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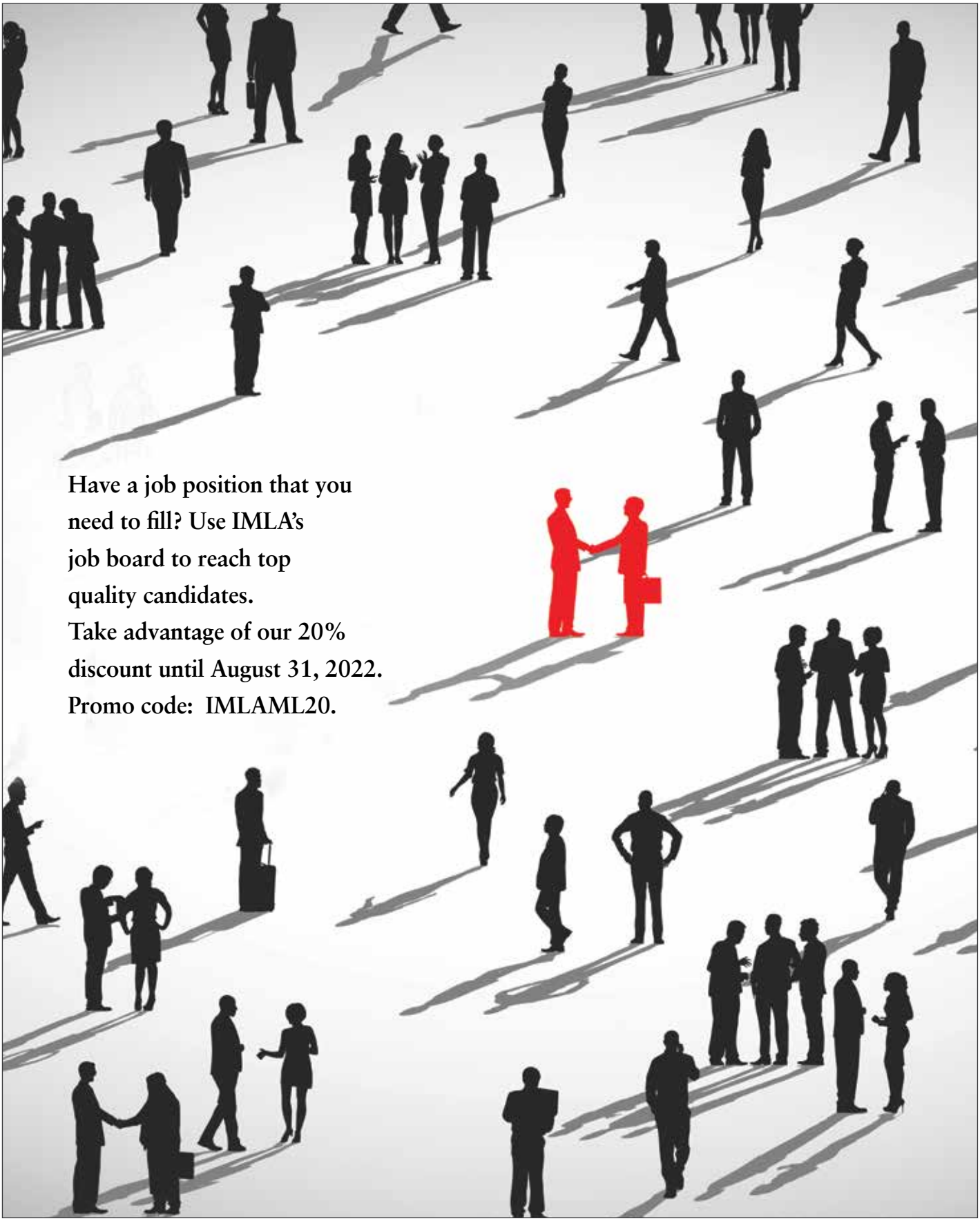
When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Assistant General Counsel
and Director of Affirmative Litigation

Towards a More Perfect Union…

As America celebrates this 246th anniversary of our Declaration of Independence, consensus on "self-evident" truths, "unalienable Rights," and "Life, Liberty and the pursuit of Happiness" seems more elusive than ever. A single week lays bare the growing divide: What most regard as the demolition of an inviolable fortress protecting women's autonomy is viewed by some as a proper restoration of state powers. A modest bipartisan step towards firearm safety, offered in response to hundreds of lives already gunned down this year, is decried as a further infringement. A local effort to avoid governmental endorsement of religion falls to proponents of free exercise. And even as a public inquiry seeks to reveal clandestine activities undermining the past election, ever more obscure stratagems are being employed to contort the electoral process in future races.

The turmoil in reproductive rights, gun control, electoral integrity, governmental imprimatur on prayer, and much more will present challenges long after the Summer of 2022 has passed. Against this contentious backdrop, local government lawyers will be tasked with upholding the rule of law, however it is defined. With that mission in mind, and in a less cataclysmic tenor, we turn to this July-August *ML*. Our lead article advises on countering unsupportable allegations of the police "Blue Wall," an assertion often made even though no code of silence is at play. A second feature is ML's annual law student offering, this one analyzing the proper time and place for legislative censure. A third feature highlights local government affirmative suits—specifically, the steps localities can take to develop an affirmative litigation capability.

We also offer two Canadian submissions, one discussing Canada's procurement parameters which govern almost universally in all provinces, and one evaluating the ultimate impact of a high-profile Ontario case on policy decision immunity.

There's more. *Practice Tips* provides the first of a two-part series on project development, and *Cases* assesses a recent Fourth Circuit decision measuring charter school dress codes against Equal Protection and Title IX.

Returning to the disquieting landscape introduced above, there are still ample grounds for a glass-more-than-half-full perspective. One modest source of hope for our future: at the very moment this note is being written in the interval between Juneteenth and the Fourth of July, Justice Ketanji Brown Jackson is ascending to her seat on the Supreme Court of the United States. So, a small but nevertheless transformative step is taken on the sometimes-rocky path towards a more perfect union.

Best wishes as we celebrate independence.

Erich Eiselt

PRESIDENT'S LETTER



BARBARA A. ADAMS,
General Counsel, Illinois Local Government Lawyers Association and IMLA President

Recognizing Excellence in Rose City

Summer is in mid-swing, and so are preparations for IMLA's 87th Annual Conference in Portland, Oregon, otherwise known as the City of Roses. Both the substantive program and the other attendees who will be with you are sure to be engaging and enlightening. Programming will include a wide range of topics, including the impact of recent cases out of the U.S. Supreme Court on land use, telecommunications, employment law, sober/group homes, public contracts, ethics, and many other invaluable topics. And don't forget to sign up for the ever-popular IMLA Land Use Tour, which will be back again—on Friday afternoon this year. Portland will be a fascinating venue for the Tour, and for our Conference overall.

A wide range of opportunities for networking will be available--connecting with colleagues from past conferences and seminars, and making new friends who have also chosen local government law as their profession. These will include coffee breaks, the welcome reception, breakfasts, and the opportunity to join "dine-around" outings with fellow attendees. For those looking for some athletic activity after long days in meeting rooms, opportunities to play softball, soccer and golf will be available.

And IMLA seeks your help in creating some of the best moments at the Conference—by nominating a fellow IMLA member for one of IMLA's eleven (yes, 11!) awards in a wide range of categories. For most of the accolades, an Intent to Nominate statement is due July 8, 2022, with complete nomination forms due by August 5, 2022.

Some awards, like the Charles S. Rhyne Lifetime Achievement Award, recognize a long history of work and service in our profession. This award honors Charles S. Rhyne, who was the founder of what is now IMLA.

Long-standing, consistent, and continuing service to clients is recognized by awards such as the James H. Epps III Award for Longevity of Service to a Community and the Marvin J. Glink Private Practice Local Government Attorney Award. James Epps served as attorney for the City of Johnson City, Tennessee for more than 40 years, while Marvin Glink served a range of local governments in Illinois for more than 50 years while in private practice.

Our younger lawyers can be recognized by other awards, such as the Daniel J. Curtin Young Public Lawyer Award and the Brad D. Bailey Assistant City/County Attorney Award.

Still other awards recognize the depth and breadth of the diversity of our membership, such as the Diversity, Equity and Inclusion Award. And the Brown, Mulligan, Rocha Distinguished Public Service Award honors three key leaders of IMLA from diverse backgrounds: Benjamin Brown, a Black attorney and leader who served as Executive Director and General Counsel of IMLA after serving as City Solicitor for the City of Baltimore; Joseph Mulligan, who served as Corporation Counsel of the City of Boston and served as a past President of IMLA; and Susan Rocha, a Latina who represented numerous local governments in Texas and served as a past President of IMLA.

We also honor our colleagues in Canada; distinguished service by a Canadian municipal lawyer is recognized by the Bruce A. Noble Award. Bruce was the first Canadian President of IMLA.

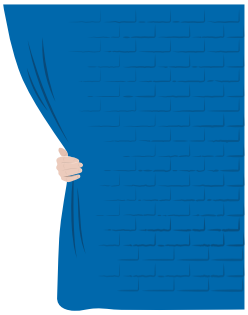
Service to IMLA is valued and can be recognized through three different awards. The Outstanding State League Counsel Award recognizes the service of counsel to our state leagues and associations and other councils of government. The William I. Thornton, Jr. IMLA Faculty Award is named for Bill Thornton, who was a dedicated participant as a faculty member/teacher of many of our members, and recognizes those who continue in those efforts. The Burk E. (Buck) Delventhal Legal Advocacy Award honors Buck Delventhal, who advocated for the City and County of San Francisco for almost 50 years and was a tremendous asset to and supporter of IMLA's legal advocacy program, and recognizes others who work in this field.

Recognizing our colleagues for their many contributions to our profession by nominating them for one of these awards is a generous gesture and provides a unique and heartwarming opportunity (yes, we lawyers do have hearts!) to honor our colleagues for their achievements, recognize them for their accomplishments in local government law and thank them for their service to IMLA—in eleven different categories! A complete list of awards and past winners can be found at this link: https://imla.org/awards/

Portland promises to be a great host venue for IMLA. Please sign up to attend, bring a colleague, and join us. I look forward to seeing you all in Rose City!

When Experts Construct a Blue Wall: Defending Police Against Code of Silence Claims

ROBERT W. HIGGASON, *Senior Assistant City Attorney, Houston, Texas*



INTRODUCTION

What is the problem?

Civil rights plaintiffs often complain that (1) police cannot be trusted to testify truthfully against another officer's wrongdoing; (2) police cover for each other; (3) police retaliate against officers who do not follow this code; and (4) Internal Affairs investigations are a part of the cover-up. As attorneys who represent local government and our law enforcement officers, we should care about this for at least two reasons.

First, the claim that police follow a code of silence prejudices the factfinder. That can affect the outcome of a case by overpowering credible evidence that would tend to show an officer's conduct was legal and reasonable. A jury that believes police follow a code of silence will be more likely to return an adverse judgment based on suspicions rather than on evidence.

Second, outside of court, such a claim will prejudice society. The more people believe that police are not trustworthy, the harder it will be to defend our officers, regardless of what the evidence shows. A generalized distrust of police also feeds the movement to abolish qualified immunity.

Many of us will have to defend police officers and municipalities against allegations that our police follow a code of silence. Lawyers can take specific steps to challenge the admissibility of those claims and to undermine the impact of such testimony if it goes to a jury. This article is intended as a preliminary guide for that defense.

1. Recognizing the so-called "Code of Silence"

Many courts have discussed claims that police follow a Code of Silence—generally not concluding that police do so, but simply admitting evidence. Researching caselaw (and media coverage) on this issue should encompass alternative terms for this alleged phenomenon: Blue Wall of Silence; Blue Code of Silence; Blue Shield; Blue Wall; Blue Curtain; and Blue Veil. Some representative cases are discussed below.

A. *Thomas v. City of New Orleans*

In *Thomas v. City of New Orleans*, former New Orleans Police Department police officer Randolph Thomas alleged discriminatory employment practices leading to wrongful discharge, claiming that there was "a widespread and invidious 'blue curtain' within NOPD, creating a code of silence to shield those who abide by the code and punish those who violate it."[1] Thomas elicited testimony of a former NOPD police chief, who acknowledged that there had been a "blue curtain" of silence in NOPD, *and* that it existed in most major police departments. The court's reasoning shows why this is significant:

> 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.[2]

The Code of Silence claim is pervasive; if a jury believes it, that will operate as an evidentiary force multiplier interpreting other evidence in plaintiff's favor.

B. *Barry v. New York City Police Dept.*

In *Barry v. New York City Police Dept.*, a police sergeant alleged retaliation in violation of First Amendment rights after exposing police misconduct within her unit.[3] The district court observed that "blue wall of silence" testimony can be critical to municipal liability, calling it the "central hook" in this case:

> 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.[4]

The court explained that municipalities can be liable under *Monell*[5] without an explicit policy if "a plaintiff can show that practices are so persistent, widespread, and permanent that they constitute a custom or usage with the force of law."[6] If a plaintiff presents Code of Silence evidence along with evidence of policy-making officials' acquiescence, that combination can lead to municipal liability.

C. Baron v. Suffolk County Sheriffs Dept.

In *Baron v. Suffolk County Sheriffs Dept.*, a former corrections officer alleged First Amendment violations by retaliatory harassment for breaching a Code of Silence by reporting a fellow officer's misconduct (playing cards with inmates).[7] Baron's attorney introduced testimony from Deputy Superintendent Feeney confirming the Code of Silence and potential consequences to an officer who violates it.[8] The First Circuit reasoned that, despite the fact that "other Department employees denied at trial the existence of a code of silence[,]" Feeney's acknowledgment gave "additional weight" to Baron's testimony and could help the jury find for plaintiff.[9]

D. Valentin v. New York City

Valentin v. New York City illustrates the impact that Code of Silence testimony can have on municipal liability.[10] A former officer with New York City Housing Authority alleged sexual harassment and discrimination, hostile work environment, and retaliation in violation of the First and Fourteenth Amendments.[11] Valentin proffered expert testimony of Dr. Stephen Leinen to opine on "retaliation against officers who violate the 'code of silence[,]'" which defendants moved *in limine* to exclude.[12] Following extensive discussion of Leinen's qualifications and the Federal Rules of Evidence, the court concluded that Code of Silence testimony could support an inference of such a practice, which would be relevant in showing causation and satisfying *Monell*:

> 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.[13]

2. Federal Rules of Evidence Governing Expert Testimony

Code of Silence testimony can be offered by both lay witnesses and expert witnesses. An effective challenge to those claims requires a solid knowledge of several critical Federal Rules of Evidence, eight of which are presented here.

A. Rule 702 should be a primary focus for a defense challenge to an expert's opinion on Code of Silence. It sketches the parameters of expert testimony, how the witness can qualify as an expert, and some requirements for admissibility.

Rule 702. Testimony by Expert Witnesses[14]

> 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;
> (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.

Because the testimony must meet all conditions (a) through (d), defense counsel has several potential grounds for challenging proposed expert testimony.

B. Rule 703. If the proposed testimony satisfies Rule 702, the expert is allowed a great deal of leeway under Rule 703:

Rule 703. Bases of an Expert's Opinion Testimony[15]

> 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



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Before joining the City's Legal Department, Mr. Higgason was in private practice for 20 years, focusing primarily on civil appeals. Before opening his solo appellate practice, he worked for two major international law firms for several years. He also worked for the First Court of Appeals in Houston as a briefing attorney and research attorney and for an appellate boutique firm in Houston.

Mr. Higgason received his Doctor of Jurisprudence from the University of Houston Law Center in 1991. He also has a Master of Arts in philosophy from the University of Houston and an undergraduate degree in Christianity and psychology from Houston Baptist University.

Blue Wall *cont'd from page 7*

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.

One problem that can arise from Rule 703 is that it arguably would allow the expert to base Code of Silence testimony on "facts or data" in the form of unreliable studies or surveys, such as the Trautman report examined below.[16] Even if only a relatively small number of experts rely on Trautman's report (or any given study), that might be enough for some judges to find the reliance to be reasonable (because it's a narrow field and experts use the same materials).

The defense counsel should challenge the reasonableness of such reliance by exposing the unreliability of the study, survey, facts, or data. An unreliable foundation cannot give rise to a reliable opinion. No number of experts will make the unreliable reliable. This problem should not arise if the court follows Rule 702, which sets requirements for expert testimony.

Defense can also challenge what counts as "facts or data" as opposed to conclusions or extrapolations drawn from alleged "facts or data." If a study asserts that a Code of Silence operates in most major police forces, that is a conclusion the study's author drew from data. Yet that conclusion itself might be treated as an underlying fact, like this: *given the fact that the Code of Silence is widespread among police departments, we can opine not only that it exists here but that it was a cause of plaintiff's injury*.

C. Rule 705 also provides experts a great deal of leeway, but enables defense counsel to expose weaknesses in underlying data:

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion[17]

> 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. But the expert may be required to disclose those facts or data on cross-examination.

D. Rules 401 and 402 might seem to be so commonly understood that we need not refer to them, but it can be helpful to go back to these foundational criteria. Even if the judge initially overrules a relevance objection, defense counsel should renew that objection after exposing the unreliability of proposed testimony.

Rule 401. Test for Relevant Evidence[18]

> 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.

Rule 402. General Admissibility of Relevant Evidence[19]

> 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.

E. Rule 403. If the judge overrules relevance objections, defense counsel should be ready to argue Rule 403 to exclude Code of Silence testimony.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons[20]

> 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.

Counsel should be prepared to explain how Code of Silence testimony would create unfair prejudice, confuse the issues, or mislead the jury. Indirect help comes from *Thomas*, *Baron*, and *Valentin*. Counsel should not cite those cases for excluding the testimony, because each allowed it. But those cases can help counsel understand the problem of admitting the testimony: it supercharges other evidence, which provides some footing for arguing that it misleads the jury.

The defense can also challenge what counts as "facts or data" as opposed to conclusions or extrapolations drawn from alleged "facts or data." If a study asserts that a Code of Silence operates in most major police forces, that is a conclusion the study's author drew from data.

F. Rule 406 presents a danger for defense counsel wanting to exclude Code of Silence testimony:

Rule 406. Habit; Routine Practice[21]

> 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.

Evidence that a Code of Silence is *this* Department's routine practice is admissible to show that *this* Department engaged in the Code of Silence in *this* case. But defense counsel should 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 Rule 406.

G. Rule 701. Even if the court excludes Code of Silence expert opinion, Rule 701 provides this alternate means by which a plaintiff may introduce such testimony:

Rule 701. Opinion Testimony by Lay Witnesses[22]

> 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.

Counsel can challenge lay opinion testimony of Code of Silence by exploring the depth and breadth of the witness's perception, but that could backfire if the witness has observed many instances of this phenomenon. It would likely be more effective to challenge the testimony on grounds that it will not help the jury understand or determine a fact in issue.

3. Challenging the Experts and the Evidence

A. Outdated research - *Zamora v. City of Houston*

In a 2012 case alleging retaliation against a Houston police officer for filing a discrimination complaint, the plaintiff introduced expert opinion that there was a Code of Silence in the Houston Police Department.[23] Plaintiff's expert testified he was "[v]ery familiar with the phenomenon known as 'the code of silence[,]'" and had "reviewed research on it, seen it in operation, dealt with it over the years."[24] The beginning of his description might be viewed as favorable:

> 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.[25]

Stating that officers must depend on each other for their safety on the streets sounds fine. So far, so good. But the expert didn't stop there:

> 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.[26]

The expert continued and turned to research that he relied on for his testimony:

> Research shows that about 50 percent of active law enforcement officers experience misconduct, they see misconduct and they don't report it. And the reason they don't report it is, I think, 75 percent of them say, they're afraid [of being] retaliated against or ostracized if they do.[27]

The "misconduct" label is very broad. If it is not clarified, the jury can easily believe that it refers to extreme cases such as physically abusing a suspect that is already in custody. Defense counsel should consider exploring the distinctions of misconduct that an officer might witness and whether officers would report more serious misconduct while overlooking less serious infractions.

The expert next cited investigations over the past century recognizing the Code of Silence:

- **The 1931 Wickersham Commission**, which was primarily about the impact of Prohibition on crime and whether to recommend that Prohibition be continued or repealed.[28] It was not primarily a Code of Silence investigation, although it mentioned it in one of 14 reports the Commission produced. The *Report on Lawlessness in Law Enforcement* has been called: ". . . 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."[29] While this *Report* prompted a new generation of police leaders committed to "the police professionalization movement,"[30] any mention of police Code of Silence from the Wickersham Commission is too old to be relevant.
- **The 1991 Christopher Commission** investigating the Los Angeles Po-

Continued on page 32

Just Because You Can, Doesn't Mean You Should: A New Framework for Local Government Censures

ALEXANDRA MARSHALL, Class of 2022, *George Washington University School of Law*



"I urge you to stop being a rancid tub of ignorant contagion," Minnesota Councilmember Ben Plunkett wrote in an email to a community member.[1] Shortly thereafter he was censured by the River Falls City Council.[2]

A censure is a formal reprimand issued by a body of government, imposed on one of its members. Censures are an adaptable and unique form of government action. They can be purely symbolic, for example, publicly condemning a member for an off-color comment without further punishment. Or they can be somewhat punitive, carrying mild punishments such as stripping a member of a caucus position or placing a member last in seniority. Censures can be meaningfully used to condemn behavior otherwise unworthy of civil or criminal enforcement, but they can also serve to further drive local communities into the contentious "us" vs. "them" political narrative.

On March 24, 2022, the United States Supreme Court returned a unanimous verdict for *Houston Community College System v. David Buren Wilson*, overturning a Fifth Circuit decision involving free speech and censure at the local level.[3] Authored by Justice Gorsuch, the opinion confirms what many thought to be already-settled law: government entities – local and federal – possess nearly unlimited power to censure members for public and private conduct. In light of the decision, this article seeks to answer the question: if a local government's censure power is nearly unlimited, what framework should it apply when deciding to take such action?

This article will proceed in three parts: Part I will discuss the tradition of censure and the recent decision in *Houston Community College*; Part II will consider some recent examples of censure and their correlation to current events; and Part III will introduce a new framework for analyzing the appropriateness of local government censures based on the Court's analysis in *Wilson,* and conclude with a call to action for governments to impose censures only when it is socially and politically responsible.

I. CENSURE, A HISTORY

A. What is Censure?

Censure is defined in Black's Law Dictionary as "an official reprimand or condemnation; an authoritative expression of disapproval or blame."[4] In a legislative context, a censure is usually the passage of a "resolution that publicly condemns a member's conduct."[5] Censures are one of many tools in the toolkit of a government body. They fall in the middle of the spectrum of severity; reprimands being a lesser and more informal form of punishment, and expulsion being a more severe form.[6] Censures are just that: speech which publicly condemns another, but it does not mean they are without teeth. James Madison once remarked that a potential censure would be "a severe punishment" for the parties reprimanded.[7]

Censures allow for government bodies to take a formal public stand against harmful actions or words in circumstances where either the law is unavailable to help or where it would be politically or socially unwise to pursue such action. An overarching theme of censures is that they are tied to preserving the "peace of the community."[8] While they may appear in some ways to stifle minority voices or actions, they are not intended to suppress constitutional rights. They are instead meant to create another opportunity

for meaningful dialogue among public officials, and between the government and the governed.[9] They seek to strike a balance between formal legal action and idly standing by while holding one's tongue.

Legislative censures have held a place our nation's governance since the earliest days of the republic.[10] One of the earliest censures is thought to be President George Washington's censure during the Whiskey Rebellion in 1794.[11] And the Founding Fathers included a discipline provision in the federal Constitution: "[e]ach House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member."[12] This provision was modeled after the English court system where "[t]he power to discipline [members] was more or less assumed as a part of [legislative] privilege."[13] Today, nearly all states and many local governments have enacted similar disciplinary provisions.[14]

While censures are common and have repeatedly been upheld to be constitutional, from their debut on American soil, some scholars have expressed opposition to their use. One argument is that censure seeks to restrain public speech and may hasten the path towards censorship.[15] In this vein, one early critic said that censure would "lock the mouths of men."[16] Other scholars opposed to censures argue that they are unnecessary expressions of mere opinions, and that distasteful or unpopular speech will simply be drowned out in the free marketplace of ideas.[17]

B. The Latest Case: Background

The Houston Community College System – operating several community college campuses in Houston, Texas – is run by a publicly-elected Board.[18] Under Texas law, the Board has the authority to govern via orders and resolutions, and adopt rules and bylaws.[19] Voters elected David Wilson, the Respondent, to the nine-member Board in 2013.[20] The position came with a six-year term and Wilson's tenure was turbulent from the start.[21] During his time on the Board, he engaged in many disruptive practices. For example, Wilson filed a number of lawsuits against the Board while in office, costing the Houston Community College System more than $270,000 in legal fees.[22] In one such lawsuit, he alleged a violation of the Board's bylaws when a trustee was permitted to vote via videoconference.[23] In addition to the litigation, Wilson publicly disparaged Board members by name in local media interviews, organized nuisance robocalls to bombard constituents of other Board members, and hired a private investigator to research another member.[24]

Over the course of Wilson's tenure, the Board publicly reprimanded him on two separate occasions.[25] The first, in 2016, was a public reprimand via resolution but with no other punishment.[26] The second, and the subject of this case, was in 2018 when the Board again adopted a public resolution with a formal censure as a result of Wilson's conduct being inconsistent with "the best interest of the college… not only inappropriate, but reprehensible."[27] The 2018 censure also carried with it a number of penalties including a stipulation that barred him from holding officer positions as well as restricting his ability to be reimbursed for travel expenses absent Board consent.[28] The Board additionally recommended that Wilson attend a governance and ethics training.[29] Following this action, Wilson amended one of his pending state court claims to include a First Amendment violation, seeking an injunction, compensatory damages for his mental anguish, and attorney's fees.[30] He also sought punitive damages.[31]

Eventually the case found its way to the Fifth Circuit, which sided with Wilson, holding that he had successfully stated a First Amendment retaliation claim and finding that the censure was intended as a punishment for "criticizing other Board members for taking positions that differ from his own" and "filing suit alleging the Board was violating its bylaws."[32] The Fifth Circuit conducted a two-step merit analysis and ultimately concluded that the verbal reprimand created an actionable First Amendment claim but that the additional punishments did not violate Wilson's First Amendment rights because he never had "an entitlement to those privileges."[33] On appeal to the Supreme Court, the only element at issue was whether the verbal reprimand alone created an actionable First Amendment claim: "did the Board's censure offend Mr. Wilson's First Amendment right to free speech?"[34]

C. The Latest Case: Supreme Court Analysis

In his brief, Wilson argued that the censure qualified as a "retaliatory action" after he engaged in speech constitutionally protected by the First Amendment.[35] Justice Gorsuch begins the analysis with a primer on the history of censure in the United States.[36] Throughout history Congress has censured members for a variety of public and private conduct, and local governments have followed suit, at times even surpassing in frequency their federal counterpart.[37] Justice Gorsuch concludes that this long history alone leaves a "considerable impression" on this case, if not putting the case to rest all together.[38]

The bulk of the legal analysis considers what exactly constitutes "retaliatory action." In order to qualify, the government must have taken a

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material "adverse action" following an individual's speech – such as an arrest, prosecution, dismissal, or deprivation of another right – that the government otherwise would not have taken "absent the retaliatory motive."[39] There is no decisive test to determine materiality in this context, so the Court utilized two tests proposed in lower courts. The first test asks: "whether the government's challenged conduct would 'chill a person of ordinary firmness' in the plaintiff's position from engaging in 'future First Amendment activity.'"[40] The second test asks whether the action "adversely affected" the speaker's protected speech, "taking into account things like the relationship between speaker and retaliator and the nature of the government action in question."[41]

Applying Wilson's circumstances to both tests, the Court highlights a few facts. First, elected officials such as Wilson are expected to bear a significant amount of comment and criticism in relationship to their office.[42] As candidates for public office, they necessarily insert their reputation, character, and actions into the sphere of public discourse.[43] Second, because the First Amendment allows public officials like Wilson to criticize the government, it similarly protects other representatives of that local government so that they may defend themselves or bring new information to light.[44] Finally, Wilson never evidenced a chilling of his First Amendment activity due to the Board's conduct;[45] he certainly did not "cower silently" after the Board took action.[46]

The Court unanimously sided with the Houston Community College System on these facts, but it left open the door to potential future litigation for a variety of other reprimands: censures which carry punishments, censures aimed at ordinary citizens, cross-governmental reprimands, and verbal reprimands issued by the government aimed at students or employees.[47]

II. CENSURE CASE STUDIES: A SPECTRUM

Civil unrest, democratic crises, and the Covid pandemic created many an opportunity for public officials to "open mouth and insert foot"– and in some cases, both feet. Censures provided a way for local governments to denounce conduct otherwise unworthy of formal legal action. These measures fell on a spectrum. On one end, they were effectively used to denounce wildly offensive or dangerous speech/conduct, but on the other end, they were disproportionate politically motivated reactions to otherwise mild offenses. To illustrate this spectrum, consider the following three case studies:

One extreme example is that of Senator Amanda Chase. After the January 6th Riot, Senator Chase, a Virginia Senate Member who was present at former President Trump's January 6th rally, was censured by bipartisan vote in the Virginia Senate, in part, for comments made during a floor speech.[48] During a address defending Ashli Babbitt, she stated "[t]hese were not rioters and looters, these were patriots who love their country and do not want to see our great republic turned into a socialist country."[49] The resolution, signed January 27, 2021, censured Chase "for failure to uphold her oath of office, misuse of office, and conduct unbecoming of a Senator."[50]

The Resolution was framed as being primarily a result of the Senator's January 6th comments, but this was not the only incident listed in the censure resolution. The other alleged conduct included, in part: using offensive gestures and language towards a Capital Police Officer after she was denied access to a restricted parking area, posting on social media that sexual assault survivors are to blame for their assaults because they were "naive and unprepared" and did not fend off their attackers with a gun, accusing Virginia State Senator Jennifer McClellan for not being "for all Virginians" because she was a member of the Virginia Legislative Black Caucus, and proclaiming during the pandemic that she doesn't "do" COVID, among other statements and actions.[51]

Another example, somewhere in the middle on the spectrum, is the case of Mark Paddack, a council member in Ocean City, Maryland.[52] Paddack's alleged offense stems from a late-night racially charged Facebook comment made in his personal, private account on another individual's Facebook Story video.[53] The comment read: "tell the dude to turn his hat back where the white designed the hat to be worn. Where I come from that is punk. Immature POS."[54] After the post went viral and caught the attention of the Mayor and Council, the councilman claimed his Facebook account had been hacked and the local sheriff's office began an investigation.[55] In the weeks following, absent a completed investigation, the Council President successfully moved to censure Paddock for the conduct which was "not becoming of a councilmember."[56]

Finally, an example on the other extreme, is the case of Tom Duerr, a councilman in Allegheny County, Pennsylvania.[57] After a somewhat contentious council meeting in March 2022, Duerr allegedly "accosted" another councilman immediately following the meeting "in a hostile tone of voice."[58] The censure motion reported that Duerr said, "I always knew you were a [expletive] coward" in regard to the votes the other councilman had cast during the meeting.[59] The brief exchange has been characterized as a "personal attack" and the censure motion demanded that Duerr issue a public apology and "refrain from any such public behavior at all times in the future."[60] Ultimately, the Allegheny County Council dropped the motion, but not before the threat of censure prompted Duerr to release a statement publicly appologizing to the councilmember for the "sharpness" of the words he used.[61]

III. A NEW FRAMEWORK

A. Public Policy Perspective

Nothing in politics exists in a vacuum, and it is important to analyze censures in context of the current political environment. According to the Pew Research Center, "America is exceptional in the nature of its political divide."[62] Nine-out-of-ten registered voters associated with each party answered that they worried victory by the other party "would lead to lasting harm to the U.S."[63] And eight-out-of-ten registered voters answered that their differences with the opposing party were about "core American values."[64] There is stark disagreement on major issues: racial justice, science, law enforcement, international policy, and more.[65] As issues become more deeply entrenched in political camps it becomes more difficult for Americans to find common ground or a "collective national identity."

Like many tactical political moves, censures can be used to either heal or drive apart a community. They can be meaningfully used to condemn problematic behavior otherwise unworthy of civil or criminal enforcement, or they can be used as a weapon to further drive local politics into the contentious "us" vs. "them" mindset. Judge Edith Jones, who dissented in the Fifth Circuit *Wilson* decision, wrote about this phenomenon: "Given the increasing discord in society and governmental bodies, the attempts of each side in these disputes to get a leg up on the other, and the ready availability of weapons of mass communication with which each side can tar the other, the panel's decision is the harbinger of future lawsuits… It weaponizes any gadfly in a legislative body."[66] For this reason, the author advocates for a more nuanced approach to censures.

B. Towards a New Paradigm

The question remains: if local governments are permitted nearly unlimited power to censure their members, yet the current political climate demands they exercise restraint in imposing censures, what framework would best serve the ultimate goal of preserving the "peace of the community" while still holding public officials responsible for abhorrent conduct?[67]

The author argues that governments should adopt an analysis similar to that utilized by the Supreme Court in *Wilson*, except in a reversed order and with a modified party perspective. Recall in *Wilson* that in order to determine if a government action (in this case, a censure) offends the First Amendment, the Court considered two tests. First, whether the "challenged conduct would 'chill a person of ordinary firmness' in the plaintiff's position from engaging in 'future First Amendment activity.'"[68] And second, whether the action "adversely affected" the speaker's protected speech, "taking into account things like the relationship between speaker and retaliator and the nature of the government action in question."[69]

In the new proposed framework, the local government would apply these same standards when assessing whether or not censure is an appropriate response to a member's speech or conduct. This new framework would proceed in two steps, where the answers to each step are intended to be evaluated collectively using a totality of the circumstances approach:

> Step 1A: what was the nature of the relationship between the member at issue and the party or parties who were intended to hear the message?
> Step 1B: what was the nature of the speech or conduct?
> Step 2: how likely is it that the member's speech or conduct would chill a person of ordinary firmness in the recipient's position from engaging in future First Amendment activity?

Step 1A seeks to determine the nature of the relationship and the power dynamic between the parties. The least worrisome conduct would be between two publicly-elected members of the same governmental entity, and especially in a case where the speech or conduct is directed from a junior member to a more senior member of the governmental body. In these situations the member at issue is either equally matched with the recipient of the conduct or is in a slightly disadvantaged position. Governments should be highly skeptical of censuring a member for speech or conduct between members. This is because public officials, as Justice Gorsuch noted, are expected to bear a significant amount of comment and criticism in relationship to their office, especially from their peers.[70] Additionally, censures for speech or conduct between members may provide the greatest kindling for local animosity and political jockeying. Alternatively, censure would be more appropriate if the speech/conduct is aimed at members of the public who possess less social or political capital and therefore are unable to meaningfully respond or defend themselves.

Step 1B seeks to account for the differences between public versus private speech/conduct. Did the speech/conduct at issue take place in area where the member reasonably expected privacy (for example, in a private comment on a Facebook Story), or was the member acting in public? And if the conduct was public, was the conduct public in a limited way (for example, berating a Capital Police Officer in a Congressional parking lot) or in a very public way (for example, making a formal statement on national television or posting content through an official campaign Facebook page)? The less public the speech, the less appropriate a censure might be to address the situation. This step is the least meaningful in the framework, but it does provide an opportunity to evaluate the facts of the situation more wholistically.

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How Can Your City or County Begin Filing Affirmative Suits?

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INTRODUCTION

Once a public law office commits to assuming the role of lawyer for the community, local affirmative litigation starts with several straightforward steps. This article outlines recommended first steps toward launching an affirmative litigation practice in your city or county.

Editor's Note-This article is excerpted with permission from "Local Action, National Impact: A Practical Guide to Affirmative Litigation for Local Governments," published by Justice Catalyst, Public Rights Project, San Francisco Attorney's Office, and Yale Law School-San Francisco Affirmative Litigation Project. The complete Guide can be accessed at www.publicrightsproject.org.

STEP ONE: Set Your Affirmative Litigation Goals

We believe it is important to be deliberate as you embark upon an affirmative litigation program. The following four goals should animate any local affirmative litigation effort:

Pursue cases that have a nexus to your residents. At heart, the mission of your office is local: Whether you are investigating a national corporation or a local company, you should confront entities that cause harm to your residents. Thus, a key first step to establishing an affirmative litigation program is to generate cases by examining what issues cause harm both to the locality directly and also to the public—your constituency—more broadly. This will show your community that their local public law office is advocating on its behalf, building trust and a foundation for dialogue. Grounding litigation in local harm will also justify the affirmative litigation work that your office does. For example, in 2016, San Francisco used its affirmative litigation power to sue a for-profit university that was unlawfully skirting zoning laws and depriving San Franciscans of hundreds of rent-controlled dwellings.[1]

Fill gaps in the private and public interest law markets. Your office will not be the only one filing lawsuits on behalf of members of your community: legal aid clinics, nonprofits, and private plaintiffs' firms all file litigation to curtail practices that harm communities. Yet, as a public office, you can take advantage of tools that are not available to private plaintiffs. For example, many companies include binding arbitration clauses in their contracts that force employees and consumers to arbitration should a conflict arise. These arbitration clauses heavily favor defendants and can give companies impunity to violate the law knowing that conflicts will be resolved through arbitration rather than in open court.[2] Further, courts have restricted the abilities of private plaintiffs to bring class actions to challenge consumer contracts rendering many cases cost-prohibitive and ineffective.[3]

These restrictions often do not constrain public enforcement. Thus, by using affirmative litigation to take cases that consumers cannot bring themselves, you can put your office's unique position to its best use.

Protect your community's most vulnerable residents. Although legal clinics and nonprofits serve some of our most vulnerable communities, these

organizations rarely have enough resources to sufficiently protect communities of color, low-income communities, immigrant communities, children, LGBT residents, and elderly persons. Your office can become a resource for communities that might not ordinarily have easy access to the legal system.

Tailor your cases to the scope of your authority and your tools. Every city and county public law office has different tools available for affirmative litigation. In some situations, a public law office may realize that litigation is not the right tool to redress unlawful activity. Often sending a letter or initiating an investigation will be sufficient to encourage the business to comply with the law.[4] Alternatively, if your city or county has a contract with a company that is engaging in unlawful conduct, you can leverage that relationship to encourage the company to change its practices.

STEP TWO: Use the Full Scope of Your Local Authority

With your office's overarching goals in mind, evaluate the scope of your authority to ensure you undertake litigation consistent with that authority and that makes the best use of your available legal tools.

As the examples discussed earlier demonstrate, localities rely on a variety of legal authorities in affirmative litigation. For example, San Francisco and Los Angeles have relied primarily on their consumer protection authority to bring litigation—redressing a variety of unlawful, unfair, or fraudulent business practices using California's Unfair Competition Law.[5] New York City relies on aggressive enforcement of its municipal code and other tax laws to promote public health, safety, and welfare. Localities may also be able to proceed under federal law when they can demonstrate sufficient harm from the unlawful conduct to satisfy Article III standing requirements. This section highlights some of the most common sources of authority for local affirmative litigation.

Consumer Protection Authority

Consumer protection laws give public law offices authority to stop predatory business practices. While all states have adopted their own consumer protection laws, most state statutes take their cues from the Federal Trade Commission Act.[6] The FTC Act broadly prohibits unfair and deceptive business practices.[7]

-Unfair business practices are those that cause or are likely to cause substantial harm to the consumer, that the consumer cannot reasonably avoid, and that are not outweighed by countervailing benefits to competition.[8]

-Deceptive business practices are those that are misleading in a material respect, either by making a suggestion or omission that would deceive consumers.[9]

Many states have not only adopted the FTC Act's prohibitions in their own consumer protection statutes, but have also expanded on federal protections. Many, for example, prohibit unconscionable business practices, generally defined as practices that are substantially one-sided and take advantage of the consumer's disadvantages in commercial transactions.[10]

California has additionally classified any business practice that violates other federal, state, or local laws as an act of unfair competition—making any unlawful business act a consumer protection violation.[11]

What makes consumer protection law especially valuable for impact litigation is its breadth and versatility. When local law offices take full advantage of consumer protection law, they can engage in a wide range of public interest litigation. They may engage in prototypical consumer protection cases—combatting deceptive sales tactics, false advertising, or unfair banking and lending practices.[12] But local law offices can also use consumer protection laws to protect residents from business practices that cause other types of widespread harm or threaten residents' well-being.

Protecting Minors

In 2014, the San Francisco City Attorney's Office sued the mobile phone application MeetMe, alleging that the app's distribution of minors' locations to strangers, including sexual predators, was an unfair and deceptive business practice.[13] MeetMe eventually settled with the City Attorney's Office, agreeing to make "groundbreaking" changes to its business model that would better protect children's safety and privacy rights, in addition to paying damages, attorneys' fees, and other costs.[14] Though consumer protection law had not previously been used in this context, it could readily fit this situation, and the case illustrates how consumer protection laws can be leveraged to protect communities even as illegal practices vary and evolve.[15]

To determine whether your office can use consumer protection law for affirmative litigation, evaluate whether your office has standing to enforce the relevant state statutes. Every state consumer protection statute empowers the state's attorney general to enforce its provisions, and some states allow municipal or county authorities to enforce these provisions as well, independently or in cooperation with the attorney general.[16]

Without an affirmative grant of authority by the state's consumer protection statute, it is less likely that a city or county could directly enforce state consumer protection laws without demonstrating a direct harm to the city itself.[17]

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Affirmative Suits *cont'd from page 15*

After evaluating your standing to proceed under a consumer protection theory, examine your state's consumer protection statute to weigh whether it is the best vehicle for affirmative litigation. Many states have adopted statutes that are purposefully broad and meant to be construed liberally.[18] In a few states, the consumer protection statute limits unlawful conduct to an enumerated list of business practices or includes an intent requirement.[19] Thus, offices should evaluate whether the statute provides the best vehicle for affirmative litigation compared to other tools, including by assessing the facts of any particular potential law violation.

Nuisance Authority

Public nuisance authority gives cities and counties the opportunity to address activities that threaten the health, safety, or welfare of their communities. Unlike consumer protection law, public nuisance abatement has its origins in common law, making it a more widely available cause of action. While the definition of a public nuisance varies by jurisdiction, the term is generally understood as "an unreasonable interference with a right common to the general public" such as "the public health, the public safety, the public peace, the public comfort or the public convenience."[20]

The main advantages of public nuisance law are its long history, broad availability, and flexible application. Public nuisance is a well-established cause of action that has been recognized by courts for over a century.[21] The U.S. Supreme Court has recognized that the right to abate public nuisances is inherent in the notion of territorial sovereignty.[22] Thus, the standing problems that municipalities may face when enforcing consumer protection laws do not typically apply in the public nuisance context.

As a result of this broad authority, states and cities have been able to use the law of public nuisance to combat a variety of harms, from air pollution to the sale of diseased meats to the dangerous storage of combustible materials.[23]

For example, a coalition of ten cities and counties in California used their public nuisance authority to sue three major paint manufacturers for using toxic amounts of lead in their paint and endangering residents' (particularly childrens') health.[24] In this way, cities and counties can use public nuisance law similarly to consumer protection law as a tool to combat a wide range of practices that harm members of their communities.

Cities can also use public nuisance law in ways beyond the scope of consumer protection law. For example, in 1997, the Los Angeles City Attorney's office established the nation's first Citywide Nuisance Abatement Program (CNAP) to use civil nuisance abatement as a tool for public safety in collaboration with other municipal agencies like the Los Angeles Police Department and Los Angeles Department of Building and Safety.[25] In 2016, CNAP was responsible for shutting down a property used by a white supremacist gang for drug trafficking.[26] Through public nuisance affirmative litigation, the Los Angeles City Attorney's Office has combatted illegal drug, weapon, and human trafficking, as well as other violent activity.[27]

Public nuisance law can continue to evolve to meet local needs as cities and counties define its scope. All states have adopted their own statutes defining public nuisance,[28] but many states allow municipalities to define public nuisances as well.[29] If your city or county has the ability to expand the definition of public nuisance, you can also consider working with local legislators so that public nuisance doctrine can be tailored to fit your affirmative goals and the needs of your community—noting, of course, that the scope of your public nuisance authority will be limited by state and federal preemption norms.

Code Enforcement Authority

All city and county offices have the authority to enforce local ordinances within their jurisdiction. While local ordinances may not prohibit as broad a range of harmful conduct as state statutes or common law, local law offices can equitably enforce these ordinances to combat harms that businesses may inflict on the community. For example, as previously mentioned, New York City has effectively enforced its municipal code provisions to protect residents by, for example, aggressively enforcing its tax provisions against tobacco companies.[30] Oakland has successfully enforced its minimum wage ordinance to protect workers' rights to receive overtime pay and sick leave.[31] Additionally, as your office sets the goals for its affirmative litigation to address the greatest harms to your community, you can work with local legislators to enact ordinances targeting the misconduct you hope to combat—again keeping in mind state and federal preemption limitations.

Federal Law Authority

Cities may also have the ability to enforce certain federal laws. For example, as discussed above, in Bank of America Corp. v. City of Miami, the U.S. Supreme Court held that the city of Miami had standing to enforce the Fair Housing Act as a standalone plaintiff against banks discriminating against people of color throughout the city.[32] Baltimore, San Francisco, and Oakland sued fossil fuel companies seeking to enforce the application of federal common law

in a state public nuisance action.[33] The claims brought by San Francisco and Oakland were dismissed by the federal district court and appeal is pending before the Ninth Circuit.[34] While it is uncommon for localities to enforce federal law, municipalities have been able to do so in some cases where there is concrete harm to the city. Enforcing federal law through local affirmative litigation is in most cases a novel—and thus inherently uncertain—strategy, but it could also greatly benefit local residents.

Remedies

The final issue to consider in evaluating the various potential bases of legal authority for your affirmative litigation are the remedies available under each approach. As discussed above, the key goal of a local affirmative litigation practice is to benefit the community and the local jurisdiction. Remedies to achieve that goal would include both injunctive relief to protect future victims and restitution to make past and current victims whole. Civil penalties or attorney's fees can also help make an affirmative litigation practice sustainable for a local office. Evaluating available relief under each potential statute or common law theory, along with the factors discussed in this section, will help your office determine the best approach in each case.

STEP THREE: Find Your First Cases

Once you have set your affirmative litigation goals and determined the scope of your enforcement authority, you can put them into action on behalf of your community. There are myriad ways to find cases and no universal set of instructions. At the most basic level, this exercise involves identifying problems that exist in your community and applying the available laws to solve them. This section offers some places to start, but your office should think creatively and strategically as it identifies cases.

Take advantage of the data you already have. Cities and counties keep data on a variety of local phenomena. Especially useful is data on resident complaints or grievances filed with other city departments, including the city council and the mayor's office. For example, if workers complain of minimum wage violations, those complaints may provide clues for your office to begin investigating broader business violations. In addition to local data that your city collects, other sources like the Better Business Bureau and federal agencies make available information that can be useful to your case planning efforts. The Consumer Financial Protection Bureau currently keeps a public log of all consumer complaints that can be filtered by location, allowing your office to learn about complaints from your residents.[35] The Federal Trade Commission also maintains a free database of millions of consumer complaints related to a variety of potential law violations, including identity theft, telemarketing scams, advance-fee loans and credit scams, immigration services, and debt collec-

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PRACTICE TIPS

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Municipal Attorneys as the Key to Successful Project Delivery

This article starts with a simple question: Is the municipal attorney's role in public construction contracts undervalued? Stated otherwise, a more relatable rendering of that question might be: Is the municipal attorney consulted at all before public construction contracts degrade into claims litigation and finger pointing?

Editor's note: This is the first in a two-part series.

Decks are stacked against public owners that not only want to build, but need to do so, and the municipal attorney's hand is all too often the card that is most underplayed. Effective public construction projects, from inception to signing the beam, involve a complex and intricate series of decisions that can make or break the project. All too often, critical project development decisions are made in ae vacuum, devoid of legal considerations. Municipal attorneys need to have their voices heard and change that trend, if cities and towns are to improve the way they deliver projects.

Regardless of project type, there are four very distinct phases of public construction: planning, procurement, contract drafting, and contract administration. Done right, you can avoid a fifth phase, construction litigation. I am convinced that the earlier we involve the seasoned municipal attorney in the incremental phases of construction project development, the less likely we are to end up in litigation, or end in litigation at a distinct disadvantage. This article provides some practice pointers for each phase to help avoid unfavorable outcomes for municipalities. Today's installment discusses the first two phases-planning and procurement.

Planning. Project need and identification are areas where municipal attorneys may feel that their skill set is not necessary, or that work at this phase would be out of their "lane." Nothing could be more inaccurate. Quite often both the need for, and opportunity to fund/facilitate a project emanates from statutory or regulatory requirements or grant in aid opportunities. Look no further than the American Recovery and Reinvestment Act (P.L. 111-5 (2009)), or the Infrastructure Investment and Jobs Act (P.L. 117-58 (2021)) In addition to funding acts and programs, such as state drinking water and wastewater revolving funds and state school building assistance, the planning aspects of public construction are always grounded in a very legal framework that defines requisite qualifications for the project on a definitive, and often times exclusory, basis. Identifying, analyzing, and meeting regulatory requirements in the project planning stage for public construction is a *legal function.*

In addition to funding opportunities as a genesis for public construction project development, quite often municipalities enter project development not because of funding availability but through forced regulatory compliance. In the areas of water, wastewater and environmental remediation, quite often public owners are thrust into construction projects to meet enhanced state or federal environmental standards for municipal functions. In these cases, municipal counsel is often at the table during development of the consent decree or remedial agreement, judgment or order that becomes the predicate for the construction project. One such example would be a municipality forced to construct significant plant upgrades to meet enhanced regulatory standards for wastewater effluent or biosolids. Being conscious of the public construction alternatives, project delivery options and funding at this stage can help the municipal owner make the right decision in agreeing to the scope, timing, and compliance schedule for these mandated improvements.

As a practice pointer in this area, I suggest attorneys become familiar with the statutory environment for the funding as well as the regulatory framework for compliance. In law school, they taught us to map out the elements of a claim or defense. In law practice, we then learned to take those elements and program in the documentary, testimonial and demonstrative evidence that supports each such element. The planning phase of public construction is no different. Map out the funding opportunity, matrix the requirements of the funding act, not simply filing dates but the substantive components of documentation and project need, and be sure the planners, design professionals and municipal managers fill the "legal squares" laid out in the funding act or regulatory scheme.

Understanding these elements, we then move to the next phase of project planning, which is delivery model selection. Delivery model selection is constrained in most states and quite often restricted to traditional public construction via low-bid procurement. It is incumbent upon the municipal attorney to understand and advise the municipal client on the available delivery model based upon project type as well funding source

for the particular jurisdiction. The most common project delivery models include traditional design-bid-build, design-build, progressive design-build, and construction manager at risk. A discussion of the definitions, advantages, disadvantages, and process requirements for each of these delivery models is too extensive to include in this short article; however, the key for municipal counsel is to understand that varying delivery models exist for public construction and that their availability for use is carved out in state enabling legislation, local laws, or home rule amendments. Project delivery model selection will drive the selection of the procurement vehicle, which again, will be defined by state law.

Practice pointers: Know your available project delivery models and help the client understand the requirements of traditional hard-bid but the advantages of non-traditional project delivery for public construction. Shift the D-B-B paradigm.

Procurement: Procurement is a derivative of the planning stage, but its boundaries are finite and constricted by state law in most jurisdictions. Procurement options, like project delivery models, must be specifically authorized by state statute, facilitated by enabling legislation or home rule, or grounded in previously delegated local authority. Municipal counsel must be familiar with the many or unfortunately sometimes few, procurement models available. Phased procurement is often the rule, and not the exception in many jurisdictions. Be aware that procurement options may differ based on the type and value of the construction, for instance, vertical (buildings) versus horizontal (heavy, highway, bridges and below grade utilities). In addition, availability for alternative project delivery sometimes requires the project to meet threshold values, for instance, only building projects over ten million dollars can use competitive proposals as opposed to sealed bid procurements.

The most common type of municipal procurement is design-bid-build. Often referred to as "low bid" or "hard bid" this procurement vehicle involves separate bids for the design and construction phases of the procurement. Commonly, the design professional, an architect or engineer (A/E), prepares the specifications for the project to 100% (complete) design and also prepares the bid documents. General Contractors then submit bids and selection is based upon the lowest responsive/responsible/eligible or qualified bidder; terms vary among jurisdictions. The bedrock principle, however, is that if a bidder meets the minimum qualifications enumerated in the specifications and submits a responsive proposal, containing all information, proposal forms, surety forms and state/local requirements, the one with the lowest bid is selected.

The problems with low-bid selection are obvious and inherent. The best way to protect against substandard contractors is to ensure the minimum criteria are detailed, specific, have higher thresholds and place a great deal of emphasis on project history, performance, prior terminations, or payment of liquidated damages, environmental, regulatory and permit compliance and references. By setting minimum, historic performance and compliance requirements in the bid documents, how a "responsive," "responsible," or "eligible bidder" is defined changes significantly in favor the municipality. Like minimum bonding capacity and surety requirements, minimum historic performance standards are realistic measures of a contractor's responsibility and should always factor into the eligibility requirements.

The process I described above pervades municipal construction project development, and what is missing is the input of municipal counsel. All too often only the A/E reviews the invitation for bids (IFB) without legal review or input, yet an IFB is as much a legal as it is a technical document. Much of document is prescribed by state or local procurement law, and legal eyes need to see it before it is "on the street" and a catalyst later for contract defense or bid protest.

Alternative project delivery, including design-build, progressive design-build and Construction Manager at risk offer the benefit of "qualifications-based selection" (QBS)n or "Best Value" selection and can integrate design and construction phases of a project in manner not achieved with traditional low bid construction. Most types of alternative project delivery give municipal owners the opportunity to use both minimum and comparative evaluation criteria in the selection process, and to make final selection on factors other than price alone, to achieve the "best match" or the best value for the municipal project. The key to using QBS or Best Value is a careful, substantive development of the comparative evaluation criteria and tying them to the project needs. Moreover, whether it is a numeric rating scale (1 to 5, 10), weighted point average or a narrative valuation (Highly Advantageous, Advantageous, Not Advantageous or Unacceptable) definitive statements/thresholds mark the level at which a proposer is rated in each category. For instance, in a criterion entitled "related project history/similar projects" a score of 5 can be reserved for proposers with 5 or more comparable projects within 3 to 5 years, a 4 for proposers with 3 -4 projects in the last five years, etc. By making these threshold narratives for each matrixed criteria and score, all of the sudden subjective evaluation becomes objective, and the municipal owner is in a position to defend its selection criteria. ML

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Municipal Procurement Law in Canada: Everyone Sings Off the Same Song Sheet

By: RAHUL RANADE, *Lidstone & Company, Vancouver, British Columbia*



In 2018, a domestic trade tribunal in Ottawa famously put the kibosh on the Canadian government's procurement of design services for a new fleet of warships. One of the bidders had alleged that the process had violated a domestic trade agreement, and the tribunal ordered suspension of the purchase as an interlocutory remedy. While the purchase did ultimately proceed upon final disposition by the tribunal, municipal purchasers across the country keenly watched the story as it unfolded and took notes.

Why would a municipality be interested in a warship procurement saga, you ask? Because municipal procurement in Canada is subject to the same substantive law that binds procurement made by higher levels of government. Yes, the procurement of a humble snowplough for keeping municipal roads drivable must follow the same rules as the procurement of a $5 billion state-of-the-art warship. And a municipality in Nova Scotia on the Atlantic shore is bound, more or less, by the same procurement rules that bind a municipality in British Columbia on the Pacific shore.

A common legal framework

While a common body of law governs municipal procurement across Canada, surprisingly, none of it is owed to federal law-making; in fact, there is no federal statute on point. Rather, municipal procurement law arises out of voluntarily-entered trade agreements – primarily the Canadian Free Trade Agreement ('CFTA') - and the celebrated (and criticized in equal measure) decision of the Supreme Court of Canada in *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111 and its progeny. At the risk of oversimplification, one could say that the two aforementioned pieces of writing - CFTA and *Ron Engineering* - together bind all municipal procurement in Canada to a common legal framework.

The CFTA is a domestic, multilateral trade agreement which all provinces, territories and the federal government have entered into. While the CFTA is not a statute, each of the signatory governments has adopted laws making a monetary award under the CFTA enforceable in courts of that jurisdiction. This makes the CFTA a formidable source of black-letter law related to procurement. Municipalities, while not direct signatories, are subject to the CFTA through commitments made by senior levels of government (with the exception of municipalities in Yukon).

But wait, CFTA is not the only trade agreement that municipalities must worry about; there are other supra-national and sub-national treaties that also apply. Internationally, there is the Canada-European Union Comprehensive Economic and Trade Agreement which applies to a majority of municipalities in Canada. Regionally, some provinces have entered into trade agreements with neighbouring provinces; for example, the Trade and Cooperation Agreement Between Ontario and Quebec provides rules that apply to municipal procurement in those provinces.

Fortunately for municipal purchasers, the trade agreements in the melange all impose obligations that are substantially similar. If a procurement complies with one of the agreements, then it is highly likely that it complies with all of them (subject to different

monetary thresholds, but more on that later). As a practical matter, the CFTA is often used as a stand-in for the entire set of applicable agreements by Canadian municipalities (and their lawyers).

The first of the trade agreements was executed in 1995 (when a predecessor to the CFTA was signed) but even before then, the Canadian procurer was no stranger to the idea of a nation-wide set of procurement principles. That concept had been around since 1981 when the *Ron Engineering* decision was issued by the Supreme Court of Canada ('SCC'). Indeed, no discussion of municipal procurement is complete without discussion of the 'Contract A/Contract B' framework propounded by the SCC in that decision. Delving into that concept is not necessary for purposes of this sweeping review and it will suffice to state the central message of *Ron Engineering*: there is a duty on a procuring entity inviting bids to treat each bidder equally and fairly. Further, the decision opened the door for courts to step in to generally preserve the integrity of the bidding process and specifically to remedy the alleged unfairness. Under *Ron Engineering*, a procuring entity's failure to meet the duty of fairness could – and does - result in monetary awards against procuring entities for bidders' lost profits and other damages. A line of cases from the SCC and lower courts following *Ron Engineering* have helped refine the law, prominent among these being *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619.

A comparative view

The legal/institutional system that frames municipal procurement in Canada is unusual. For starters, the trade obligations that CFTA's domestic signatories have placed on each other are reminiscent of those found between sovereign nations. Indeed, there are provisions in the CFTA that are modeled after the General Agreement on Tariffs and Trade and the erstwhile North American Free Trade Agreement. This characteristic of the CFTA is owed to the dynamic (read, fractious) nature of relationships between Canadian provinces. The situation is not helped by the SCC's interpretation of federal powers that favours provincial autonomy over nationwide economic integration (compare this with the US, whose supreme court has tipped the balance in favour of economic integration by reading in the 'dormant commerce clause' in its constitution).

To continue the across-the-border comparison, there is nothing quite like the all-encompassing body of Canadian procurement law found in the United States. While federal procurement in the US is governed by federally mandated rules (e.g., the Federal Acquisition Regulation), municipal procurement must follow rules that are usually established by state legislatures. For example, in California, municipalities must publicly bid certain contracts as set out in the Public Contract Code. Further, there is no free-standing common law duty of fairness in the tendering process as engendered in Canada by *Ron Engineering*.

But to draw a contrast between municipal procurement law in Canada and its counterpart in the United States is to miss the point that even within the universe of laws that apply to Canadian municipalities, procurement law is highly unusual in having rules that apply nationwide. Except for broadly applicable legal principles (e.g., administrative law), is it not easy to find substantive law that is applicable to municipalities across provincial boundaries. This author, who practices in Alberta and British Columbia, may not have the foggiest idea as to what statutes govern council procedure or municipal rights-of-way in the neighbouring province of Saskatchewan, but will readily offer an opinion on a municipal procurement question from anywhere in the country, thanks to procurement law being unrestrained by provincial boundaries.

With that background, let us look at some broad principles that apply to municipal procurement in Canada.

Principles of law for municipal procurement in Canada

The substantive law that arises under the CFTA and *Ron Engineering* permeates each step of a typical municipal procurement exercise. Simplistically, a municipality's procurement obligations are manifested in four discrete aspects of the procurement process: deciding whether to use open procurement, dealing with non-compliant bids, applying selection criteria, and contracting with the lowest bidder.

Decision whether to open procure

When initiating a procurement, the first decision that municipalities face is whether the vendor or contractor must be selected by publicly inviting competitive bids ('open procurement') or through a closed procurement process. There is no common law requirement in Canada for municipalities to seek open procurement. While some provinces do impose open procurement requirements on municipalities by statute (such as Newfoundland and Labrador's Public Procurement Act), such statutes are the exception and not the norm.

The law requiring open procurement arises from the trade agreements. Article 502(1) of the CFTA requires municipalities to use open procurement when purchasing goods,

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service or construction over certain monetary thresholds. For example, for the year 2022, the CFTA requires that municipal procurement of goods and services above $121,200, and construction above $302,900, must be open procured. The monetary thresholds provided in different trade agreements vary, in descending order from the international agreements to those at the regional level. As a practical matter, municipal purchasers concern themselves only with the monetary thresholds for the regional agreement that their province is subject to, since this threshold is the quickest to be crossed.

Noncompliant bids

One of the specific rules of law that has arisen from the *Ron Engineering* line of cases is that when a procuring entity invites submissions from potential vendors, there is a legal obligation to only accept a submission that complies with mandatory requirements for submissions set out in the invitation. "An owner owes no contractual duty of fairness to a bidder who does not submit a compliant bid, and owes contractual duties to all compliant bidders" (*True Construction Ltd. v. Kamloops* (*City*), 2016 BCCA 173). In other words, noncompliant submissions must be rejected by the procuring entity. That said, the SCC has recognized that tendering would become unworkable if minor defects are not overlooked; needless to say, lot of judicial ink has been spilled upon finer questions about whether certain defects in submissions were minor or material.

The degree of noncompliance was *at issue in Maglio Installations Ltd. v. Castlegar* (City), 2018 BCCA 80, where the dispute arose out of the City's invitation to tender for the construction of a swimming facility. The plaintiff submitted a bid that was fully compliant with the invitation to tender, whereas the successful bidder did not include a construction schedule as required by the tender documents. The plaintiff sued. At trial, the City argued that while the successful bidder's tender was indeed missing a schedule, the omission was immaterial. The trial judge disagreed, and held that the noncompliance of the successful bidder was material and, accordingly, the City was obligated to reject the bid. Judgment was granted to the plaintiff for breach of contract, and the Court of Appeal agreed.

Undisclosed criteria

Both the CFTA (article 515(5)) and common law require the procuring entity to select successful bidders in accordance with, and solely based upon, the criteria specified in the tender documents. In other words, a bid may not be evaluated on the basis of extraneous criteria that is not disclosed in the invitation to bid (Chinook *Aggregates Ltd. v. Abbotsford* (*District*), 1989 CanLII 241 (BCCA)).

In *Tarmac Canada Inc. v. Regional Municipality of Hamilton-Wentworth*, 1999 CanLII 2692 (ONCA), the lowest compliant bidder on a road project was not awarded the contract. Instead, the municipality awarded the contract to the bidder with the second-lowest price because this bidder represented to the municipality that it paid taxes in the region and employed local workers, many of whom were laid off (the lowest bidder was not a local entity). There were no criteria in the invitation to bid allowing the municipality to give a preference to local bidders. The lowest bidder challenged the decision and the trial court found in its favour. The Court of Appeal agreed that by relying on criteria extraneous to those identified in the tender documents, the municipality had breached its duty of fairness. (Note: The CFTA in its present form prohibits a local preference regardless of whether it is disclosed or note.)

Duty to contract with "lowest bidder"

Prior to *Ron Engineering*, a procuring entity had no legally enforceable duty to accept only the lowest tender. Since that decision, there is no doubt now that a procuring entity must enter into a contract with the lowest bidder. This obligation is tempered by the procuring entity's ability to cancel the process at any time for bona fide reasons (e.g., budgetary limitations). A corollary to the duty discussed above is that once a lowest bidder is identified, the procuring entity may not solicit other vendors in order to find a better deal; i.e., "bid shopping". The practice of bid shopping was expressly proscribed by the SCC in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58.

The duty to contract with the lowest bidder and the prohibition against bid shopping were both at issue in *Halifax (Regional Municipality) v. Amber Contracting Ltd.*, 2009 NSCA 103. In this case, the municipality invited bids for a storm sewer project and after opening the bids publicly, cancelled the tender. It then retendered substantially the same scope of work. Another party bid a price lower than the original lowest bidder's price and was awarded the contract. Upon challenge by the original lowest bidder, the Court found that the municipality, by retendering a project for which the original bids were publicly known, had failed its duty to contract with the lowest bidder and that the municipality's conduct was "classic bid shopping". The plaintiff was awarded its lost profits.

But what about RFPs?

Ron Engineering was issued in an age when most municipal procurement was carried out through traditional bidding processes where price was the exclusive criteria of evaluation. In the intervening decades, municipalities

have also introduced the qualifications-based model in their procurement. In the latter model, procurement is often carried out by issuing requests for proposals ('RFP') and selection is based on multiple criteria.

Courts seem to have seamlessly adapted the *Ron Engineering* principles to this new reality. In the RFP context, the term 'lowest bidder' is understood by courts to mean the party who best meets the selection criteria. Further, instead of relying on whether a procurement document is called an invitation to tender or RFP, courts look to whether the language of the RFP contemplates the creation of a binding contractual obligation. If there is no such language, then there is no duty for the procuring entity to enter into the contract with the lowest bidder. Finally, courts have held that regardless of whether or not the process is intended to result in a binding contractual obligation, the principles of fairness require that the procurer abide by the process that it has defined for itself in the procurement document.

Conclusion

Municipalities across Canada are bound by the same body of substantive law when it comes to procurement. This unitary, all-encompassing legal framework for procurement is unusual not only when viewed from the outside (i.e., when compared with procurement law in the United States), but it is also unusual within the universe of laws that otherwise apply to municipalities in Canada. It is uncommon to find substantive municipal law that applies across provincial boundaries.

Canada's procurement law arises primarily out of two sources – trade agreements and *Ron Engineering* and its progeny. The CFTA is the most prominent trade agreement as it binds each province, territory, and the federal government, but other international and regional trade agreements also apply. *Ron Engineering* held, in essence, that the procuring entity owes a duty of fairness to bidders.

Whether based on CFTA or *Ron Engineering*, procurement obligations that apply to municipalities can broadly be divided in four aspects: deciding whether to use open procurement, dealing with non-compliant bids, applying selection criteria, and contracting with the lowest bidder. While the procurement obligations were initially developed in the price-based bidding context, the principles have been adapted by courts for qualification-based selections that are increasingly in use now. ML



INSIDE CANADA

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Windrows and Municipal Liability: An Ontario Perspective on *Nelson (City) v. Marchi*, 2021 SCC 41

Overview

There was quite a hullabaloo in the national media when the Supreme Court's decision in *Nelson (City) v. Marchi*[1] was handed down last October, with all kinds of takes on it that clearly did not reflect the limited practical and even legal significance of the decision. To read some popular media accounts, the Supreme Court had mandated that all municipalities across the country had to clear windrows as fast as they cleared the traveled lanes on their roads following any significant snowfall. As I had to spend an inordinate amount of time over the following days and weeks explaining to my municipal clients, nothing could be further from the truth.

As this article will explain, the Supreme Court's decision deals only with the narrow issue of the so-called "policy decision immunity", and even then only reiterating, and perhaps also narrowing the scope of that "defence." Moreover, the decision has even less application to highway winter maintenance cases in provincial jurisdictions such as Ontario with statutory duties of repair of highways, in respect of which the courts have long held are not subject to the policy decision "defence".

Facts

The basic fact pattern in *Marchi* is a common one that we defenders of municipal liability claims have seen over the years. The City of Nelson was hit with a snowstorm on January 4th and 5th, 2015. The City began plowing and sanding in response to the snowfall. The plowing out of on-street parking bays created a windrow or snowbank along the curb that separated the parking stalls from the sidewalk. The City did not clear the windrow or create an access route through the snowbank to the sidewalk for drivers by the day after the storm had ended. On the evening of January 6, 2015, the plaintiff parked in the on-street parking area and decided to cross the snowbank, instead of walking along the road to the nearest street corner. In the process of doing so, the plaintiff fell, causing serious injuries to her leg.

Since 2000, Nelson had relied on a written procedures document called "Streets and Sidewalks Snow Clearing and Removal" (Document). The Document stated that snow removal, sanding and plowing would be carried out "on a priority schedule to best serve the public and accommodate emergency equipment within budget guidelines". As such, the City first cleared snowbanks in the downtown core, then next removed snowbanks from other areas, including around civic centres and around schools, before addressing snowbanks on secondary streets.

Throughout the snowfall, the City's public works supervisor followed the direction provided in the Document and made decisions about how many employees should be on snow removal shifts based on it. Her evidence was that all streets in the City are first cleared of snow, and snowbanks are only removed after all snow plowing is complete. The downtown snowbanks were completely removed on January 9, 2015, just four days after the end of the heavy snowstorm.

When is a decision a "core policy" and covered by an immunity defence?

The sole issue, as framed by the Supreme Court, was whether the City's decision not to clear pathways through windrows such as to permit drivers who parked vehicles in parking spots on the road to safely access the sidewalks and adjoining businesses was a "core policy decision" as defined by the SCC in *Just v. British Columbia*[2] and refined in *R v. Imperial Tobacco*.[3]

Core policy decisions are decisions as to a course of action that are based on public policy considerations, such as economic, social, and political factors, provided they are neither irrational nor taken in bad faith. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity.

It is important to note that the mere presence of budgetary, financial, or resource implications does not determine whether a decision is a core policy. Further, the fact that the word "policy" is found in a written

document, or that a plan is labelled as "policy", is not determinative of the question.

Four factors assist in assessing the nature of a government's decision:

–The level and responsibilities of the decision-maker;
–The process by which the decision was made;
–The nature and extent of budgetary considerations; and
–The extent to which the decision was based on objective criteria.

The Court reminded readers that the purpose of "core policy" immunity in negligence is to protect the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers. This rationale must serve as the overarching guiding principle in weighing the factors in the analysis. In this case, the Court found:

> The City's public works supervisor admitted that she did not have the authority to make a different decision with respect to the clearing of parking stalls than what the Document set out;
> There was no suggestion that the method of plowing the parking stalls resulted from a deliberative decision involving prospective balancing of competing objectives and policy goals by the supervisor or her superiors;
> Although it is clear that budgetary considerations were involved, these were not a high-level budgetary consideration but rather the day-to-day budgetary considerations of individual employees;
> The City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria.
> The Court found that the City's clearing of snow without ensuring direct access to sidewalks was not the result of a core policy decision immune from negligence liability but was a routine part of the City's snow removal process. Therefore, the City's core policy defence failed and it owed the Plaintiff a duty of care. The Court also found that the trial judge erred regarding the standard of care and in analyzing causation. The Court declined to substitute its own findings of fact for that of the trial judge and remanded the case back to the British Columbia Supreme Court for a new trial.

In no way, shape or form did the Supreme Court purport to pass judgment on the reasonableness of the City's approach to snow-clearing – that was left to be decided at the new trial.

Why Marchi does not affect the development of liability for highway non-repair and occupiers' liability in Ontario.

The SCC decision in *Marchi* essentially has no impact on two of the most common types of claims faced by municipalities in Ontario, highway non-repair and occupiers' liability, for three reasons:

Ontario municipalities have never had recourse to the "policy decision defence" in the highway non-repair and occupiers' liability context because of the mandatory statutory duties of care set out in s. 44 of the *Municipal Act, 2001* and s. 3 of the *Occupier's Liability Act*. respectively;

The Supreme Court did not rule on the reasonableness or unreasonableness – and therefore negligence – of the City of Nelson's actions in relation to clearing windrows or creating paths through the windrow to facilitate motorists parked on the road to access the sidewalk; rather, it ordered a new trial where that issue will be determined;

The analyses outlined by the Supreme Court with respect to the standard of care and causation were already well-established law.

Section 450 of the *Municipal Act, 2001*[4] codifies the policy decision defence available to Ontario municipalities as follows:

> **Policy decisions**
> **450.** No proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a

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Christina Wang summered and articled with the firm prior to returning as an Associate in 2022. During her summer with the firm, Christina developed her knowledge of municipal law while completing extensive research for the publication of the Canadian Law of First Responder's Liability textbook and updating Mr. Boghosian's loose-leaf text, The Law of Municipal Liability in Canada. Christina graduated from the J.D. program at Queen's Faculty of Law, where she was the President of the Queen's Environmental Law Club and a student researcher for Pro-Bono Canada. She developed her strong advocacy skills while representing clients at the Landlord and Tenant Board as a Case Worker for Queen's Legal Aid Clinic.

> discretionary function, if the action or inaction results from a policy decision of a municipality or local board made in a good faith exercise of the discretion, shall be commenced against, a municipality or local board; a member of a municipal council or of a local board; or an officer, employee or agent of a municipality or local board.

The key aspects of s. 450 are that it applies only to "proceedings based on negligence" and only related to a "discretionary power" or "discretionary function". The statutory cause of action for highway non-repair in Ontario does not fall within any of these categories since it is not an action in negligence, but one based on statutorily codified cause of action, and the maintenance of highways is not an "exercise of power" that is discretionary. For these reasons, Ontario courts have held that the policy immunity at common law has no application to the statutory duty to maintain highways in a state of repair.[5] This is also true, in the highway non-repair context, in provinces that, like Ontario, have statutory duties of care, as opposed to those in which the duty is found in the common law of negligence such as British Columbia.[6]

Does Marchi Say Anything of Relevance to Ontario Municipalities?

Despite the fact that the policy decision immunity does not apply in the context of two of the most common types of claims faced by municipalities in Ontario, the policy decision immunity remains relevant to many other high-level policy decisions by public authorities, including municipalities. These include decisions regarding building inspection, planning and zoning, water and wastewater, non-highway infrastructure construction, and maintenance and environmental regulation, to name but a few areas of municipal activity. In these cases, policy considerations such as budget, labour standards, safety considerations, and environmental impact can operate, in appropriate cases, to negate the duty of care that would otherwise be owed by the authority.

Furthermore, unlike jurisdictions such as British Columbia where the policy decision immunity is available such that the mere proof that a rational policy exists can be sufficient to absolve the municipality from liability for highway non-repair, in Ontario, municipalities need to establish that its policy is reasonable, it has long been held that policy considerations are still relevant in the highway non-repair context to assist judges in deciding what is "reasonable" in any given case.[7]

Conclusion

The SCC's decision in *Marchi* clearly signals that lower courts should assume they have jurisdiction to review decisions of public authorities of a policy nature based on the private law duty of care, except in the clearest of cases. This decision will have the effect of narrowing the policy decision immunity compared to how it has been applied by trial courts in recent years.

The outcome in *Marchi* and the four-factor test for the application of the policy decision immunity will be critically important for future municipal and other government defendants and counsel when assessing the availability of the policy decision immunity in applicable cases. It is however, of no significance to the development of liability for highway non-repair and occupier's liability in Ontario, or anywhere else where the governing legislation provides for both a mandatory duty and sets out the applicable standard of care for the repair of highways and premises, respectively. ML

Notes

1. 2021 SCC 41.
2. [1989] 2 SCR 1228.
3. [2011] 3 SCR 45.
4. S.O. 2001, c. 25.
5. *See* Restoule v. Strong (Township), 1999 CanLII 2320 where the Ontario Court of Appeal rejected a municipality's reliance on the policy decision immunity given the existence of the mandatory duty of care for the repair of highways set out in s. 284 of the former *Municipal Act* (which is materially identical to s. 44 of the current legislation); Cooney v. Kingston (City), 2005 CanLII 18858.
6. This includes Alberta, Manitoba, Saskatchewan, Northwest Territories, Yukon Territory and Nunavut, in addition to Ontario. The rest of the provinces, including British Columbia, the law of which was examined in *Marchi,* look to the common law to define the duty and standard of care for highway non-repair rather than a statute. For a detailed discussion of this point, see D.G. Boghosian and J.M. Davison, *The Law of Municipal Liability in Canada* (loose- leaf; LexisNexis Butterworths), paras. 3.303.35. Notably, the Supreme Court in *Marchi* cites this textbook approvingly in the course of its Reasons: see 2021 SCC 41, para. 38. The British Court of Appeal also cited this textbook on a different point in its Reasons in this case.
7. *See eg.*, Greenhalgh v. Douro-Dummer, 2009 CanLII 71014.

CASES

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Charter Schools, Dress Codes, Section 1983, and *Chevron* Deference
Peltier v. Charter Day School, Inc., no. 20-1001 (4th Cir. June 14, 2022).

Vacating and remanding in part, the Fourth Circuit, sitting en banc, holds (1) that a charter school is a state actor for Section 1983 purposes and is therefore susceptible to an Equal Protection claim by female students due its dress code; and (2) the gender-specific dress code violates the provisions of Title IX.

Background:

Charter Day School (CDS) is a public charter school in Brunswick County, North Carolina founded by Baker Mitchell (Mitchell) in 1999. It receives 95% of its funding from federal, state, and local governmental authorities. Enrollment at CDS is open to all kindergarten through eighth grade students eligible to attend North Carolina public schools. CDS is managed by a separate for-profit management company also founded by Mitchell, Roger Bacon Academy (RBA), which is responsible for CDS's day-to-day operations, including hiring school personnel and carrying out the school's education program.

Since its inception, CDS has "emphasize[d] traditional values," including a "traditional curriculum, traditional manners and traditional respect." Among other requirements, all students must wear a unisex polo shirt and closed-toe shoes; "[e]xcessive or radical haircuts and colors" are prohibited, and boys are forbidden from wearing jewelry. Female students are required to wear a "skirt," "jumper," or "skort," while boys must wear shorts or pants. All students are required to comply with the dress code unless they have physical education class, when they wear unisex physical education uniforms, or an exception is made for a field trip or other special event. A student's failure to comply with the dress code requirements may result in disciplinary action, including notification of the student's parent, removal from class to comply with the dress code, or expulsion.

In 2015, plaintiff Bonnie Peltier (Peltier), the mother of a daughter attending CDS, informed Mitchell that she objected to the skirt requirement. CDS responded in support of the policy, stating that CDS trustees, parents, and other community supporters were determined to preserve chivalry and respect among young women and men in this school of choice. For example, young men were to hold the door open for the young ladies and to carry an umbrella, should it be needed. "Ma'am" and "sir" were to be the preferred forms of address. There was felt to be a need to restore and preserve traditional regard for peers. Mitchell elaborated that chivalry is "a code of conduct where women are treated, they're regarded as a fragile vessel that men are supposed to take care of and honor," and that in implementing the skirt requirement, CDS sought to "treat[] [girls] courteously and more gently than boys."

Peltier and two other CDS parents and guardians, on behalf of their daughters, sued CDS, its Board, and RBA, alleging violations of the Equal Protection Clause and Title IX, arguing that the skirt requirement is a sex-based classification rooted in stereotypes that discriminate based on gender. The parties filed cross-motions for summary judgment. In support of their summary judgment motion, the plaintiffs submitted evidence of the harms they suffer based on the skirt requirement--one testified that the requirement conveyed the school's view that girls "simply weren't worth as much as boys," and that "girls are not in fact equal to boys." Another stated that the requirement "sends the message that girls should be less active than boys and that they are more delicate than boys," with the result that boys "feel empowered" and "in a position of power over girls." The plaintiffs also explained that they avoid numerous physical activities, including climbing, using the swings, and playing soccer, except for days on

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Affirmative Suits *cont'd from page 17*

tion.[36] The FTC database is available to local law enforcement agencies who become members of its network.

Partner with local advocates. Community-based organizations and other government entities likely know of issues or case ideas that you could address. Legal clinics see clients victimized by repeat bad actors. Community-based nonprofits and organizers that work with marginalized communities can shed light into the recurring difficulties they face as a result of unlawful and predatory conduct. Labor unions track employer abuses in different industries. State attorneys general and federal agencies possess numerous complaints and case ideas but often have insufficient resources to address or pursue them. And, of course, other cities that have already started affirmative litigation practices would be a great resource. Building partnerships with these local community-based organizations and coalitions will give you additional ideas on how to get started and help you establish your office as a trustworthy channel for advocating on behalf of the community. This visibility will also make it more likely that residents may reach out directly to your office with tips and complaints that might yield a case.

Follow the reporting. As simple as it may sound, news reports often provide ideas for new cases. Local reporters often have relationships in the community and scout for new stories, so their coverage can provide insight into unlawful conduct affecting residents. National news outlets—especially those that specialize in investigative reporting like Vox, ProPublica, or Mother Jones—may identify widespread practices that your office can investigate locally. In addition to scouring national and local news sources and following Twitter and other social media outlets, topical reports published by groups like the National Consumer Law Center can also alert your office to potentially unlawful conduct. Sign up for alerts from organizations and think tanks focused on the problems you have identified in your locality as a way to stay informed.[37]

Encourage your staff to generate proactive work. A key aspect of a successful affirmative litigation function is an entrepreneurial staff. Encourage the staff working in your office to take ownership of identifying local problems—or national problems existing at the local level—that your office can seek to address. Everyone in the office—lawyers and non-lawyers alike—should be encouraged to seek out problems requiring public protection and to suggest them for consideration. In addition to the sources outlined above, ideas can come from existing investigations, partner agencies, or conversations your employees have in their communities. They can also come from cases your office is defending that illuminate third-party misconduct the city could confront in a plaintiff capacity.

STEP FOUR: Sustain and Grow the Capacity for Affirmative Litigation
After your office has begun to investigate and file cases, it is important to establish the infrastructure to sustain a steady stream of impactful matters. Designate sufficient resources and personnel who focus solely on affirmative litigation. If possible, devote a portion of any civil penalties or other monetary recovery to future affirmative litigation so that successful cases can generate reinvestment in the public good. Finally, as the office works on active affirmative cases, be mindful of brainstorming ideas for litigation, so that a new case is ready to file when an old one concludes. Keep in mind that not every new idea results in litigation, so a pipeline of ideas and investigations is important for sustained impact. Particularly helpful to keeping a steady stream of litigation is maintaining partnerships with community groups, including local law schools.

ML

Cases *cont'd from page 27*

which they wear their unisex physical education uniforms.

Decision Below:
The district court concluded that CDS, in imposing and implementing the skirts requirement, was a state actor for purposes of the Equal Protection claim brought under Section 1983. That court found that CDS' provision of a free, public education is a function historically and exclusively performed by the state and that, therefore, CDS' conduct fairly was attributable to the state of North Carolina. However, the lower court concluded that RBA did not have a sufficiently close tie to the state to qualify as a state actor.

On the Equal Protection claim, the court held that the skirt requirement violates the Equal Protection Clause and granted summary judgment to the plaintiffs. But it reached a different conclusion regarding the Title IX claim, holding that dress codes categorically are exempt from Title IX's prohibition against gender discrimination. The court reasoned that when the United States Department of Education rescinded a prior regulation governing dress codes, the Department reasonably had concluded that Congress did not intend for such policies to be subject to Title IX. The defendants were granted summary judgment on the Title IX claim.

A panel of the Fourth Circuit reversed the district court's judgment on both the Equal Protection and the Title IX claims. That decision was in turn vacated by a vote of the full Circuit Court, which then considered the appeal en banc.

Appeal - State Action:
The Supreme Court has identified various circumstances in which a private actor may be found to have

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While public officials are "on notice" that their every move is subject to scrutiny, they should nevertheless be afforded some level grace, especially in areas where privacy may have been reasonably expected.

Finally, Step 2 seeks to evaluate just how detrimental the conduct is to the peace and well-being of the community. This is the most important step in the framework. The healthiest democratic communities foster robust discourse and encourage citizens to exercise their rights to free speech, press, assembly, and so on. When citizens are afraid to engage in First Amendment activity, something is deeply amiss. The most destructive speech/conduct – and therefore most worthy of censure – is conduct which stifles First Amendment activity by making a person or group of persons feel unsafe, unwanted, or otherwise unwelcome to express their viewpoint or more broadly participate in the community. This would require something more than just unkind words. Overt racism, sexism, xenophobia, and true threats would certainly fall into this category, but other less obvious forms of offensive speech should also be considered.

C. Applying the New Framework

The new framework is best understood in the context of real-world scenarios. Recall the three examples mentioned above. In each of these cases, the member was either ultimately censured or was at serious risk of censure. Under the proposed new framework, only one of these scenarios would be found appropriate for censure.

First, the case of Pittsburgh councilmember Tom Duerr. The Allegheny County Council considered censuring Duerr after he "accosted" a fellow councilmember "in a hostile tone of voice" saying "I always knew you were a [expletive] coward."[71] Applying the facts to this new framework, the City Council should never have considered censuring Duerr. Under Step 1A: the speech was directed at the councilmember's peer, another elected official, suggesting censure may not be appropriate. Under Step 1B: the speech was made after the conclusion of a council meeting, as members were leaving. While not an entirely private space, it is clear that the speech was not intended for general public consumption, and therefore censure may not be appropriate. Finally, under Step 2: there is no indication that the speech was made or was intended to make the recipient feel unsafe or unwelcome, and there is no evidence that the speech in anyway curbed the other member's inclination for First Amendment activity. While inflammatory, the speech was relatively tame. Average Americans hear analogous commentary on a regular basis. In summary, because the speech at issue was: directed at a political peer, carried out in a semi-public forum, and did not reasonably chill the receiving councilmember's First Amendment activity, censure was inappropriate in this situation. In fact, the mere threat of censuring Duerr under these facts is likely to have done more harm than good to this local community.

Second, the case of Mark Paddack, who was censured for the racially charged private Facebook message. Utilizing the new framework, this is the only situation where the local government should conclude that censure is appropriate. Under Step 1A: the speech at issue was directed at a member of the public, suggesting that censure may be appropriate. Under Step 1B: the speech was made in a private forum, indicating that censure may not be appropriate. While online conduct does live forever, public officials, especially at the local level, should be given some level of leeway for their private behavior. Considering just steps 1A and 1B alone might suggest that censure is inappropriate in Paddack's circumstances. However, Step 2 materially shifts the analysis. His comment, while private, is the type of insidious racism which makes underrepresented minorities feel unsafe and unwanted in a community. His comment is likely to make voters of color think twice before contacting him to discuss a community issue or bringing a community issue to the attention of the Board on which he sits. This is exactly the type of behavior which chills First Amendment activity and is therefore worthy of censure.

Third, the case of Senator Chase. Senator Chase was censured for a history of concerning speech and conduct. But, if the analysis is narrowed to *only* her comments following the January 6th riot, this framework would conclude that censure is inappropriate.[72] Step 1A is inconclusive: the speech was directed at both her peers and members of the public. Under Step 1B: the speech was made in an extremely public place through an official channel, which cuts in favor of issuing a censure. However, under Step 2, the speech was not particularly harmful to any one group. It generally disparaged the nation and fed into a narrative which is widely believed to be untrue (e.g. the election was stolen, citizens should take up arms to "defend" democracy), but the comments did not chill any First Amendment activity. In fact, it likely spurred more First Amendment activity as people felt compelled to engage in counter-speech. Censure should not be used as a means to beat a political foe into submission or to further alienate

an unpopular political viewpoint, especially in circumstances such as these where the community is already deeply divided, and channels of meaningful communication are breaking down. It is the author's argument that censure would not be in the interest of preserving the "peace of the community." Importantly, the decision not to censure Senator Chase does not mean that other members cannot condemn her behavior publicly – they should take every opportunity to combat her speech with thoughtful counter -speech. It is simply that ostracizing the senator via formal censure in this scenario feeds into the "us vs. them" narrative which is already tearing our communities apart. [73]

CONCLUSION

Censures are a powerful double-edged sword for local governments; with great power, comes great responsibility. Censures can be effectively used to protect and enhance the peace of a community in circumstances where formal legal action is inappropriate. But they can also serve as a means to further drive apart communities which are already struggling to find common ground. Local governments should adopt this new framework, based on the legal analysis proposed in the most recent Supreme Court decision on local government censure power, in order to methodically consider the appropriateness of taking such an action.

If there is one group which is able to meaningfully begin the process of healing America's deeply divided social and political landscape, it is local governments. Responsible exercise of censure power, applying it when clearly appropriate but refraining when such an extreme measure is unwarranted, is one small, concrete way they can contribute to that goal.

Notes

1. Michael Brun, *River Falls City Council censures member for 'derogatory and unprofessional' comments in face mask debates,* Rivertowns.Net (Aug 11, 2020, 9:00 PM), https://perma.cc/HV5V-FY5Z.
2. *See id*.
3. Houston Cmty. Coll. Sys. v. Wilson, No. 20-804, 2022 WL 867307 (2022).
4. *Censure*, Black's Law Dictionary (11th ed. 2019).
5. *Case Comment, Constitutional Law – First Amendment – Fifth Circuit Creates Circuit Split by Finding a Legislature's Censure Can Violate the First Amendment – Wilson v. Houston Community College System, 955 F.3d 490 (5th Cir. 2020).* 134 Harv. L. Rev. 2638, 2638 (2021).
6. *See* Jack Maskell, Cong Research Serv., Rl31382, Expulsion, Censure, Reprimand, And Fine: Legislative Discipline In The House Of Representatives (2016).
7. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1566 (2004).
8. *See id*. at 1572.
9. *See generally id*.
10. *See id*. at 1528.
11. *See id*.
12. U.S. Const. art. I, § 5, cl. 2.
13. *See Case Comment, supra* note 5 (quoting Mary Patterson Clarke, Parliamentary Privilege In The American Colonies 184 (1943)).
14. *See id*.
15. *See* Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. Rev. 1525, 1565 (2004).
16. *See id*.
17. *See id*.
18. *See Wilson, supra* note 3 at *2.
19. *See Case Comment, supra* note 5.
20. *See Wilson at* *2.
21. *See id*.
22. *See id*.
23. *See id*.
24. *See id*.
25. *See id*. at *2—3.
26. *See id*. at *2.
27. *Id*. at *3.
28. *See id*.
29. *See id*.
30. *See id*.
31. *See id*.
32. *See id*.
33. *See id. at* *3.
34. *Id*. at *2.
35. *See id*. at *3.
36. *See id*. at *4.
37. *See id*.
38. *See id. at* *5.
39. *See id*.
40. *Id*. (quoting Nieves v. Bartlett, 139 S.Ct. 1715, 1721 (2019)).
41. *Id*.
42. *See id*.
43. *See id. at* *5.
44. *See id*.
45. *See id*. at *6.
46. *See id*.
47. *See id*. at *7.
48. *See* Sarah Rankin Denise Lavoie, *Virginia Sen. Amanda Chase Sues Over Being Censured*, Associated Press (Feb. 1, 2021), https://apnews.com/article/censures-lawsuits-virginia-75977d7351bf4719e822b782d54ca17e.
49. *See id*. Capital Police fatally shot Ashli Babbitt during the January 6th Riot. More reading on Babbitt can be found here: Michael Biesecker, *Ashli Babbitt a Martyr? Her Past Tells a More Complex Story*, Associated Press (Jan. 3, 2022), https://apnews.com/article/ashli-babbitt-capitol-siege-a15c7e52a04d932972b7a284c7a8f7df.
50. S. Res. 91, 2021 Sess. (Va. 2021).
51. *See id*.
52. Greg Wehner, *Ocean City Councilman's Comments Censured with 4-2 Vote*, Ocean City Today, Oct. 22, 2021.
53. *See id*.
54. *Id*.
55. *See id*.
56. *Id*.
57. Hallie Lauer, *Allegheny County Council May Censure Member After*

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Blue Wall *cont'd from page 9*

lice Department. This Commission, appointed by Mayor Tom Bradley and led by attorney Warren Christopher (future Secretary of State), was prompted by the 1991 Rodney King beating,[31] and proposed 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.[32]

While the Christopher Commission acknowledged that the Code of Silence was a big problem in LAPD at that time, LAPD was directed to implement reforms, and the problem might have been eliminated. More to the point, it was only about LAPD. The Commission's findings about LAPD in 1991 are too remote in time and too localized to be relevant.

- **The 1992 St. Clair Commission** investigating the Boston Police Department. This was commissioned by Boston Mayor Raymond Flynn, led by attorney James St. Clair, and produced the *Report of the Police Department Management Review Committee*.[33] It was concerned with the way Boston PD's Internal Affairs Division handled complaints and investigations, and it recommended reforms in BPD.[34] Any references to Code of Silence from this Commission are too old and too localized to be relevant.

- **The 1992 Kolts Commission** investigating the Los Angeles County Sheriff's Department. This Commission was led by Special Counsel James G. Kolts (former LA County Superior Court Judge and prosecutor) and was prompted by numerous costly settlements over excessive force.[35] The Commission's report provided a thorough plan for reform[36] noting that reform had already begun: "the Department has made some progress and is improving still."[37] As with the St. Clair Commission and the Christopher Commission, any mention of Code of Silence from this source is too old and too localized to be relevant.[38]

- The 2000 National Institute of Ethics Nationwide Survey was a survey that Neal Trautman, Director of the National Institute of Ethics, sent to 3,714 officers and recruits from 42 states. He produced a report based on responses from 1,016 recruits at 25 academies in 16 states, and he received responses from 1,116 then-current officers.39 As to recruits, he found that:

  - 79% said that a law enforcement Code of Silence exists and is fairly common throughout the nation.
  - 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.
  - 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.[40]

The recruits' responses are useless to show Code of Silence. Recruits would not have a reliable basis for asserting that a Code of Silence is "fairly common throughout the nation." Recruits would have no experience with what type of conduct might be covered by a Code of Silence. These statistics are vague, unreliable, irrelevant, and inadmissible.

Trautman further compiled responses from 1,116 on-the-job officers:

- 532 officers acknowledged having witnessed "misconduct by another employee, but concealed what they knew."
- 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."[41]

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:

- 697,195 total officers nationwide as of 2019 (FBI.gov)[42]
- 2,132 questionnaires in Trautman study ≈ 0.31% (less than 1/3 of 1%)

The methodology of Trautman's survey is unreliable, the data is out of date, and nothing connects it to the specific department or officer involved in a case today. Grounds for challenging the Trautman report, or any testimony relying on it, is that it is (1) speculative, (2) irrelevant, and (3) even if relevant, more prejudicial than probative.

B. Insufficient Evidence - *Rubio v. County of Suffolk*

Not all district courts have admitted Code of Silence opinion testimony. In *Rubio v. County of Suffolk*, the plaintiff 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."[43] Rubio alleged that the County was liable because it knew of Wright's pattern of sexual misconduct. Former police officer John Weeks "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.'"[44] The district court concluded:

> 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.[45]

Of course, there's no such official policy. But what about custom or practice? The court addressed that next:

> 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.[46]

This opinion provides some guidance for challenging Code of Silence testimony, continuing:

> 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.
> * * *
> 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.[47]

The court granted summary judgment for the County.

C. Excluding Expert Testimony – *Hill v. City of New York*

Hill v. City of New York offers a helpful guideline for arguing that the court should exclude expert testimony of a "Blue Wall of Silence" or "Code of Silence."[48] Hill sued officers and the city claiming excessive force, and he proposed to offer expert testimony showing 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.**[49]

Hill's proposed expert testimony would use Code of Silence to evaluate witness credibility. Note that the expert here uses two terms—Blue Wall of Silence and Code of Silence—more-or-less interchangeably, but he provided slightly different definitions.

> Dr. Leinen defines the Blue Wall of Silence as "the reluctance of members of law enforcement to act upon the misconduct of other members" and defines the Code of Silence as "that unwritten, often unspoken, rule that prohibits members of law enforcement from reporting the misconduct of other members."[50]

The City moved to exclude such expert testimony and expert report. The court excluded the testimony and provided an extensive analysis that defense counsel will find useful today:

> **i. Analytical gap too great**
> First, the court determined 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 his methodology, reliability, and relevance to the case at hand.[51] The analysis in the following excerpts can be helpful:
>
> > [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.**
> > * * *
> > 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."
> > * * *
> > 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."**[52]
>
> **ii. Not connected to specific department**
> Next, the court observed that an expert's general claim that the Blue Wall of Silence is pervasive is no evidence that it is at work in a specific department:
>
> > 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**

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> **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.[53]

The court's distinction between two law enforcement agencies in the same city illustrates that it is not enough to say that all agencies are infected with the Code of Silence.

iii. Unreliable methodology
The court observed that the expert's methodology did not satisfy *Daubert*:

> 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. [54]

iv. Speculative and conjectural
The court determined that the expert's data was insufficient and his methods were unreliable:

> 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[.]"[55]

v. Invades the province of the jury to evaluate credibility
Rather than stopping there, the court found that the proposed expert report and testimony would not help the jury but would actually usurp the jury's role:

> [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.[56]

vi. Casts the relevance net too widely
If the expert's opinion were allowed here, it would endorse admitting Blue Wall evidence in virtually any case where an officer's testimony was questioned:

> [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.[57]

vii. Unfair prejudice, confusion of issues, misleading the jury
Having already determined that this expert's testimony was unreliable under *Daubert* and irrelevant under Rule 702, the court also excluded it under Rule 403:

> 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[.]"
> * * *
> The credibility of the witnesses, including the police officers, in this action are for the jury to determine, and Dr. Leinen's proposed testimony regarding the Blue Wall of Silence and Code of Silence is inappropriate here where plaintiff has provided little or no support to show that these phenomena are applicable here.[58]

Defendants' motion to exclude was granted. The court's thorough analysis essentially eliminated any potential for reversal over this evidentiary ruling. It is included here extensively so that it might provide an accessible reference for challenging Code of Silence testimony.

D. No Policy or Custom: *Lyles v. City of Dallas*

In *Lyles v. City of Dallas*, a judge for the Northern District of Texas granted a motion to dismiss where plaintiff's complaint relied on Blue Wall of Silence claims.[59] After suffering a beating, tasing, pepper spray, and racial verbal abuse from police officers in a traffic stop, Lyles sued two officers and the city, alleging violations of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights:

> 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.[60]

The court noted that the complaint did not allege sufficient facts to show a Blue Wall of Silence:

> 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."
> * * *
> Lyles makes no attempt to show how the City's hiring, disciplining, or training practices show the establishment, implementation, or a custom of acceptance of illegal behavior by police officers.[61]

The court addressed the Complaint's reference to unspecified media accounts of "incidents committed against African-American subjects" showing "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.[62]

The court concluded that the broad allegations of a Code of Silence did nothing to support a complaint that did not allege sufficient facts to state a claim for which relief could be granted.[63]

4. Undermining Code of Silence Testimony

The foregoing shows that we can attack Code of Silence opinion testimony on the following grounds:

- 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?)
- The data experts use is old, and Commissions all pointed to reform.
- Show that there has been reform.
- Directly controverting evidence: testimony and supporting statistics of officers reporting each other's misconduct.

Regarding the last ground listed above, it can be very helpful to present directly controverting evidence in the form of (a) testimony that there is no Code of Silence in the specific department being sued, and (b) providing data and statistics supporting that testimony. In a 2021 trial against the City of Houston,[64] 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). As in the *Zamora* case cited above, plaintiff here claimed that a Code of Silence operated in HPD.

Plaintiff's cross of Chief McClelland went 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.[65]

Plaintiff's counsel followed up with another 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?
>
> 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.[66]

Defense counsel should offer current departmental statistics to (1) challenge plaintiff's Code of Silence testimony, and (2) bolster controverting defense testimony. Code of Silence allegations typically accompany claims that a police department so regularly engages in misconduct (e.g., false arrest or excessive force) that it is an unofficial custom or practice, which the department tries to conceal. If police were routinely abusing citizens, it would be reasonable to see a high number of public complaints. And if the police are following a Code of Silence, it would be reasonable to see few (or no) complaints by officers against other officers. Counsel should present actual statistics in their own department showing the number of police encounters with the public, the number of public complaints against the police, and the number of internal (officer) complaints against the police.

For example, Chief McClelland has stated publicly that during his tenure as chief (2010-16), Houston police officers had approximately one million encounters each year with members of the public. There were approximately 700 complaints filed each year against HPD officers during that time, and 70% of those were filed by other officers. That left 30% of the 700 complaints—approximately 210—that were filed by civilians against the police. This is doubly remarkable. First, the ratio of citizen complaints to police-citizen encounters was only 210 per million, which is 0.021%. That is to say that 99.979% of the encounters were either positive, neutral, or not negative enough to provoke a citizen to file a complaint. That doesn't square with the image of an abusive department. Second, the ratio of officer complaints against other officers was more than three times the number of complaints that civilians brought. That dispels the Code of Silence allegation.

If the police chief can testify to

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Blue Wall *cont'd from page 35*

annual statistics of police encounters with the public, public complaints against police, and police complaints against police, those statistics (assuming they are favorable) will weaken claims of an abusive and secretive department. Beyond the chief's testimony, the data itself (*recent* statistics) should be available and accessible to the public.

Argue that if a Code of Silence ever existed in a given department on a broad enough basis to support municipal liability, that was something from the past. Present evidence that instead of a Code of Silence, officers today follow its opposite—a Code of Honor.

5. The Code of Honor

Some institutions, such as the United States Military Academy at West Point, have adopted a succinct yet powerful Code of Honor: "A CADET WILL NOT LIE, CHEAT, STEAL, OR TOLERATE THOSE WHO DO."[67] This can easily be embraced by police departments nationwide.

Police departments will have a code of ethics, conveying in some form the ideas of the Code of Honor. But a code of ethics can be voluminous, easy to forget, and hard to follow. The Code of Honor is hard to forget and easy to follow.

Some police departments have adopted this Code of Honor, while others might use another succinct statement of core values. Houston Police Department has adopted a set of three core values: Honor, Integrity, and Respect, to be applied every day in every situation; these are also hard to forget and easy to follow. Recommend that your police department:

- Adopt a succinct statement that is hard to forget and easy to follow;
- Display the Code of Honor or the Core Values prominently at the academy, headquarters, and every precinct as a constant reminder;
- Promptly investigate reports of misconduct, and discipline officers where appropriate; and
- Treat alleged participation in the Code of Silence as a report of misconduct.

Showing that all these are in effect will counter any claims of a Code of Silence.

Conclusion

Defense counsel should vigorously challenge any proposed expert opinion testimony that police followed a Code of Silence. An effective challenge to such claims will help defend our law enforcement officers and promote a more favorable public perception of officer trustworthiness. ML

Notes

1. 687 F.2d 80, 82-83 (5th Cir. 1982).
2. *Id*. at 83.
3. No. 01 Civ.10627 CBM, 2004 WL 758299 at *11 (S.D.N.Y. April 7, 2004).
4. *Id*.
5. Monell v. Dep't of Social Services, 436 U.S. 658, 694-95 (1978).
6. *Barry*, 2004 WL 758299 at *11 (citing Sorlucco v. New York City Police Dept., 971 F.2d 864, 871 (2d Cir. 1992)).
7. 402 F.3d 225, 229 (1st Cir. 2005).
8. *Id*. at 237-38.
9. *Id*. at 238.
10. No. 94 CV 3911(CLP), 1997 WL 33323099 at *1 (E.D.N.Y. Sept. 9, 1997).
11. *Id*.
12. *Id*. at *13.
13. *Id*. at *22-23.
14. Fed. R. Evid. 702.
15. Fed. R. Evid. 703.
16. Neal Trautman, National Institute of Ethics: Nationwide Survey, https://aele.org/loscode2000.html.
17. Fed. R. Evid. 705.
18. Fed. R. Evid. 401.
19. Fed. R. Evid. 402.
20. Fed. R. Evid. 403.
21. Fed. R. Evid. 406.
22. Fed. R. Evid. 701.
23. Zamora v. City of Houston, No. 4:07-CV-04510 (S.D. Tex. Aug. 12, 2010).
24. Transcript on file with author.
25. Transcript on file with author.
26. Transcript on file with author.
27. Transcript on file with author.
28. https://nleomf.org/historys-blotter-prohibition-and/.
29. Samuel Walker, Ed., *Records of the Wickersham Commission on Law Observance and Enforcement, Part 1: Records of the Committee on Official Lawlessness* (Bethesda: University Publications of America, 1997) at v (bold print added)https://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf (citing Samuel Walker, *Popular Justice: A History of American Criminal Justice*, 2d ed., rev. (New York: Oxford University Press,1997),154-157). This is from a 1997 overview of the Wickersham Reports, by Samuel Walker, Professor in the Department of Criminology, University of Nebraska at Omaha. (As of this writing, he is an Emeritus Professor there.)
30. *Id*. at x.
31.https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt
32.https://archive.org/details/ChristopherCommissionLAPD https://archive.org/stream/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD_djvu.txt at 176.
33. https://www.documentcloud.org/documents/7041359-St-Clair-Commission-Report.html.
34. https://www.boston.com/

news/local-news/2021/07/29/report-findings-patrick-rose-boston-police/; http://masspolicereform.org/1992/01/st-clair-commission-findings/; http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo47.htm; https://www.hrw.org/legacy/reports98/police/uspo46.htm.
35. James G. Kolts, *The Los Angeles County Sheriff's Department: A Report by Special Counsel James G. Kolts & Staff, July 1992* (Los Angeles County 1992) at 1 https://www.scribd.com/document/546295655/Kolts-Report ("*Kolts Report*"); also at https://calisphere.org/item/726d1c9b86eb9a1594106784c4148d88/ and https://digitallibrary.usc.edu/asset-management/2A3BF1OA5DG_U; *see also* Jennifer Rowland, *"Report Condemns Sheriff's Department for use of force,"* (UPI Archives July 20, 1992) https://www.upi.com/Archives/1992/07/20/Report-condemns-Sheriffs-Department-for-use-of-force/7735711604800/.
36. *Id*., at 4-5; *see also* https://www.latimes.com/archives/la-xpm-2001-dec-24-me-17708-story.html; https://www.latimes.com/archives/la-xpm-1992-07-21-me-4107-story.html.
37. *Kolts Report* at 3.
38. While the Wickersham Commission was unlike the Kolts, St. Clair, or Christopher Commissions in that it was not localized—while it had a significant focus on Chicago, it was nationwide in scope—it was far older than any of them. None of those four commissions should serve as a basis for showing that Code of Silence testimony is relevant to a specific agency, office, or department today.
39. https://aele.org/loscode2000.html.
40. *Id*.
41. *Id*.
42. https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-74.
43. No. 01-CV-1806 (TCP), 2007 WL 2993833 at *2, 3 (E.D.N.Y. Oct. 9, 2007).
44. *Id*. at *3.
45. *Id*. at *4.
46. *Id*.
47. 2007 WL 2993833 Id. at *4, 5, 9.
48. No. 03-CV-1283 (ARR)(KAM), 2007 WL 1989261 at *1 (E.D.N.Y July 5, 2007).
49. 2007 WL 1989261 at *2 (bold print added).
50. *Id*.
51. *Id*. at *3-4.
52. *Id*. at *4 (quoting General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) (bold print added).
53. *Id*. at *4 (bold print added).
54. *Id*. at *5 (bold print added).
55. *Id*. at *5 (citing Boucher v. United States Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir.1996)).
56. *Id*. at *6 (quotation marks and citations omitted)
57. *Id*. at *6.
58. *Id*. at *8.
59. 3:11-CV-0428-P, 2011 WL 13154073 (N.D. Tex. Sep. 16, 2011).
60. *Id*. at *1-2.
61. *Id*. at * 3.
62. *Id*. at * 4 (citing Ashcroft v. Iqbal, 556 U.S. 678 (2009)).
63. *Id*. at * 4 (citations omitted).
64. Trimmer-Davis v. City of Houston, No. 2010-11410 in the 295th District Court of Harris County, Texas, which, after having been on file for 11 years, with multiple interlocutory appellate proceedings, finally went to trial in 2021.
65. This is from the author's memory, not from a transcript. Houston prevailed, and there was no appeal.
66. This exchange is from the author's notes taken contemporaneously.67 https://www.westpoint.edu/military/simon-center-for-the-professional-military-ethic/honor

Dress Code *cont'd from page 28*

engaged in state action. For example, when the state has coerced, or has provided "significant encouragement" to, a private actor, or if there is "pervasive entwinement of public institutions and public officials" with a private entity, that entity's conduct is considered state action. A state also will be held responsible for a private actor's decision when the state's engagement or encouragement is so significant that "the choice must in law be deemed to be that of the State."

The plaintiffs argued that CDS was a state actor because the operation of schools designated as "public" under North Carolina law is an exclusively public function that the state had delegated in part to charter school operators to fulfill the state's constitutional duty to provide free, universal elementary and secondary schooling. In response, CDS argued that because the state of North Carolina was not involved in CDS' decision to implement the skirts requirement, there was no "coercion" or "pervasive entwinement" by the state with the challenged conduct. Furthermore, because no North Carolina student was required to attend CDS, the state had not delegated to charter schools its responsibility to educate North Carolina students. In addition, CDS cited the fact that the Supreme Court has never held that the provision of elementary and secondary education is exclusively a state function. In sum, CDS was merely a private actor providing a service under its charter contract with the state.

The Fourth Circuit majority (Senior Judge Keenan and nine others) disagreed. To fulfill its duty to provide an education to state residents, the North Carolina legislature authorized the creation of public charter schools

Continued on page 38

Government Censure *cont'd from page 31*

Confrontation Over Vote, Pittsburgh Post-Gazette (Apr. 10, 2022, 7:15 PM), https://www.post-gazette.com/local/region/2022/04/08/allegheny-county-council-censure-member-confrontation-over-vote-denied-appointments/stories/202204080122. This story was first published on Apr. 8, 2022, 2:17 PM.
58. *Id*.
59. *See id*.
60. Julia Zenkevich, Allegheny County Council won't censure Councilor Tom Duerr, WESA (Apr. 13, 2022, 5:29 AM), https://www.wesa.fm/politics-government/2022-04-13/allegheny-county-council-wont-censure-member.
61. Michael Dimock & Richard Wike, America is Exceptional in The Nature of its Political Divide, Pew Research Center (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.
62. *See id.*
63. *See id*.
64. *See id*.
65. *See id*.
66. Adam Liptak, *Are Censures of Politicians a Form of Free Speech or a Threat to It?* The New York Times, Aug. 31, 2021, at A11.
67. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic,* 82 N.C. L. Rev. 1525, 1572 (2004).
68. *See Wilson, supra* note *3 at *5*.
69. *See id.*
70. *See id.*
71. Lauer, *supra* note 57.
72. Senator Chase's earlier conduct could likely be appropriately censured under this proposed framework.
74. This analysis is contingent only on the facts presented in this paper. There may be additional facts that this author is unaware of which could materially alter Step 2 of this analysis (for example, if she made comments explicitly praising white supremacist groups). It is this author's argument that simply making a general comment on one very complex public event is not sufficient to warrant a censure, especially during a time when the community is already in crisis.

Cases *cont'd from page 37*

overseen by a state board. Among other requirements imposed by the state, charter schools must design their educational programming to satisfy student performance standards adopted by the state board of education--a requirement not applicable to non-public schools. And in defining the nature of charter schools, North Carolina law expressly provides: "A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters."

The majority concluded that a charter school cannot use that status to avoid regulations applicable to state actors:

> The statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to provide free, universal elementary and secondary education. . . . Were we to adopt CDS' position, North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools. We need look no further than the shameful history of state-sponsored racial discrimination in this country to reject an application of the Equal Protection Clause that would allow North Carolina to abdicate its duty to treat public schoolchildren equally.

Thus, for purposes of Section 1983, CDS was acting under color of state law and was susceptible to an Equal Protection claim.

The court reached a different conclusion as to RBA, a for-profit management company, finding that North Carolina has not chosen to delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management companies like RBA. "To the contrary, RBA has no direct relationship with the state and is not a party to the charter agreement between CDS and North Carolina." The Circuit concluded that RBA's actions implementing the skirt requirement were not "fairly attributable" to the state.

Appeal - Equal Protection:
The plaintiffs had asserted that the skirt requirement failed heightened scrutiny, because CDS did not identify an important governmental interest that justifies the sex-based classification; instead, CDS had relied on gender stereotypes to support the skirts requirement, a plainly illegitimate justification under well-settled Supreme Court precedent. In response, CDS argued that "comprehensive sex-specific dress codes" do not violate the Equal Protection Clause when male and female students are subject to comparable burdens under the policy: the skirt requirement did not violate the Constitution because boys also were limited in dressing and grooming options, including prohibitions against long hair and wearing jewelry, which were applicable only to male students. And because its female students had achieved academic and extracurricular success, these students had not been "hobbled" by the skirt requirement.

The majority disagreed with CDS. Among other precedents, it cited *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). There, the Supreme Court rejected the Commonwealth of Virginia's attempt to preserve single-sex education for males at the Virginia Military Institute by establishing a "leadership" program for women at a nearby private women's college. *Virginia* held that, to satisfy the heightened scrutiny applicable to gender-based discrimination, a defendant "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

This the defendants could not demonstrate: "Applying the demanding lens of intermediate scrutiny, we conclude that the skirts requirement is not supported by any important governmental objective and, thus, falls woefully short of satisfying this constitutional test. CDS does not attempt to disguise the true, and improper, rationale behind its differential treatment of girls, which plainly does not serve an important governmental interest."

Appeal - Title IX:

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Unlike the Section 1983 analysis which found no liability by RBA, the majority found that Title IX did extend to RBA, which received Federal monies—even if indirectly through CDS.

Having found that both CDS and RBA fell within Title IX, the court construed the statute. Although there were various matters excepted from Title IX, "Notably, dress, appearance, and grooming policies are not included among the[m]…." The Circuit held that, based on the plain language and structure of the statute, Title IX "unambiguously encompasses sex-based dress codes" promulgated by covered entities: "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." Because it concluded that Title IX unambiguously covered such sex-based dress codes, the Circuit did not apply *Chevron* to defer to the Department of Education's rescission of its earlier regulation applicable to such policies.

In sum, the majority affirmed the district court's award of summary judgment to the plaintiffs on their Sectioinn 1983 Equal Protection claim against CDS, while affirming the court's award of summary judgment to RBA on the Section 1983 claim because RBA was not a state actor. It vacated the district court's holding that Title IX did not apply to dress codes and remanded for an evidentiary hearing on that issue.

DISSENTS: Six judges, including Judge Quattlebaum and Judge Wilkinson, dissented to varying degrees.

Judge Quattlebaum and four others disagreed that a publicly funded charter school is a state actor, pointing to an emerging circuit split on the issue:

> Prior to today, neither the Supreme Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under § 1983. The majority, however, breaks that new ground. In my view, in deciding that a private operator of a North Carolina charter school is a state actor, the majority misconstrues and ignores guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues. The immediate casualty of the majority's decision is a small part of a dress code at a particular charter school. That is the least of my concerns. . . . . By casting aside guidance from Supreme Court precedent, the majority significantly broadens the scope of what it means for the actions of a private party to be attributed to the state for purposes of a § 1983 claim. Frankly, it is hard to discern, much less define, the limits of what constitutes "state action" after the majority's decision.

Judge Wilkinson wrote separately to argue that Title IX did not reach the issue of dress codes and that the majority decision was yet another example of federal meddling in what should be a local issue:

> This case provides a perfect example of using federal powers to wrench our Constitution from its founding shape by hammering the constituent sovereignties in our system into one conforming federal mold. As the Department of Education rightly recognized, a single dress policy in an individual school is an issue for local determination, not federal control. ML

Practice Tips *cont'd from page 19*

Practice pointers: If stuck with traditional low-bid procurement, public owners should make the minimum evaluation criteria as stringent as possible to weed out historically substandard performers. In addition, where available, you should guide your municipal clients toward using QBS or Best Value procurement models. If using comparative evaluation criteria in a qualifications-based selection model, be sure to clearly use well defined criteria with measurable standards, to make subjective determinations as objective as possible. Finally, insist on the earliest possible involvement of municipal counsel in development and review, or at a bare minimum review, of the procurement documents.

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