritten rule in police organizations found primarily because policing is a paramilitary organization[,] and you have to depend on your fellow officers for backup on the streets and everything.

One Expert's Testimony

[Plaintiff's expert continues:]

"It's an unwritten rule that you just don't ever testify against a fellow officer. You don't report their misconduct and you don't ever go outside of your agency and report misconduct to someone else about your agency. And the research shows that the reason that is because the practice has been to ostracize officers who have done that in [sic] retaliate against them."

One Expert's Testimony

[Plaintiff's expert continues:]

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[Plaintiff's expert continues:]

"Research shows that about 50 percent of active law enforcement officers experience misconduct, they see misconduct and they don't report it.

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To whom should they report the misconduct?

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To whom should they report the misconduct?

What type of misconduct does this encompass?

One Expert's Testimony

[Plaintiff's expert continues:]

"Q When you suggest that the code of silence is a refusal to testify against another officer, would that be limited to crimes or acts of brutality committed by other officers?

"A Definitely not. It deals with just about any kind of issue you can think of in a police department. This is not a new -- I emphasize this is not a new understanding of this phenomenon.

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"It was reported by the Saint Clair Commission about the Boston Police Department.

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"It was reported by the Saint Clair Commission about the Boston Police Department. It was reported by the Christopher Commission on the Los Angeles Police Department.

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One Expert's Testimony

[Plaintiff's expert continues:]

"So it has been there for 80 years recognized and it is being dealt with today in major departments across the country."

One Expert's Testimony

[Plaintiff's expert continues:]

"So it has been there for 80 years recognized and it is being dealt with today in major departments across the country."

* * *

"And it has been recognized as the major impediment causing -- keeping reform in policing, professionalization of policing, prevent that from happening. The Code of Silence has been identified as the major issue. It was by the Christopher Commission and it's been recognized by many other commissions since then."

Research shows?

The four Commission reports and the Institute report that this expert relied on:

1931	Wickersham Commission	nationwide/prohibition/Chicago
1991	Christopher Commission	Los Angeles Police Department
1992	St. Clair Commission	Boston Police Department
1992	Kolts Commission	Los Angeles County Sheriff's Department
2000	National Insitute of Ethics	survey of 3,714 (actually 2,132) officers and recruits from 42 states

Research shows?

1931 Wickersham Commission nationwide/prohibition/Chicago

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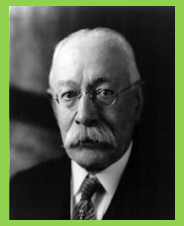

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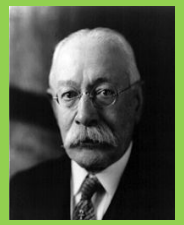

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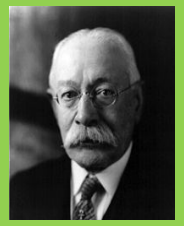

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Result: 14 Reports on these subjects:

Research shows?

- Prohibition
- Enforcement of the Prohibition Laws of the United States
- Criminal Statistics
- Prosecution
- Enforcement of the Deportation Laws of the United States
- the Child Offender in the Federal System of Justice and the Federal Courts
- Criminal Procedure
- Penal Institutions, Probation, and Parole
- Crime and the Foreign Born
- The Cost of Crime
- The Causes of Crime (two volumes)
- The Police *Report on Lawlessness in Law Enforcement*
- The controversial Mooney-Billings case, report submitted to commission but not officially published.

Research shows?

The Police *Report on Lawlessness in Law Enforcement* (Wickersham)

> ". . . one of the most important events in the history of American policing. It was the first systematic investigation of police misconduct and became a catalyst for reforms involving new forms of accountability for the police."

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This Report prompted a new generation of police leaders committed to "the police professionalization movement."

Conclusion: Any mention of police code of silence in this report is too old to be relevant.

Research shows?

1991 Christopher Commission Los Angeles Police Department

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Officially: “The Special Independent Commission to Review the Structure and Operation of the Los Angeles Police Department”

Research shows?

1991 Christopher Commission Los Angeles Police Department

From Mayor Bradley's Charge to the Commission:

> "The Los Angeles Police Department is facing a crisis of confidence. * * * The time has come for a reasoned, objective, thorough and constructive examination of the structure and operation of our Police Department. How can we improve it; how can we correct its faults; how can we increase its service, its efficiency, its fairness; how can we make it a model for the next century?"

Research shows?

1991 Christopher Commission Los Angeles Police Department

Findings from the Report included the Code of Silence problem:

> "Perhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers' unwritten code of silence; an officer does not provide adverse information against a fellow officer. While loyalty and support are necessary qualities, they cannot justify the violation of an officer's public responsibilities to ensure compliance with the law, including LAPD regulations."

Research shows?

1991 Christopher Commission Los Angeles Police Department

Reform:

"The Department must make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas.

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1991 Christopher Commission Los Angeles Police Department

Reform:

> "The Department must make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas. In doing so, it should actively and severely discipline those who violate Department policy by failing truthfully to report known instances of misconduct. * * *

Research shows?

1991 Christopher Commission Los Angeles Police Department

Reform:

> "The Department must make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas. In doing so, it should actively and severely discipline those who violate Department policy by failing truthfully to report known instances of misconduct. * * * Further, safeguards must be established to protect officers who break the code of silence from harassment or punishment by other officers or the Department itself."

Research shows?

1991 Christopher Commission Los Angeles Police Department

Our conclusion:

While the Christopher Commission acknowledged that the Code of Silence was a big problem in LAPD at that time, the Commission recommended serious steps to eliminate the problem.

The findings of the Code of Silence problem in LAPD in 1991 are too remote in time and too localized to be relevant.

Research shows?

1992 St. Clair Commission Boston Police Department

Research shows?

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Commissioned by Boston Mayor Raymond Flynn, led by attorney James St. Clair, the “Report on the Police Department Management Review Committee”

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Conclusion: Any mention of code of silence is too old and too localized to be relevant.

Research shows?

2000 National Institute of Ethics survey of 2,132 officers and recruits from 42 states

Neal Trautman, Director

Based on confidential questionnaires specifically addressing the Code of Silence.

Research shows?

2000 National Institute of Ethics (Trautman) 25 academies, 16 states; 1,016 questionnaires

· 79% said that a law enforcement Code of Silence exists and is fairly common throughout the nation. [Recruits would not have a reliable basis for this assertion.]

· 52% said that the fact a Code of Silence exists doesn't really bother them.

· 24% said the Code of Silence is more justified when excessive force involves a citizen who's abusive. [For recruits, this is hypothetical. And what about the other 76%?]

· 46% said they would not tell on another officer for having sex on duty.

· 23% said they wouldn't tell on another cop for regularly smoking marijuana off duty.

Research shows?

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Of those 532 officers, 252 reported being “pressured to keep quiet by the officer(s) who committed the misconduct and 118 felt pressure from uninvolved officers.”

Research shows?

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> "To be successful at preventing the Code of Silence, we must be able to develop cultures in which the bad officers are the ones who are alienated."

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Trautman drew many conclusions from his survey. Two of the more helpful are:

> "To be successful at preventing the Code of Silence, we must be able to develop cultures in which the bad officers are the ones who are alienated."

and

> "A culture must be established in which an allegiance to principles is a higher priority than loyalty to people."

Research shows?

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Our conclusion: Trautman's survey is at least 22 years old, and it relied on a sample that is minuscule when compared to the number of officers nationwide.

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697,195 total officers nationwide as of 2019 (FBI.gov)

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2,132 questionnaires in Trautman study $\approx$ 0.31% (less than $\frac{1}{3}$ of 1%)

The methodology is unreliable, and the data is out of date. And nothing connects it to the specific department or officer involved in today's case.

Research shows?

Nothing from the past 22 years in *your* city's police department.

An assumption that what happened in some other departments some decades ago is currently happening in your own department.

Speculative.

Irrelevant.

Even if relevant, more prejudicial than probative.

"Code of Silence" Evidence Insufficient

Rubio v. County of Suffolk

Rubio was sexually assaulted by Suffolk County Police Officer Frank Wright, who "pled guilty to four instances of acting in an unconstitutional manner" and "was sentenced to five years in prison for the violations."

Rubio sued the county under § 1983, alleging that the County was liable because it knew of Wright's pattern of sexual misconduct.

No. 01-CV-1806 (TCP), 2007 WL 2993833 at *2, 3(E.D.N.Y. Oct. 9, 2007)

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Plaintiffs also assert facts that allegedly support their claim that defendant Suffolk County had pre-existing knowledge of "systemic sexual misconduct and discriminatory practices by its police officers."

2007 WL 2993833 at *3.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Plaintiffs also assert facts that allegedly support their claim that defendant Suffolk County had pre-existing knowledge of "systemic sexual misconduct and discriminatory practices by its police officers." . . . For example, former police officer John Weeks indicated in a sworn statement that he informed Chief Robillotto of the following sexual misconduct by several police officers: . . . .

2007 WL 2993833 at *3.

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Rubio (cont'd)

> Plaintiffs also assert facts that allegedly support their claim that defendant Suffolk County had pre-existing knowledge of "systemic sexual misconduct and discriminatory practices by its police officers." . . . For example, former police officer John Weeks indicated in a sworn statement that he informed Chief Robillotto of the following sexual misconduct by several police officers: . . . . Weeks further testified that the County had a custom or practice of a "blue wall of silence" whereby "supervisory officials covered up police officers' civil and criminal violations."

2007 WL 2993833 at *3.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> On this factual record, the Court finds that the plaintiffs failed to adduce evidence to support their claim for municipal liability . . . .
>
> * * *
>
> Similarly, the County has no official policy endorsing the practice of a "blue wall of silence" or extending courtesies between police officers.

2007 WL 2993833 at *4.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Neither have plaintiffs put forward facts that support the second alternative for establishing municipal liability, i.e. the existence of a custom or practice that is so pervasive and widespread that the municipality had either actual or constructive knowledge of it.

2007 WL 2993833 at *4.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Moreover, even assuming that plaintiffs' allegations with respect to other civilians whose constitutional rights were violated relate to the same "custom or practice," the Court is unable to discern how a few violations by a small group of subordinate County employees with no policymaking authority amount to the "pervasive and widespread" custom or practice necessary for municipal liability.

2007 WL 2993833 at *4.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Equally unpersuasive is plaintiffs' allegation that the County endorsed "a blue wall of silence." There are no facts that support the contention that "a blue wall of silence" was a practice so pervasive and widespread that the County had or should have had knowledge of it.

2007 WL 2993833 at *5.

"Code of Silence" Evidence Insufficient

Rubio (cont'd)

> Instances where courts found that a party presented sufficient evidence to permit a jury to infer that the "blue wall of silence" constitutes a custom involve specific findings describing a long-standing pattern by the police department to engage in a code of silence, together with involvement or awareness of that code of silence by individuals with policymaking authority.
>
> * * *
>
> No similar facts were adduced here to support plaintiffs' claims.

2007 WL 2993833 at *5, 9. The court granted summary judgment for the County.

Excluding "Code of Silence" Testimony

Hill v. City of New York

Plaintiff brought § 1983 action against officers and city claiming excessive force.

> Plaintiff seeks to introduce Dr. Leinen as an expert in police procedures to testify regarding police culture and the "Blue Wall of Silence."

No. 03-CV-1283 (ARR)(KAM), 2007 WL 1989261 at *1 (E.D.N.Y July 5, 2007)

Excluding "Code of Silence" Testimony

Hill (cont'd)

Plaintiff proposed to offer expert testimony of the following impact of the "Code of Silence":

> The statements of both deputy sheriffs and Detectives Barrett and Rafferty are in sharp contrast to Mr. Hill's statement that the detective vehicle did in fact bump/ram his vehicle. What might account for these contrasting statements? One strong possible explanation is the Blue Wall of Silence and Code of Silence.

2007 WL 1989261 at *2.

Excluding "Code of Silence" Testimony

Hill (cont'd)

Defense moved to exclude such expert testimony and expert report.

Court conclude that Dr. Leinen was "qualified as an expert in police misconduct and the Blue Wall of Silence generally."

Then the court applied the *Daubert* factors and evaluated the expert's methodology, reliability, and relevance to the case at hand.

2007 WL 1989261 at *3-4.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> [O]ther than noting that the police officers' testimony in this case is in sharp contrast to the plaintiff's, Dr. Leinen provides no specific support for and points to no particular facts in this action explaining why the Blue Wall of Silence and Code of Silence may play a role in this particular case.

2007 WL 1989261 at *4.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Instead, he offers only a blanket assertion that the Blue Wall of Silence is a "normal, inevitable feature of policing" which "permeates virtually every level of policing", and that the Code of Silence is the "unwritten, often unspoken, rule that prohibits members of law enforcement from reporting the misconduct of other members."

2007 WL 1989261 at *4.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Lacking an explanation for why the Blue Wall of Silence and Code of Silence may be present in this case, the court must conclude that there is "simply too great an analytical gap between the data and the opinion proffered."

2007 WL 1989261 at *4 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Excluding "Code of Silence" Testimony

Hill (cont'd)

> In addition, other than his assertion that the Blue Wall of Silence and Code of Silence are a normal part of policing and law enforcement everywhere, Dr. Leinen provides no support for his conclusion that these phenomena apply equally to the deputy sheriffs in this case, who are not a part of the NYPD, but rather are members of the New York City Sheriff's Office, which is a component of the Department of Finance.

2007 WL 1989261 at *4.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Considering the *Daubert* factors that are relevant here, the court also notes that Dr. Leinen's *ipse dixit* conclusion is not susceptible to testing in any meaningful way, and he has provided no evidence that his methodology for reaching his conclusion-namely, reviewing the pleadings, depositions and selected other materials unrelated to this case-is a generally accepted methodology within the sociological community for reaching such conclusions.

2007 WL 1989261 at *5.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Ultimately, Dr. Leinen's opinion is comprised of no more than his "say-so" that the Blue Wall of Silence and Code of Silence explain the differences between the testimony of the particular police officers and plaintiff in this case.

2007 WL 1989261 at *5.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Under Federal Rule of Evidence 702, the court cannot conclude that this testimony is based upon sufficient facts or data, that it is the product of reliable principles and methods, or that Dr. Leinen has applied the principles and methods reliably to the facts of this case.

Excluding "Code of Silence" Testimony

Hill (cont'd)

> Under Federal Rule of Evidence 702, the court cannot conclude that this testimony is based upon sufficient facts or data, that it is the product of reliable principles and methods, or that Dr. Leinen has applied the principles and methods reliably to the facts of this case. As such, Dr. Leinen's testimony must be excluded because it is "speculative and conjectural[.]"

2007 WL 1989261 at *5 (citing *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir.1996)).

Excluding "Code of Silence" Testimony

Hill (cont'd)

The court then found that the proposed expert report and testimony, designed to explain conflicts in witness testimony, would not be helpful to the jury but would usurp the jury's role in evaluating witness credibility:

> [B]ecause the credibility of witnesses is exclusively for the determination by the jury, the Second Circuit has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702.

2007 WL 1989261 at *6 (quotation marks and citations omitted)

Excluding "Code of Silence" Testimony

Hill (cont'd)

> [T]he court concludes that Dr. Leinen's opinion poses too great a risk of substituting his opinion on the credibility and motivations of the police officer witnesses for that of the jury.

Excluding "Code of Silence" Testimony

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> [T]he court concludes that Dr. Leinen's opinion poses too great a risk of substituting his opinion on the credibility and motivations of the police officer witnesses for that of the jury. To allow Dr. Leinen's testimony to be admitted in this action would cast the relevance net so widely as to hold that testimony regarding the Blue Wall of Silence could be admitted in any case in which a police officer's testimony was challenged.

2007 WL 1989261 at *6.

Excluding "Code of Silence" Testimony

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2007 WL 1989261 at *6.

And there's more:

Excluding "Code of Silence" Testimony

Hill (cont'd)

> In any case, Dr. Leinen's testimony is also properly excluded on the basis of Federal Rule of Evidence 403, which provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

2007 WL 1989261 at *6.

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2007 WL 1989261 at *6.

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2007 WL 1989261 at *6. The court granted defendants' motion to exclude.

Excluding "Code of Silence" Testimony

Lyles v. City of Dallas

After suffering a beating, tasing, pepper spray, and racial verbal abuse from police officers in a traffic stop, Lyles brought § 1983 action against two officers and City of Dallas, alleging violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

3:11-CV-0428-P, 2011 WL 13154073 at *1-2 (N.D. Tex. Sep. 16, 2011)

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Lyles v. City of Dallas

After suffering a beating, tasing, pepper spray, and racial verbal abuse from police officers in a traffic stop, Lyles brought § 1983 action against two officers and City of Dallas, alleging violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

> The Complaint also refers to a "custom and culture of not properly hiring, training, and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities."

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> The Complaint also refers to a "custom and culture of not properly hiring, training, and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities." . . . This culture has created a "blue wall of silence," among DPD officers, whereby they refuse to report each other for breaking the law.

3:11-CV-0428-P, 2011 WL 13154073 at *1-2 (N.D. Tex. Sep. 16, 2011)

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Even if Lyles's Complaint stated enough facts to support his argument that the chief of police is the final policymaker, Lyles does not include in his Complaint sufficient facts to support his argument that the chief implemented an official policy or had, or supported, an official custom, a " 'blue wall of silence,' whereby officers do not report other officers for breaking the law and violating the rights of citizenry."

2011 WL 13154073 at *3.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Lyles refers to two other specific incidents he alleges show "concrete and widespread incidents of conspiratorial cover-up unaddressed through City hiring, disciplining, and/or training practices."

2011 WL 13154073 at * 3.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Lyles refers to two other specific incidents he alleges show "concrete and widespread incidents of conspiratorial cover-up unaddressed through City hiring, disciplining, and/or training practices." . . . However, apart from conclusory assertions, the complaint does not contain any factual allegations showing that these incidents are any more than inappropriate behavior by individual police officers rather than a custom tacitly approved by the chief or the City.

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2011 WL 13154073 at * 3.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Lyles's Complaint also refers to "countless media accounts" depicting the DPD's "custom and culture of not properly hiring, training and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities."

2011 WL 13154073 at * 4.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Lyles's Complaint also refers to "countless media accounts" depicting the DPD's "custom and culture of not properly hiring, training and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities." . . . The Complaint alleges a "high-profile incident when officers of the Dallas Police Department beat up motorcyclist Andrew Collins on September 5, 2010, who was violently knocked off his vehicle and pummeled on the ground as depicted by videotape."

2011 WL 13154073 at * 4.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Lyles's Complaint also refers to "countless media accounts" depicting the DPD's "custom and culture of not properly hiring, training and disciplining officers concerning excessive use of force, particularly against racial and ethnic minorities." . . . The Complaint alleges a "high-profile incident when officers of the Dallas Police Department beat up motorcyclist Andrew Collins on September 5, 2010, who was violently knocked off his vehicle and pummeled on the ground as depicted by videotape." . . . Lyles does not mention any other details regarding this event. Nor is this one prior incident sufficient to support the argument that there is "a pattern of similar constitutional violations by untrained employees" which would "demonstrate deliberate indifference for purposes of failure to train."

2011 WL 13154073 at * 4.

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Further, the media accounts are not specified, nor are the statistics showing the alleged disproportionate "number of Department incidents committed against African-American subjects that is a product of an ongoing culture of conscious indifference."

2011 WL 13154073 at * 4 (citing *Iqbal v. Ashcroft*, 556 U.S. —— 129 S. Ct. 1937, 1949-50 (2009)).

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Further, the media accounts are not specified, nor are the statistics showing the alleged disproportionate "number of Department incidents committed against African-American subjects that is a product of an ongoing culture of conscious indifference." . . . Such claims amount to legal conclusions and conclusory statements of fact, not specific facts sufficient to support a claim that there is either a "blue wall of silence" in the DPD or that its officers are not well-trained in the proper use of force.

2011 WL 13154073 at * 4 (citing *Iqbal v. Ashcroft*, 556 U.S. —— 129 S. Ct. 1937, 1949-50 (2009)).

Excluding "Code of Silence" Testimony

Lyles (cont'd)

> Finally, without sufficient facts to find an official custom or policy of discrimination, Lyles's Complaint cannot state sufficient facts to support a claim that the chief's policies were the moving force behind the violation of Lyles's constitutional rights. . . . Thus, Lyles's Complaint fails to state facts sufficient to support a Section 1983 claim in accordance with Rule 8(a)(2) and *Iqbal*.

2011 WL 13154073 at * 4 (citations omitted).

Undermining the "Code of Silence" Testimony

- Inadequate data (sample not representative)
- Unreliable Methodology
- No causal connection
- Irrelevant to this department in these times
- Unfair prejudice
- Confusion of issues
- Misleading the jury
- Usurping the jury's role (credibility determination)
- Poor definition (silent about what, in what situations, and to whom?

Undermining the “Code of Silence” Testimony

The data experts use is old, and the Commissions all pointed the way to reform.

Show that there has been reform.

Directly controverting evidence: testimony and supporting statistics of officers reporting each other’s misconduct.

Undermining the "Code of Silence" Testimony

In a 2021 trial against the City of Houston, the City presented as a fact witness former Houston Police Chief Charles McClelland (who had served his entire 39-year career in HPD, from 1977 – 2016 overall; chief from 2010-2016).

Plaintiff's cross of Chief McClelland went something like this*:

*(This is from memory, not from a transcript. Houston prevailed, and there was no appeal.)

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Q Isn't it true that the police engage in what is known as a "wall of silence?"

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Plaintiff's cross of Chief McClelland went something like this*:

Q Isn't it true that the police engage in what is known as a "wall of silence?"

A No. I've never seen it in my career. That's something you plaintiffs' lawyers made up.

*(This is from memory, not from a transcript. Houston prevailed, and there was no appeal.)

Undermining the “Code of Silence” Testimony

Plaintiff’s counsel followed up with a question to which he did not know the answer:

(This exchange is from notes taken contemporaneously.)

Undermining the "Code of Silence" Testimony

Plaintiff's counsel followed up with a question to which he did not know the answer:

Q: "Isn't it rare for a police officer to file a complaint against a fellow police officer?"

(This exchange is from notes taken contemporaneously.)

Undermining the "Code of Silence" Testimony

Plaintiff's counsel followed up with a question to which he did not know the answer:

Q: "Isn't it rare for a police officer to file a complaint against a fellow police officer?"

And McClelland answered:

A: "No, it's not rare. In fact, it's more common than not. 70% of all complaints against our officers are from other officers."

(This exchange is from notes taken contemporaneously.)

Undermining the “Code of Silence” Testimony

Juries will determine witness credibility.

If you can obtain (recent) statistics to support a statement like this one that the vast majority of complaints against officers are filed by other officers, that will strengthen the testimony and help undermine the plaintiff’s claims of a code of silence in this department at the relevant time.

Undermining the “Code of Silence” Testimony

Emphasize that if the Code of Silence ever existed on any widespread basis that could serve as grounds for municipal liability, that it a thing of the past.

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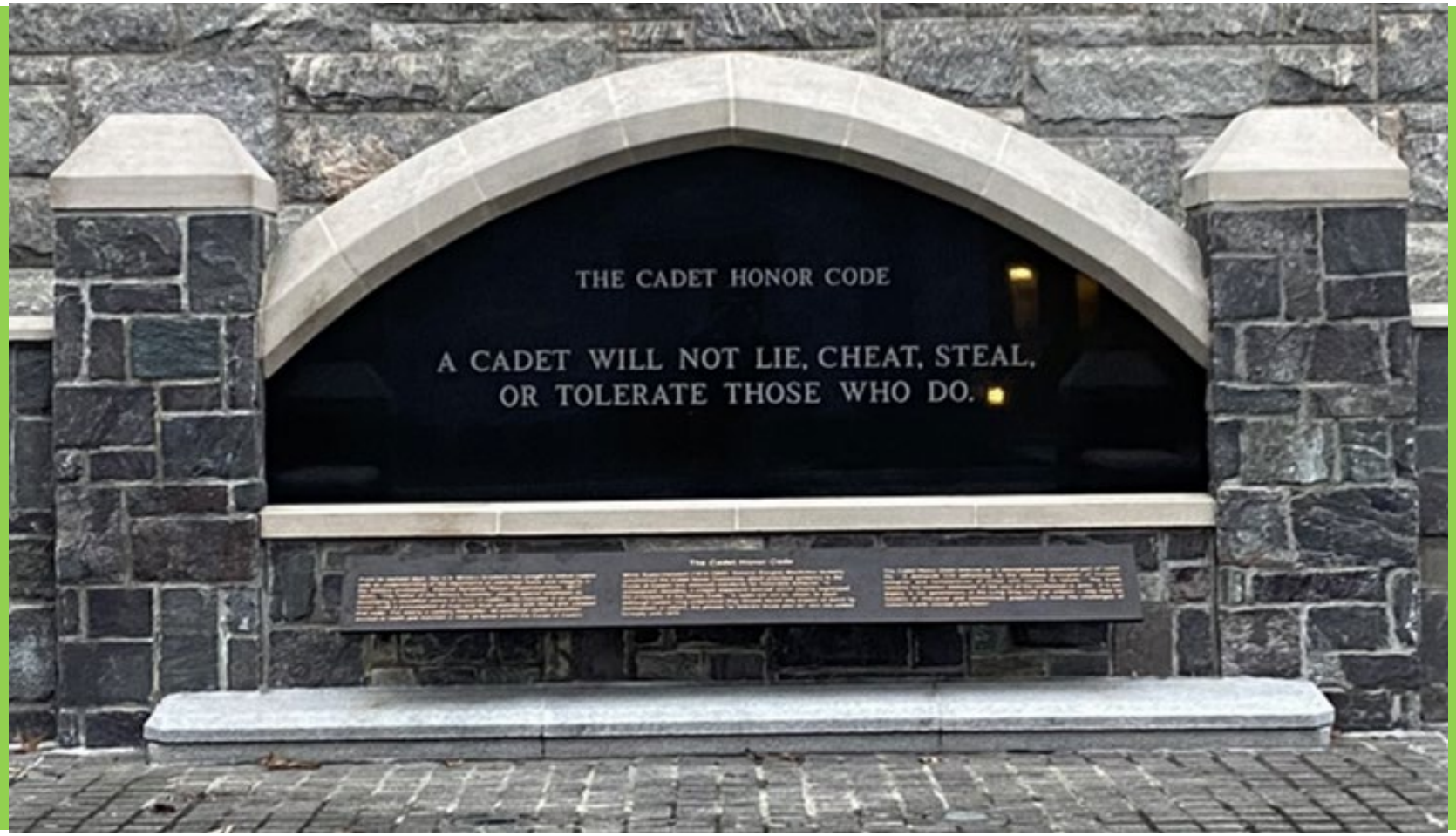
Emphasize that if the Code of Silence ever existed on any widespread basis that could serve as grounds for municipal liability, that it a thing of the past.

The code our officers follow today is a Code of Honor, and it is directly opposed to a Code of Silence.

Code of Honor

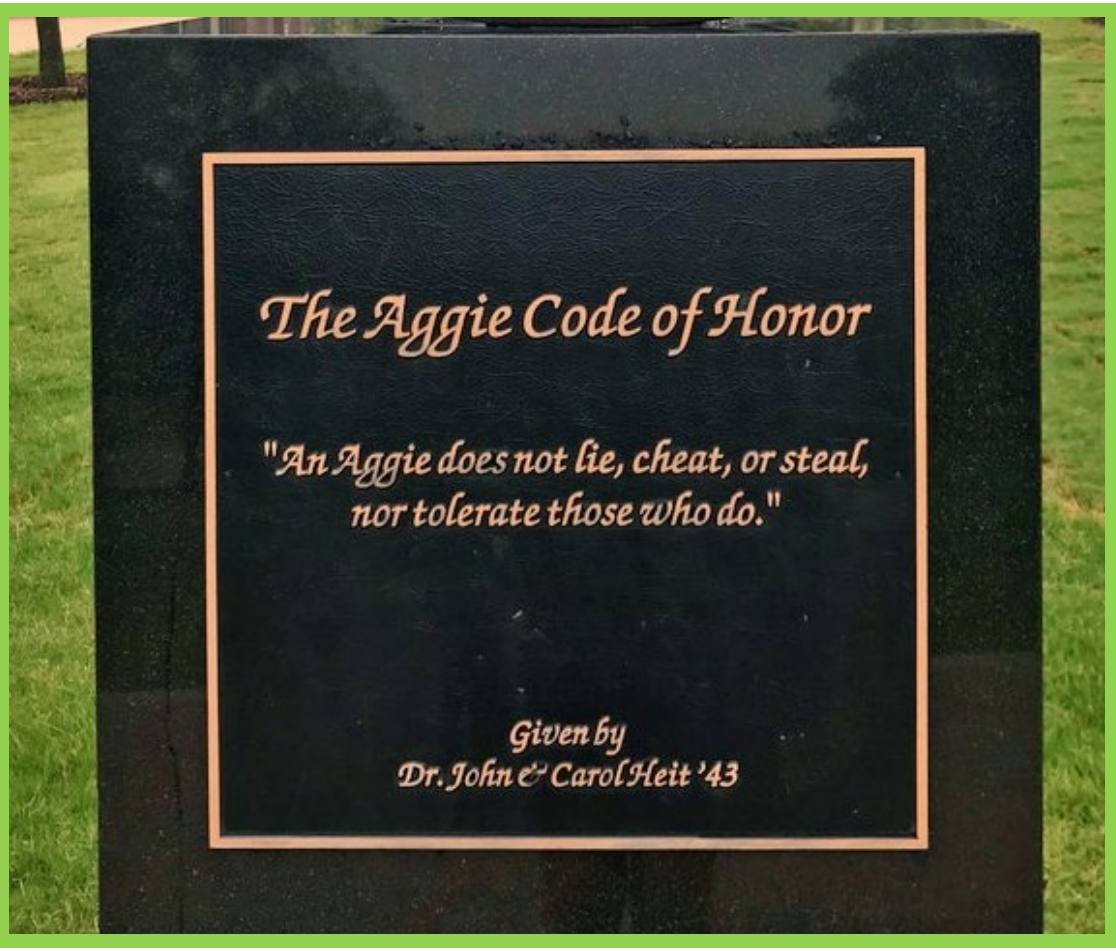
West Point Cadet Honor Code



Code of Honor

The Aggie
Code of Honor

Texas A&M University



Code of Honor

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Showing these will help to undermine any expert's testimony of a code of silence.