
**CREDITING THE INCREDIBLE: HOW THE
SEVENTH CIRCUIT USES PROCEDURE TO MASK
ITS IMPROPER PERFUNCTORY GRANT OF
DEFERENCE TO CHICAGO’S LAW
ENFORCEMENT OFFICERS**

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Cite as: Ava B. Gehringer, *Crediting the Incredible: How the Seventh Circuit Uses Procedure to Mask Its Improper Perfunctory Grant of Deference to Chicago’s Law Enforcement Officers*, 13 SEVENTH CIRCUIT REV. 1 (2017), at <https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v13/gehringer.pdf>.

INTRODUCTION

On December 7, 2015, in the wake of the fatal shooting of Laquan McDonald by Chicago Police Officer Jason Van Dyke, the United States Department of Justice (DOJ) and the United States Attorney’s Office for the Northern District of Illinois jointly initiated an investigation into the City of Chicago’s Police Department (CPD) and its in-house accountability agencies, the Independent Police Review Authority (IPRA) and the Bureau of Internal Affairs (BIA). The DOJ then issued its Investigation Report, in which it concluded that it had found reasonable cause to believe that the CPD routinely engages in patterns or practices of using force in violation of the Fourth Amendment of the United States Constitution.¹ The DOJ

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¹ U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION & U.S. ATTORNEY’S OFFICE NORTHERN DISTRICT OF ILL., *Investigation of the Chicago Police Department* (Jan. 13, 2017).

determined that those unlawful patterns or practices were the result of systemic deficiencies in training and accountability. Specifically, the DOJ found that IPRA and the BIA fail to conduct meaningful investigations into instances of police misconduct, thereby allowing, and implicitly encouraging, the continuation of those practices.² Nowhere was this problem more prevalent than in predominantly black and Latino communities.³

The DOJ's investigation delved into racial, ethnic, and other disparities in the CPD's force and accountability practices, and found that community trust has been broken by systems that have allowed CPD officers who violate the law to escape accountability.⁴ The DOJ also determined that the CPD's accountability systems were broadly ineffective at deterring and detecting officer misconduct, and at holding officers accountable if and when they violate the law or CPD policy.⁵ Further, because attempts by investigators to hold officers accountable for misconduct have been frustrated by the "code of silence"⁶ and the "pervasive cover-up culture"⁷ among CPD officers, the potential for inappropriate coordination of testimony and risk of collusion are effectively built into the system.⁸ Thus, IPRA and the BIA accept the CPD's culture and well-recognized code of silence as "immutable fact[s] rather than []thing[s] to root out."⁹

Though the DOJ Report focused primarily on the lack of accountability inherent in the agencies created to review instances of

² *Id.* at 145.

³ *Id.* at 144. In Chicago, black and Latino citizens account for approximately sixty-one-percent of the city's population. *Id.* at 144.

⁴ *Id.*

⁵ In fact, during the five years preceding the DOJ's Investigation, the City received over 30,000 complaints of police misconduct, yet fewer than two percent were sustained by IPRA or the BIA. *Id.* at 7.

⁶ The City, police officers, leadership within the CPD, its police officer union, and even the Mayor openly acknowledge that a code of silence among officers exists. *Id.* at 75.

⁷ *Id.* at 47.

⁸ *Id.* at 8.

⁹ *Id.* at 47.

officer misconduct, that institutional deficiency is only part of the problem. Between 1995 and 2015, federal prosecutors nationwide declined to levy charges against U.S. law enforcement officers alleged to have committed civil rights violations in 12,703 of 13,233 referrals made by the FBI and other agencies.¹⁰ That 96% rejection rate, when contrasted with a 23% rejection rate for all other allegations of criminal activity in the same period,¹¹ illustrates the proverbial shield law enforcement officials enjoy against accountability in our justice system.¹²

As a result of those institutional deficiencies, the burden of deterring police misconduct has effectively fallen on the victims themselves. Not only is this result fundamentally unfair to those whose rights have been violated by law enforcement, the primary tools at those victims' disposal¹³ have yet to translate into an effective system for detecting and deterring police misconduct.¹⁴ Civil plaintiffs who bring charges against law enforcement officers are hampered by evidentiary and procedural difficulties, including but not limited to the

¹⁰ Brian Bowling & Andrew Conte, *Trib Investigation: Cops Often Let Off Hook for Civil Rights Complaints*, TRIB LIVE (Mar. 12, 2016, 6:00 PM), <http://triblive.com/usworld/nation/9939487-74/police-rights-civil>.

¹¹ *Id.*

¹² Craig Futterman, founder of the Civil Rights and Police Accountability Project at the University of Chicago opined that “[t]his is an area where the feds need to be bolder and put greater resources in . . . [i]ndeed the failure to aggressively bring those cases has allowed too many abusive officers to believe that they can operate without fear of punishment.” Brian Bowling & Andrew Conte, *supra* note 10.

¹³ 42 U.S.C. §1983 and state law claims brought pursuant to that statute’s purpose.

¹⁴ See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 548 (citing longitudinal studies conducted by the Federal Judicial Center on summary judgment that show a particularly high rate of termination by summary judgment in civil rights and employment discrimination cases (70% and 73%, respectively)—the highest of any type of federal civil case—and opining that these trends raise important questions as to whether meritorious cases are being decided and dismissed on incomplete factual records in the federal courts).

established “code of silence” among police officers and exceptionally high procedural burdens shouldered by civil rights plaintiffs in the pre-trial stages of litigation.¹⁵ These two factors combined often turn §1983 suits into credibility contests, with one party enjoying great deference based on the authority vested in an officer displaying a star over his or her heart. Yet while the improper, perfunctory grant of deference to police officers has been mistakenly cited as an issue that plagues citizens serving on the jury, that cognitive bias has shown to often affect judges at the federal level.¹⁶

Judges have traditionally followed three basic restrictive rules on the motion for summary judgment: the evidence is to be viewed in the light most favorable to the nonmovant, the credibility of witnesses is not to be evaluated, and contradictory evidence is not to be weighed.¹⁷ Yet federal court judges have read the Supreme Court’s 1986 “Summary Judgment Trilogy,”¹⁸ as a directive to be more receptive to summary judgment in ways that are more striking than anything actually articulated in those three cases.¹⁹ As a result, judges have stepped into the role of the jury, effectively removing an essential element of our adversarial system through procedural mechanisms. Not only has this practice resulted in judgments against plaintiffs in an unprecedented number of civil rights cases at the summary judgment

¹⁵ *Id.* at 520 (noting that it is widely recognized that civil rights plaintiffs face enormous hurdles in federal court and, as a result, there appears to be a disparate impact on employment discrimination and civil rights cases).

¹⁶ Schneider, *supra* note 14, at 564-66 (listing cognitive bias, lack of judicial humility, incapacity to see issues outside their own perspective, and deep skepticism of civil rights cases as factors that help explain the results of the 2009 Clermont & Schwab study, which revealed that jury trials result in considerably more favorable verdicts for civil rights plaintiffs than bench trials).

¹⁷ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clinches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U.L. REV. 982, 1057-58.

¹⁸ Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

¹⁹ Miller, *supra* note 17, at 1071.

stage,²⁰ it also runs afoul of the Supreme Court's ruling in *Tolan v. Cotton* just three years ago.²¹

In *Tolan*, the Court chastised the United States Court of Appeals for the Fifth Circuit for failing to “adhere to the axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”²² The Court's harsh criticism of the Fifth Circuit in *Tolan* should have served as a much needed reminder to federal judges across the nation as it explicitly stated that “though [the Court] is not equipped to correct every perceived error coming from the lower federal courts,” it “felt compelled to intervene in *Tolan*'s case” because “the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of [its] precedents.”²³

Yet the Fifth Circuit is not alone. The Seventh Circuit similarly misapplied the summary judgment standard in *Colbert v. City of Chicago, et al.*,²⁴ when it affirmed the lower court's grant of summary judgment in favor of defendant Chicago police officers despite numerous disputes over facts material to the plaintiffs' respective claims. In *Colbert*, the Seventh Circuit majority failed to review the lower court's legal conclusions *de novo* and stepped into the role traditionally reserved for the jury, taking it upon themselves to resolve credibility disputes in favor of the police officer-defendants, which effectively transformed officer testimony into undisputed facts in the record at the summary judgment stage.

Thus, while the Court's expansion of summary judgment as a procedural tool was designed to control both the volume of litigation overall and its scope in any particular case, federal judges across the nation have used that mechanism to supplant the role of the jury in our

²⁰ Schneider, *supra* note 14, at 520 (noting that the greater impact of the change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers).

²¹ *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

²² *Id.* at 1863, citing *Anderson*, 477 U.S. at 255 (1986).

²³ *Tolan*, 134 S. Ct. at 1868.

²⁴ *Colbert v. City of Chicago, et al.*, 851 F. 3d 649 (7th Cir. 2017).

justice system.²⁵ Though this degradation of the adversarial system through misapplication of the summary judgment standard has undoubtedly reached all types of claims, nowhere is it more prevalent or more unjust than in the context of claims brought by minority plaintiffs against those acting under the color of law.²⁶

This article uses *Colbert* to examine the ways in which our justice system deteriorates when judges usurp the role of the jury at the pretrial stages of litigation, especially in the context of civil rights claims. Nowhere is this improper use of judicial authority more prevalent, or more harmful, than in the Seventh Circuit, which has jurisdiction in most cases involving the City of Chicago and its law enforcement officers. This article concludes by contending that, in light of the DOJ's warnings about the pervasiveness of police

²⁵ The Supreme Court's recent decision in *Scott v. Harris* provides a dramatic example of this problem. 550 U.S. 372 (2007). *Scott* involved a §1983 action brought by a motorist against the police and other officials claiming that those officials used excessive force during a high-speed chase in violation of his Fourth Amendment Rights. *Id.* at 375-76. The district court denied defendant's motion for summary judgment, and the Eleventh Circuit affirmed. *Id.* at 376. On *certiorari*, eight Justices reversed the denial and entered judgment for the defendant after watching a videotape of the chase. *Id.* at 386. Those justices concluded that "no reasonable jury" could find for the plaintiff, which triggered a vigorous dissent from Justice Stevens. *Id.* at 379-80. In that dissent, Justice Stevens referred to the Justices in the majority as "my colleagues on the jury," *Id.* at 392 (Stevens, J, dissenting), and criticized the Court for having "usurped the jury's factfinding function and, in doing so, implicitly labeling the four other judges to review the case unreasonable." *Id.* at 395. He further noted that "if two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events." *Id.* at 396; *see also* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 894-902 (2009) (discussing the importance of "judicial humility").

²⁶ Schneider, *supra* note 14, at 542-43 (noting that because civil rights cases often involve subtle issues of credibility, inferences, and close legal questions, where issues concerning the "genuineness" and "materiality" of the facts are frequently intertwined with law, a single district judge may be a less fair decisionmaker than jurors, who are likely to be far more diverse and to bring a broader range of perspectives to bear on the problem).

misconduct and the ineffectiveness of the CPD's accountability systems, the Seventh Circuit must resist the temptation to grant improper deference to Chicago Police Department officers, redouble its efforts to properly evaluate summary judgment orders, and reverse them in cases in which plaintiffs have raised genuine issues of material fact that, if taken as true as required by Rule 56, would allow a reasonable factfinder to conclude that those plaintiffs' rights were violated by those officers.

Part I of this article discusses the private civil remedies available to plaintiffs who have suffered civil rights violations by law enforcement, specifically those brought by the respective plaintiffs in *Colbert*—42 U.S.C. §1983 and the Illinois common law intentional tort of malicious prosecution—and the unintended consequences of the Supreme Court's transformation of the summary judgment standard since its inception. Part II provides an overview of the factual and procedural background of *Colbert v. Willingham, et al.*²⁷ Part III examines the district court's grant of summary judgment in favor of Chicago Police Officers on all counts. Part IV then discusses the Seventh Circuit majority's opinion in *Colbert v. City of Chicago, et al.*, contrasting it with that of Judge David Hamilton, who dissented in part. Finally, Part IV applauds Judge Hamilton for avoiding the temptation to step into the role reserved exclusively for juries in American jurisprudence, and argues that his approach ensures fairness to parties seeking to enforce the protections guaranteed by our Constitution and is consistent with the Supreme Court's summary judgment precedent and the stated goals of 42 U.S.C. §1983.

²⁷ *Colbert v. Willingham, et al.*, No. 13 Civ. 2397, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015).

BACKGROUND

A. Private Civil Remedies Available to Civil Rights Plaintiffs

1. 42 U.S.C. §1983

Section 1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871, and was the first statute to create a federal claim for civil rights violations.²⁸ Later amended and codified, the Act affords a civil cause of action for any person deprived of any rights, privileges or immunities secured by the United States Constitution or other federal law by another person who was acting under color of any state law, statute, ordinance, custom or usage.²⁹ Section 1983 is not itself a source of substantive rights, but rather provides a vehicle for the vindication of rights elsewhere conferred. Some of the most common claims brought pursuant to §1983, and those upon which this article is focused, are claims predicated on the Fourth Amendment, which protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”³⁰

Despite the formal recognition of this private remedy for violations of federal law, however, civil suits brought pursuant to §1983 were a rarity until the Supreme Court’s 1961 decision in *Monroe v. Pape*.³¹ In *Monroe*, the Court for the first time explicitly stated that the “under color of” provision of §1983 applied as well to unconstitutional actions taken without state authority as to

²⁸ 42 U.S.C. §1983 (2012).

²⁹ *Id.*

³⁰ U.S. CONST. AMEND. IV.

³¹ *Monroe v. Pape*, 365 U.S. 167 (1961) (reversing the Seventh Circuit’s dismissal of plaintiffs’ claim brought against several Chicago police officers who searched plaintiffs’ home and arrested them without a warrant, holding that the guarantee against unreasonable searches and seizures contained in the Fourth Amendment was applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment) (overruled on other grounds by *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).

unconstitutional action authorized by the state.³²³³ Further, in 1998, the Supreme Court in *United States v. Ramirez* broadened its traditional determination of what may constitute an unreasonable search pursuant to §1983 to encompass the manner in which that search was conducted.³⁴ Noting that the “general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant,” the Court concluded that “excessive or unnecessary destruction of property during a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression.”³⁵

In order to establish actionable individual liability under §1983, the Supreme Court has held that “it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.”³⁶³⁷ The Seventh Circuit has echoed the Court’s

³² *Monroe*, 365 U.S. at 236.

³³ The increased availability of federal remedies for plaintiffs whose Constitutional rights had been violated by persons acting under color of state law was enhanced by the codification of the Civil Rights Attorney’s Fees Awards Act of 1976, which allows the award of “a reasonable attorney’s fee” to the “prevailing party” in certain civil rights cases, including those brought pursuant to §1983. Courts have since routinely held that prevailing plaintiffs are entitled to recover attorneys’ fees unless special circumstances would render an award unjust, thereby allowing poor plaintiffs adequate representation and civil rights attorneys an opportunity to take cases that may result in minimal monetary damages. This practice reflects the Supreme Court’s view that when a plaintiff succeeds in remedying a civil rights violation, he serves “as a private attorney general, vindicating a policy that Congress considered of the highest priority.” *Fox v. Vice*, 563 U.S. 826 (2011). Fee shifting pursuant to §1988, the Court noted, “at once reimburses plaintiff for ‘what it cost him to vindicate civil rights,’ *Riverside v. Riviera*, 477 U.S. 561, 577-78 (1986), and holds to account ‘a violator of federal law.’” *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 418 (1978).

³⁴ *United States v. Ramirez*, 523 U.S. 65 (1998).

³⁵ *Id.* at 71.

³⁶ *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

³⁷ If, however, the officer-defendant claims the doctrine of qualified immunity, the respective plaintiff must prove: (1) the officer-defendant’s conduct violated a constitutional right; and (2) that right was clearly established at the time of its alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Pearson v.*

standard, requiring an affirmative link between the misconduct complained of and the official sued.³⁸ Individual liability has also been extended to those who, acting under color of state law, ignored a realistic opportunity to intervene while *other* officers acted illegally.³⁹

Despite the expansion of the ways in which a party may bring a §1983 claim against officers who have conducted an unreasonable search, plaintiffs bringing such claims nevertheless run into practical problems. In such circumstances, and pursuant to standard police protocol, plaintiffs are typically restrained and moved away from the officers conducting the search. While arguably necessary in most cases, that practice also effectively immunizes officers from property damage claims by preventing a prospective plaintiff from observing the officer responsible for the damage. As a result of the competing interests inherent in successfully showing an “affirmative link” between the named officer-defendant and the alleged misconduct in such circumstances, federal circuit courts of appeals vary greatly on exactly what a prospective plaintiff should be required to plead and/or prove in order to satisfy the individual liability requirement under §1983.

In fact, the Seventh Circuit itself seems to differentiate analogous cases with little to no explanation, requiring detailed identification in some cases,⁴⁰ while accepting general identification in others.⁴¹ In an attempt to aid prospective plaintiffs, the Seventh Circuit has suggested that a plaintiff might allege a “conspiracy of silence

Callahan, 555 U.S. 223, 236 (2009) (reconsidering the *Saucier* procedure, holding that while the sequence set forth therein is often appropriate, it should no longer be regarded as mandatory in all cases). The inquiry turns on the “objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was undertaken,” *Pearson*, 555 U.S. at 244, and must be analyzed “in light of the specific context of the case, not as a broad general proposition.” *Saucier*, 533 U.S. at 201.

³⁸ *Wolf-Lillie v. Sonquist*, 699 F. 2d 864, 869 (7th Cir. 1983).

³⁹ *Miller v. Smith*, 220 F. 3d 491 (7th Cir. 2000).

⁴⁰ *See Molina ex rel. Molina v. Cooper*, 325 F. 3d 963 (7th Cir. 2003); *Hessel v. O’Hearn*, 977 F. 2d 299 (7th Cir. 1992).

⁴¹ *See Miller*, 220 F. 3d 491.

among the officers”⁴² in order to strengthen a claim against individual officers, yet has only found that allegation to be essential in certain circumstances, giving little to no guidance as to when a plaintiff is so required.

The Sixth and Ninth Circuits, by contrast, have offered an alternative approach that restores the balance of power between civil rights plaintiffs and police officer defendants.⁴³ Recognizing the inherent imbalance of power between police officer defendants and civil rights plaintiffs, federal courts in those circuits allow the burden of *production* to shift to defendant-officers at the discovery stage of litigation, while leaving the ultimate burden of *proof* with the civil rights plaintiff in the §1983 context.⁴⁴ Pursuant to that approach, the Sixth Circuit has held that once a plaintiff has named certain officers as being liable for the deprivation of his or her constitutional rights either directly or by ignoring a reasonable opportunity to intervene in their fellow officers’ misconduct, those officers are required to then come forth with evidence that negates that plaintiff’s allegation.⁴⁵ The Ninth Circuit has echoed that approach, shifting the burden of production to defendants in cases in which the respective plaintiff cannot learn the identity of the officers involved in the alleged misconduct due to those officers’ own conduct.⁴⁶

⁴² See *Molina*, 325 F. 3d at 974; see also *Hessel*, 977 F. 2d at 305 (affirming summary judgment for defendant officers, despite recognizing the plaintiffs’ “bind,” in part because plaintiffs had “alleged no conspiracy”).

⁴³ See e.g. *Burley v. Gagacki*, 729 F. 3d 610 (6th Cir. 2013); see also e.g. *Dubner v. City and County of San Francisco*, 266 F. 3d 965 (9th Cir. 2001).

⁴⁴ *Id.*

⁴⁵ See *Burley*, 729 F. 3d 610.

⁴⁶ See *Dubner*, 266 F. 3d 959, 965 (9th Cir. 2001) (holding that a plaintiff may make a *prima facie* case simply by showing that her arrest was conducted without a valid warrant, at which point the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause).

2. Malicious Prosecution

The Seventh Circuit is the only circuit to disallow an individual's Fourth Amendment right to be free from unreasonable seizure to continue beyond legal process so as to permit a federal malicious prosecution claim premised on the Fourth Amendment.⁴⁷ Thus, while 42 U.S.C. §1983 provides a legal remedy for the violation of constitutional rights conferred in the Fourth Amendment, those within the Seventh Circuit's jurisdiction who seek compensation based on the initiation of unlawful criminal proceedings must bring a state common law claim for the intentional tort of malicious prosecution.

Police officers may be held liable for malicious prosecution if they either signed a criminal complaint or "played a significant role in causing the prosecution of the plaintiff, provided all of the elements of the tort are present."⁴⁸ To state a claim for malicious prosecution under Illinois law, plaintiffs must establish: (1) the commencement or continuance of an original proceeding by the defendant; (2) the termination of that proceeding in favor of the plaintiff; (3) the absence of probable cause; (4) the presence of malice; and (5) damages.⁴⁹ The absence of any one of those elements bars a plaintiff from pursuing the claim,⁵⁰ and of those five elements, plaintiffs bringing malicious prosecution claims routinely encounter evidentiary and procedural difficulties in all but the issue of damages.⁵¹

⁴⁷ See Eric J. Wunsch, *Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and 1983: Is There a Constitutional Violation Remediable under Section 1983*, 85 J. CRIM. L. & CRIMINOLOGY 878 (1994-1995); see also *Albright v. Oliver*, 975 F. 2d 343, 347 (7th Cir. 1993), cert. granted, 510 U.S. 266 (1994) (affirming Seventh Circuit's dismissal of plaintiff's complaint because Illinois provides a tort remedy for malicious prosecution, thereby negating the need for a federal remedy).

⁴⁸ *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 348-49 (2000), citing 54 C.J.S. *Malicious Prosecution* §§ 18, 19 (1987).

⁴⁹ *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996).

⁵⁰ *Id.*

⁵¹ See *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill. 2d 267, 286 (1997) (noting that the elements requiring favorable termination of a plaintiff's criminal proceeding and malice are "no easy hurdle for the plaintiff" and that "[a]n

Under Illinois law, prosecution for a misdemeanor may be commenced by indictment, information, or complaint,⁵² while prosecution for a felony is initiated only by information or indictment, the former of which requires a finding of probable cause at a preliminary hearing.⁵³ The sole purpose of preliminary proceedings is to ascertain whether a crime charged has been committed and, if so, whether there is probable cause to believe that it was committed by the accused.⁵⁴ Yet because the standard applied to preliminary hearings is not the same as that applied in a criminal defendant's subsequent trial, "a finding of probable cause [at a preliminary hearing] is not binding upon the subsequent grand jury."⁵⁵

In a presumed effort to better articulate what is required in order to establish a defendant officer's initiation of criminal proceedings, the Seventh Circuit has effectively placed an extra hurdle before plaintiffs bringing those claims against police officer defendants, supported at least in part by a footnote in Justice Ginsburg's concurrence in *Albright v. Oliver*.⁵⁶ Accordingly, conceding that "it is conceivable that a wrongful arrest could be the first step towards a malicious prosecution," the Seventh Circuit requires plaintiffs to establish a "chain of causation" between a police officer's actions and a State's Attorney's resultant prosecution. An established "chain of causation," however, is broken by an indictment,

action for malicious prosecution remains one that is disfavored in law."); *see also* Louis A. Lehr, Jr., PREMISES LIABILITY 3D §2:18 (2014 ed.) (stating "[m]alicious prosecution is one of the most difficult causes of action to prove and many cases go down in flames by a directed verdict if not sooner by a summary judgment.").

⁵² 725 ILL. COMP. STAT. ANN. § 5/111-2 (LexisNexis 2017).

⁵³ *Id.*

⁵⁴ *People v. Morris*, 30 Ill. 2d 406, 411 (1964).

⁵⁵ *Id.*

⁵⁶ *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) ("a malicious prosecution action against police officers is anomalous," because "[t]he principal player in carrying out a prosecution – in 'the formal commencement of a criminal proceeding,' – is not police officer but prosecutor.").

as the indictment is presumed to have been supported by probable cause.⁵⁷

While “prima facie probable cause” is established by the grand jury’s return of the indictment, “it is not conclusive evidence of probable cause.”⁵⁸ Rather, that presumption may be rebutted by evidence such as proof that the indictment was obtained by false or fraudulent testimony before the grand jury, or by failing to make a full or complete statement of the facts, *or by other improper or fraudulent means.*⁵⁹ Yet, because the issue of probable cause is litigated months after the arrest, an arresting officer can merely deny a plaintiff’s claim and is afforded time to gather evidence that could arguably and retroactively support his defense of probable cause.

Additionally, for malicious prosecution purposes, criminal proceedings do not terminate, and a criminal defendant’s malicious prosecution claim does not accrue “until such time as the State [is] precluded from seeking reinstatement of the charges,”⁶⁰ which the Supreme Court of Illinois has held is consistent with the expiration of the statutory speedy-trial period.⁶¹ Illinois courts have parsed through the various dispositions that can arise from preliminary hearings, concluding that “a favorable termination is limited to only those legal

⁵⁷ The question of probable cause is a mixed question of law and fact. Whether the circumstances showing probable cause are proven is a question of fact, but, if true, whether they amount to probable cause is a question of law to be decided by the court. *Ely v. National Super Markets, Inc.*, 149 Ill. App. 3d 752, 758 (1986); *see also* *Norris v. Ferro*, 2009 U.S. Dist. LEXIS 32722, at *5 (N.D. Ill. Apr. 17, 2009) (noting the Seventh Circuit’s statement in *Askew v. City of Chicago* that “material” inconsistencies create jury questions, and denying summary judgment on false arrest claim where questions regarding defendant officer’s “credibility” were “so substantial that at the summary judgment stage,” the court could not accept any of his testimony).

⁵⁸ *Freides v. Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 296 (1965).

⁵⁹ 54 C.J.S. *Malicious Prosecution*, § 35 (1987); *Freides*, 33 Ill. 2d at 296 (emphasis added).

⁶⁰ *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 104 (2004).

⁶¹ Every person in custody in [Illinois] for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody. 725 ILCS 5/103-5(a).

dispositions that can give rise to an inference of lack of probable cause.”⁶² Importantly, “an order of dismissal for lack of probable cause is not an acquittal and is not final, as the State may later indict the accused or submit a new information.”⁶³

Thus, the Seventh Circuit’s “chain of causation” requirement appears to summarily demand a plaintiff prove most of the elements of the claim for malicious prosecution in one fell swoop, thereby providing numerous loopholes through which a plaintiff may fall. That high burden for plaintiffs is further compounded by the “liberalized” standards applied to summary judgment, which have resulted in an imbalance of power between plaintiffs and defendants, particularly in cases where defendant police officers are the movants against plaintiffs alleging officer misconduct in violation of their constitutional rights.

B. Summary Judgment

At its inception, as articulated by the Supreme Court, summary judgment was designed to protect courts from “frivolous defen[s]es” and “to defeat attempts to use formal pleading as a means to delay the recovery of just demands.”⁶⁴ The codification of the Federal Rules of Civil in 1938, however, expanded the application of the summary judgment motion, making it available as a broad-scale tool for the entry of a final decree on the merits of all claims before the federal courts.⁶⁵ This significant alteration of American jurisprudence was treated warily by federal judges, who collectively perceived it as “threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and

⁶² *Cult Awareness Network v. Church of Scientology Int’l*, 177 Ill. 2d 267, 278 (1997).

⁶³ *People v. Zook*, 177 Ill. App. 3d 62, 63 (1988).

⁶⁴ *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902).

⁶⁵ *Id.* at 76.

determinations of credibility, and the right to have one's cause advocated by counsel before a jury."⁶⁶

Prior to the 1986 Trilogy, the leading summary judgment case was *Adickes v. S.H. Kress & Co.*, which involved a conspiracy claim arising out of the refusal of luncheonette service to, and subsequent arrest of, a white civil rights worker in Mississippi.⁶⁷ The record contained allegations that the arresting policeman had been in the store when service was refused, but the plaintiff offered no specific evidence as to any conspiratorial activity. Defendant's motion for summary judgment was nevertheless properly denied, the Court held, because "the affidavits of record did not foreclose a possible inference of a conspiracy by the jury from the fact that the policeman was present at the time that service was refused."⁶⁸ Accordingly, under the standard developed in *Adickes*, both the burden of proof and the full burden of production on the motion for summary judgment fell on the movant.⁶⁹

The first of the Court's Trilogy, *Celotex Corp. v. Catrett*, fundamentally altered the *Adickes* standard by recasting the moving party's burden of production to comport with the ultimate burden of proof the movant would have at trial.⁷⁰ In so doing, the Court opened the door to pretrial adjudication on the merits, *regardless* of whether the district court judge would be constitutionally empowered to sit as

⁶⁶ *Id.* at 77.

⁶⁷ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In fact, it has been said that, despite the liberalization of the summary judgment motion after the Supreme Court's 1986 Trilogy, *Adickes* was the key precedent for the Court's decision in *Tolan v. Cotton*, discussed *infra*, because it was "the quintessential 'he said, she said' summary judgment case." Denise K. Berry, *Snap Judgment: Recognizing the Propriety and Pitfalls of Direct Judicial Review of Audiovisual Evidence at Summary Judgment*, 83 *FORDHAM L. REV.* 3343, 3346 (2015).

⁶⁸ *Adickes*, 398 U.S. at 153 (the Court stated that such an inference could not be foreclosed from the factual allegations of the plaintiff's complaint, finding that the defendant had failed to carry its burden of showing the absence of any genuine issue of fact).

⁶⁹ Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *YALE L.J.*, 73, 81 (1990).

⁷⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

the ultimate trier of fact at trial. The Court's transformation of the motion for summary judgment did not stop there. Rather, while the Court's holding in *Celotex* facilitated the process of *bringing* a summary judgment motion before the court, its subsequent decisions in *Anderson v. Liberty Lobby, Inc.*⁷¹ and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*⁷² increased the *chances* of a trial court granting summary judgment in favor of a defendant-movant by allowing broad pretrial evidentiary review, thereby expanding the discretionary authority given to the district courts.⁷³

In *Anderson*, the Court recast summary judgment into the mold of a motion for a directed verdict.⁷⁴ Yet as Justice William J. Brennan observed in his dissenting opinion, that approach marked a significant departure from the traditional view that “the measurement of the ‘caliber and quality’ of evidence ‘could *only* be performed by weighing the evidence.’”⁷⁵ Accordingly, Justice Brennan concluded that the Court's opinion was full of language which he feared “could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence *as much as a juror would.*”⁷⁶⁷⁷

⁷¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

⁷² See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁷³ Issacharoff & Loewenstein, *supra* note 69, 84.

⁷⁴ Miller, *supra* note 17, at 44-45 (noting that the Court's decision in *Anderson* allows a district court to enter judgment if the evidence produced by the plaintiff is not sufficient to convince the judge that a reasonable jury could return a verdict in his favor).

⁷⁵ *Id.* at 266 (Brennan, J. dissenting) (emphasis added).

⁷⁶ *Id.* (emphasis added).

⁷⁷ Motions for summary judgment after the Trilogy have presented a fundamental conundrum: issues of credibility are supposed to be decided by the jury, but in order to decide if the proof is enough for a “reasonable juror,” the judge must implicitly decide issues of credibility. The impetus of Justice Brennan's point was that he could not at once “square the direction that the judge ‘is not himself to weigh the evidence’ with the direction that the judge also bear in mind the ‘quantum’ of proof required and consider whether the evidence is of sufficient ‘caliber and quantity’ to meet that ‘quantum.’” *Id.* Further, Justice Brennan feared that the Court's holding would transform what is meant to provide an expedited “summary” procedure into a full-blown paper trial on the merits. *Id.* at 266-67. This fear seems

Moreover, in *Matsushita*, the Court reached into the realm of fact-finding in upholding a grant of summary judgment against the plaintiffs despite the submission of detailed and un rebutted expert reports supporting plaintiffs' claims.⁷⁸ The Court's holding triggered yet another vigorous dissent, this time by Justice Byron White, who read the majority opinion to be an "invitation to the district judge to go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the [non-moving party]."⁷⁹

Thus, while the Court's liberalization of the summary judgment standard was intended to control both the volume and scope of litigation in any particular case, the Trilogy's impact has gone far beyond this desired screening.⁸⁰ One of the unanticipated consequences of the Trilogy has been the alteration in the balance of power between plaintiffs and defendants in the pretrial phases of litigation. The Trilogy tipped this balance in favor of defendants by raising both the costs and risks to plaintiffs while diminishing both for defendants, who as a class tend to be wealthier and more powerful than plaintiffs and are typically the beneficiaries of summary judgment.⁸¹ Accordingly, summary judgment after the Trilogy remains a "powerful but blunt instrument,"⁸² as it is not sufficiently finely-honed to distinguish sharply between genuine strike suits,⁸³ and cases

properly placed in the civil rights context, where jury trials result in considerably more favorable verdicts for civil rights plaintiffs than bench trials. *Schneider*, *supra* note 14, at 564.

⁷⁸ See *Matshushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁷⁹ *Id.* at 600 (White, J. dissenting).

⁸⁰ *Issacharoff & Loewenstein*, *supra* note 69, at 74; *Bouillion v. Eli Lilly & Co.*, 677 F. Supp. 467, 471 (W.D. La. 1988) (quoting *Norris v. Bell Helicopter Textron*, 495 So. 2d 976, 982 (La. App. 1986), *cert. denied*, 499 So. 2d 85 (La. 1987)).

⁸¹ *Issacharoff & Loewenstein*, *supra* note 69, at 75; *Miller*, *supra* note 17, at 47-48.

⁸² *Id.* at 107.

⁸³ Cases initiated with the intention of extorting a payment from the defendant by threatening a costly legal battle. *Issacharoff & Loewenstein*, *supra* note 69, at 106.

of limited monetary value.⁸⁴ Many lawsuits aimed at remedying constitutional violations fall squarely into the latter category.

More importantly, critics of the Trilogy have argued that, in deciding those three cases, the Court conferred too much discretion upon trial judges, essentially transforming them into pretrial factfinders.⁸⁵ A post-Trilogy review of lower court decisions proves that courts have shown a new willingness to resolve issues of intent or motive at the summary judgment stage, and, in the extreme version, to grant summary judgment where “taken as a whole, [plaintiff’s evidence does not] exclude other reasonable hypotheses with a fair amount of certainty.”⁸⁶ In fact, considerable evidence supports the proposition that federal courts across the nation have taken *Matsushita* and *Anderson* as the invitation the respective dissenting justices so feared.⁸⁷ This development is particularly troubling in civil rights cases, which most commonly involve subtle issues of credibility, inferences taken from circumstantial evidence, and close legal questions.⁸⁸

Although the tension between the procedure’s screening value and the desire to protect the nonmovant has always been present in motions brought pursuant to Rule 50, it is heightened in the summary judgment context because of the more limited evidentiary record and the lack of any opportunity to evaluate witness credibility.⁸⁹ When

⁸⁴ Issacharoff & Loewenstein, *supra* note 69, at 107.

⁸⁵ Miller, *supra* note 17, 47-48.

⁸⁶ Issacharoff & Loewenstein, *supra* note 69, 89.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Miller, *supra* note 17, at 61; *see also* UAW v. Johnson Controls, 886 F. 2d 871 (7th Cir. 1989) (*en banc*), *cert. granted*, 110 S. Ct. 1522 (1990) (holding, in the context of a sex discrimination case challenging the exclusion of women of child-bearing age from industrial positions, that despite the conflicts on material issues absolutely central to the disputed exclusion, the plaintiffs failed to survive summary judgment). Judge Posner dissented, opining, “I think it a mistake to suppose that we can decide this case once and for all on so meager a record,” before emphasizing that “whether a particular policy is unlawful is a question of fact that should ordinarily be resolved at trial.” *Id.* at 902, 906. The Supreme Court agreed, reversing and remanding that case in part because “if the Court of Appeals had properly analyzed

viewing evidentiary material on a pretrial motion without the safeguards and environment of a trial setting, courts may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party's evidence by weighing it against contradictory evidence.⁹⁰ Further, today's rhetoric about the "litigation explosion"⁹¹ may be encouraging district courts and courts of appeals to rely on the Trilogy to justify resorting to pretrial disposition too readily because they believe that there is a pressing need to alleviate overcrowded dockets or because they disfavor certain substantive claims.⁹²

The Supreme Court's recent decision in *Tolan v. Cotton*, however, evidences the Court's renewed emphasis on the proper role of a district court in the summary judgment stages of litigation, especially in civil rights cases involving purely testimonial evidence.⁹³

the evidence, it would have concluded that summary judgment against petitioners was not appropriate because there was a dispute over a material issue of fact." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 222 (1991).

⁹⁰ Miller, *supra* note 17, at 62. Miller goes on to say that, "[e]ncouraged by systemic concerns suggesting that summary judgment is desirably efficient, judges may be motivated to seek out weaknesses in the nonmovant's evidence, effectively reversing the historic approach." *Id.* at 66.

⁹¹ Miller, *supra* note 17, at 110.

⁹² *Id.* Miller also notes that "[j]udges are human, and their personal sense of whether a plaintiff's claims seem 'implausible' can subconsciously infiltrate even the more careful analysis." *Id.* at 66.

⁹³ In *Tolan*, an officer stopped Tolan in front of his parents' home in Bellaire, Texas on the mistaken belief that the car he had been driving with his cousin was stolen. 134 S. Ct. 1861, 1863 (2014). Tolan told the officers that the car belonged to him, and after a few minutes, Tolan's parents, hearing the commotion, came outside. *Id.* His parents reiterated what Tolan had already told the officer and confirmed that Tolan lived with them. *Id.* A sergeant then arrived on the scene and ordered Tolan's mother to stand against the garage door. *Id.* at 1863-64. The officer stated that Tolan rose to his feet from the facedown position in which the officer had ordered Tolan to remain, while Tolan testified that he rose to his knees. *Id.* at 1864. The parties agreed that Tolan then exclaimed "Get your fucking hands off my mom," at which point the sergeant on scene shot Tolan three times. *Id.* Granting summary judgment to the officer-defendants, the district court relied on several disputed facts, including (1) the lighting of the porch, (2) how calmly Tolan's mother disputed the officers' allegations, (3) whether Tolan was "verbally threatening" the officer, and (4)

The facts of *Tolan*, as viewed by the Court, led to the *inescapable* conclusion that the court below credited the evidence of the party seeking summary judgment—police officers—and failed to properly acknowledge key evidence offered by the party opposing that motion—a young black man shot at the hands of one of those officers. It is natural, the Court noted, for witnesses on both sides to have their own “perceptions, recollections, and even potential biases,”⁹⁴ but, the Court continued, “by weighing the evidence and reaching factual inferences contrary to *Tolan*’s competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”⁹⁵ Failing to heed the Court’s warnings in *Tolan*, both the district court and the Seventh Circuit majority neglected to adhere to that same fundamental procedural tenet when it issued its opinion in *Colbert v. City of Chicago, et al.* just three years later.

COLBERT V. WILLINGHAM, ET AL.

A. Factual Background

In March of 2011, Plaintiff Jai Crutcher was discharged on mandatory supervised release after being incarcerated periodically for various offenses.⁹⁶ After his release, Crutcher and his girlfriend moved in with Christopher Colbert, Crutcher’s brother by adoption, who lived in the West Englewood neighborhood of Chicago.⁹⁷ As part of the terms of his supervised release, Crutcher was required to “consent to a

whether *Tolan* was “moving to intervene” in the sergeant’s interaction with his mother. *Id.* at 1867. Because the lower court failed to credit evidence that contradicted some of its key factual conclusions, the Court found that the Fifth Circuit improperly “weighed evidence” and “resolved disputed issues in favor of the moving party.” *Id.* at 1866.

⁹⁴ *Id.* at 1868.

⁹⁵ *Id.*

⁹⁶ *Colbert v. Willingham et al.*, No. 13 Civ. 2397, 2015 U.S. Dist. LEXIS 67561, at *2 (N.D. Ill. May 26, 2015).

⁹⁷ *Id.*

search of [his] person, property, or residence”⁹⁸ and agreed that he “w[ould] not use or knowingly have under [his] control or in [his] residence any firearms, ammunition, or explosive devices.”⁹⁹

Shortly after Crutcher was released on parole, Defendant Chicago Police Officer Russel Willingham (“Willingham”) allegedly received information from a “cooperating individual” who claimed to have seen Crutcher in Colbert’s residence with two firearms: a 12-gauge shotgun and a 40-caliber handgun.¹⁰⁰ Defendant Willingham ran a name check on Crutcher, which revealed that he was on parole for the use of a firearm.¹⁰¹ Based exclusively on that information, Willingham contacted Illinois Department of Corrections (“IDOC”) Parole Officer Jack Tweedle (“Tweedle”), and the two decided to conduct a parole check of Crutcher’s residence to ensure that he was in compliance with the terms of his supervised release.¹⁰²

At 6:30 a.m. on March 31, 2011, no fewer than 10 police and parole officers arrived at Colbert’s home to conduct that compliance check.¹⁰³ Asleep in the basement at the time, Crutcher woke to the officers’ knock on the front door of the residence he shared with Colbert.¹⁰⁴ Willingham, Tweedle, and IDOC Officers Luis Hopkins and Darryl Johnson (collectively, “Defendant Officers”), were among the group of agents.¹⁰⁵ Crutcher looked outside and, seeing the enormous police presence, called Colbert at work to apprise him of the officers’ arrival. Crutcher let the officers in “several minutes later” and consented to the search pursuant to the terms of his supervised release.¹⁰⁶

⁹⁸ *Id.* at *2-3.

⁹⁹ *Id.* at *3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Colbert v. City of Chicago, et al.*, 851 F. 3d 649, 652 (7th Cir. 2017).

¹⁰⁴ *Id.* at *4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Before beginning the search, the officers handcuffed Crutcher.¹⁰⁷ At some point during the search, Colbert arrived home and was also placed in handcuffs.¹⁰⁸ As a result, neither Colbert nor Crutcher was permitted to observe the search, which encompassed the totality of the home.¹⁰⁹ While both Plaintiffs were handcuffed and secured, the reporting officers ravaged the home, causing damage to both real and personal property.¹¹⁰

Specifically, the officers pulled out insulation in the basement, put holes in the walls, ripped the couch open to search its contents, and tracked dog feces throughout the house.¹¹¹ In the kitchen on the main floor, officers ransacked various food containers (*i.e.* a sugar bowl), broke part of the kitchen countertop, and broke hinges off of shelves.¹¹² Additionally, Plaintiffs described an officer who unholstered his firearm and threatened to shoot Crutcher's six-week-old puppy before leaving the dog outside, where it was lost.¹¹³

Just before concluding their search, the officers encountered the bedroom Colbert shared with his wife on the main floor, which was locked.¹¹⁴ The officers obtained a key and, once inside, found a 12-gauge shotgun in the closet with approximately 100 rounds of ammunition and a box for a 40-caliber semi-automatic handgun.¹¹⁵ Colbert admitted ownership of both firearms, neither of which was

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *4-5.

¹⁰⁹ *Id.* at *42.

¹¹⁰ *Id.* at *5.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Colbert v. City of Chicago*, 851 F. 3d 649, 661 (7th Cir. 2017) (Hamilton, J., dissenting). In addition to the property damage referenced by the district court, Plaintiffs testified that the officers damaged clothing, a weight bench, the basement door, the steps, bedroom dressers, and an electronic tablet. Crutcher testified that the officers dismantled his stereo and television, damaging them in the process, and destroyed photographs of his grandmother, leaving them on the floor covered in dog feces. *Colbert*, 651 F. 3d at 661, n.1 (Hamilton, J., dissenting).

¹¹⁴ *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *5.

¹¹⁵ *Id.* at *6.

registered with the City of Chicago, at which point the officers formally arrested both Colbert and Crutcher.¹¹⁶

B. Procedural Background

Crutcher was arrested for Unlawful Use of a Weapon/Felon in Possession of a Firearm¹¹⁷ and Violation of Parole.¹¹⁸ Officer Willingham prepared and submitted a criminal complaint against Crutcher in which he stated that Crutcher had admitted to “full knowledge of the firearm being in the residence” as well as to knowledge that a handgun had previously been in the residence.¹¹⁹ That prosecution ended on April 19, 2011, after a Cook County judge dismissed the case on a finding of no probable cause,¹²⁰ but on May 6, 2011, an Illinois grand jury nevertheless indicted Crutcher on one count of being an armed habitual criminal and two counts of unlawful possession of a firearm by a felon.¹²¹ Crutcher was found not guilty on February 28, 2012, but only after being incarcerated for a total of approximately eleven months.¹²²

Colbert was arrested for failing to register his firearm pursuant to §8-20-140 of Chicago’s Municipal Code¹²³ and an accompanying

¹¹⁶ *Id.*

¹¹⁷ Required Crutcher to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any firearm or firearm ammunition. 720 ILL. COMP. STAT. § 5/24-1.1(a) (LexisNexis 2017).

¹¹⁸ Required Willingham to have reasonable suspicion that Crutcher knowingly had a firearm or ammunition in his residence. 730 ILL. COMP. STAT. § 5/3-3-9 (2017); *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *6.

¹¹⁹ *Id.* at *31.

¹²⁰ *Id.* at *2.

¹²¹ *Id.*

¹²² *Id.*, at *6-7.

¹²³ Due to what Willingham calls “a scrivener’s error,” instead of charging Colbert under §8-20-140, the official charge listed on Colbert’s arrest report was §8-20-040, a statute declared unconstitutional by the United States Supreme Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *38.

state-law charge for possessing a shotgun able to hold over three rounds pursuant to 520 ILCS 5/2.33(m).¹²⁴ Colbert was released from custody on the same day of his arrest and the criminal case against him was later dismissed.¹²⁵

Plaintiffs Crutcher and Colbert filed their first complaint with the Northern District of Illinois, Eastern Division, on March 31, 2013, later amending it twice.¹²⁶ Colbert alleged (1) a false arrest claim against all individual Defendant Officers, (2) that §8-20-040 of the Municipal Code of the City of Chicago was unconstitutional, and (3) an unreasonable search claim.¹²⁷ Plaintiff Crutcher alleged (1) a false arrest claim against all individual Defendant Officers, and (2) a malicious prosecution claim against Willingham and the City of Chicago.¹²⁸

The City and Willingham moved for summary judgment on all claims, arguing: (1) Willingham had the requisite probable cause to arrest both Crutcher and Colbert or, in the alternative, Willingham had “arguable probable cause,” entitling him to qualified immunity on the Plaintiffs’ respective false arrest claims; (2) Crutcher’s malicious prosecution claim against Willingham and the City with respect to Crutcher’s first criminal proceeding was time-barred and that the requisite “chain of causation” applied to Crutcher’s second proceeding was broken by his indictment by the grand jury or, in the alternative, Willingham’s arrest and subsequent criminal complaint were supported by probable cause, barring Crutcher from relief as a matter of law; and (3) Colbert’s unreasonable search claim failed because there was no evidence that Willingham was personally involved in the destruction of Colbert’s property.¹²⁹

¹²⁴ *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *7.

¹²⁵ *Id.* at *7-8.

¹²⁶ Complaint, *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 2397).

¹²⁷ *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *35.

¹²⁸ *Id.* at *10-11.

¹²⁹ See Motion of Defendants City of Chicago and Chicago Police Officer Russel Willingham for Summary Judgment, *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

IDOC agents Tweedle, Johnson and Hopkins also moved for summary judgment on all claims, asserting that the agents could not be held liable for: (1) Crutcher’s arrest because it was Willingham and the other Chicago Police Officers who arrested Crutcher; and (2) Colbert’s property damage claim because Colbert had failed to provide any evidence about the condition of the property before the search and because Colbert failed to provide any description of the officers who allegedly damaged his property.¹³⁰ Colbert and Crutcher moved for partial summary judgment on their respective false-arrest claims against the City.¹³¹

C. Statements of “Un”Disputed Material Facts

When ruling on motions for summary judgment, federal courts in the Northern District of Illinois obtain the material facts of the case from the parties’ respective Local Rule 56.1 statements.¹³² Those statements filed by the respective parties in *Colbert*, and their answers, collectively proved that numerous facts were in dispute between the parties. Those which are material and therefore relevant to the respective plaintiffs’ claims are summarized below.

First, Willingham stated that the “cooperating individual” upon whom he relied informed him that he or she had personally seen

¹³⁰ See Memorandum of Defendants Jack Tweedle, Darryl Johnson and Louis Hopkins in Support of Motion for Summary Judgment, *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

¹³¹ *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394). In his motion for partial summary judgment, Colbert for the first time asserted that the registration requirements under §8-20-140, the ordinance actually underlying Colbert’s arrest, were unconstitutional. In response to Colbert’s claim, Willingham submitted an affidavit stating that Colbert had been arrested for violating §8-20-140, but Willingham had erroneously marked §8-20-040 as the cause of arrest. The district court accepted Willingham’s explanation and granted summary judgment to Defendants on Colbert’s false arrest claim. *Colbert v. City of Chicago, et al.*, 851 F. 3d 649, 654 (7th Cir. 2017). Accordingly, this article does not discuss that claim.

¹³² *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F. 3d 524, 527 (7th Cir. 2000).

Crutcher repeatedly with two firearms—a 12-gauge shotgun and a 40-caliber handgun—while s/he was present in the home he shared with Colbert.¹³³ Willingham claimed that the individual had provided him with reliable information in the past.¹³⁴ Crutcher disputed the individual’s reliability because Willingham could not recall how many times he had received information from that individual prior to the search and had not made any reports about information the individual had provided him in the past nor the information provided to him prior to his search of plaintiffs’ residence.¹³⁵ Further, Crutcher argued that because Willingham asserted privilege and refused to disclose what, if anything, the individual had told him about how he or she came to be inside of Crutcher’s residence, and also relied on that privilege to support his refusal to disclose how many times that individual claimed to have been inside Crutcher’s residence, the alleged “information” was uncorroborated, and thus Willingham should have been barred from using the evidence about the “tip” to support his “reasonable suspicion” or “probable cause” finding(s).¹³⁶

Relatedly, the parties disputed the circumstances of the officers’ visit. First, the parties disputed the length of Crutcher’s “delay” in answering the door. Crutcher testified it was approximately four minutes, while the Defendant Officers claimed it was between fifteen and twenty minutes.¹³⁷ Additionally, plaintiffs disputed the true purpose of the officers’ visit.¹³⁸ Willingham claimed the purpose was

¹³³ Defendant Chicago Police Officer Russel Willingham’s Reply to Plaintiff’s Response to Defendants’ Local Rule 56.1 Statement of Undisputed Material Facts, at ¶6, *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

¹³⁴ *Id.*

¹³⁵ Plaintiff’s Local Rule 56.1(b) Statement in Response to ECF #70, at ¶6, *Colbert v. Willingham, et al.*, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

¹³⁶ *Id.*

¹³⁷ *Colbert v. Willingham, et al.*, No. 13 Civ. 394, 2015 U.S. Dist. LEXIS 67561, at *16 (N.D. Ill. May 26, 2015).

¹³⁸ *Colbert v. City of Chicago et al.*, 851 F. 3d 649, 666 (7th Cir. 2017) (Hamilton, J., dissenting).

to ensure Crutcher was in compliance with the terms of his supervised release with respect to gun possession, yet Crutcher stated that he planned to dispute Willingham's intent at trial because, as Crutcher testified at his deposition, when Willingham first entered the home he asked "[w]here's the diesel?"¹³⁹ and reported that he had received a tip "that [they] had some drugs,"¹⁴⁰ before accusing Crutcher of flushing them down the toilet.¹⁴¹ Crutcher also pointed to the fact that as the officers searched through the house, they further indicated they were looking for drugs by looking through the sugar container in the kitchen and tearing apart the couch in the basement where Crutcher slept as it was unreasonable to believe guns could have been stored in either of those objects.¹⁴²

Additionally, while Willingham claimed that Crutcher had admitted to "full knowledge of the firearm being in the residence" as well as to knowing that a handgun had previously been in the residence—claims he included in his arrest report—Crutcher testified that he neither admitted to knowing nor knew that a firearm had been in the house.¹⁴³ Further, Crutcher testified that, after asking him about drugs, Willingham told Crutcher that he knew the shotgun was Colbert's, but said "since you didn't give me the information I needed, guess what? The shotgun is yours. [Hopkins] found it on you."¹⁴⁴ Notably, the IDOC Defendants admitted that fact for summary judgment purposes.¹⁴⁵

Finally, and perhaps most importantly, there was undoubtedly a dispute over whether the named Defendant Officers were the same officers who caused the damage to Colbert's property or, at the very

¹³⁹ "Diesel" is slang for cocaine.

¹⁴⁰ *Colbert*, 851 F. 3d at 666 (Hamilton, J., dissenting).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Plaintiff's Consolidated Statement of Additional Facts, at ¶24-25, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

¹⁴⁴ *Id.* at ¶26.

¹⁴⁵ IDOC Defendants' Response to Plaintiff's Consolidated Statement of Additional Facts, at ¶26, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

least, ignored a realistic opportunity to intervene while other officers caused the property damage. Colbert's second amended complaint named all four Defendant Officers. Willingham admitted the damage occurred, but claimed he was not personally responsible.¹⁴⁶ The IDOC Defendants, by contrast, claimed to have no recollection of the incident and merely asserted a blanket denial of personal liability.¹⁴⁷

COLBERT V. WILLINGHAM, ET AL. – THE DISTRICT COURT DECISION

A. Jai Crutcher

1. False Arrest

Beginning its analysis of Crutcher's Fourth Amendment false arrest claim, the district court stated that a warrantless search or seizure of a parolee's person or belongings "can occur where the officer has *reasonable suspicion* of criminal activity."¹⁴⁸ Accordingly, the relevant inquiry was whether, under the totality of the circumstances, Willingham had reasonable suspicion that Crutcher had committed or was committing either of the two crimes for which he was arrested *or* any crime at all.¹⁴⁹

Before answering that inquiry in the affirmative, the district court first stated that the fact that the officers found the shotgun in Colbert's locked bedroom affected the analysis of whether Crutcher *knowingly* resided in a home with a firearm.¹⁵⁰ Nonetheless, the court found that Willingham had the requisite reasonable and articulable suspicion to support Crutcher's arrest based on: (1) knowledge that Crutcher was on parole for the use of a firearm, (2) information from

¹⁴⁶ Defendant Chicago Police Officer Russel Willingham's Reply to Plaintiff's Response to Defendants' Local Rule 56.1 Statement of Undisputed Material Facts, at ¶15, 2015 U.S. Dist. LEXIS 67561 (N.D. Ill. May 26, 2015) (No. 13 Civ. 394).

¹⁴⁷ *Colbert v. City of Chicago, et al.*, 851 F.3d 649, 662 (7th Cir. 2017) (Hamilton, J., dissenting).

¹⁴⁸ *Id.* (emphasis in the original).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *15.

an informant relating that Crutcher had been in his residence with multiple firearms, including a shotgun, (3) the amount of time it took Crutcher to answer the door, and (4) the discovery of corroborating evidence (the shotgun that Defendant Officers found in Colbert's locked bedroom after a full search of the residence).¹⁵¹

In analyzing the disputed length of Crutcher's delay in opening the door for the officers, the court differentiated between a "significant delay," which would be sufficient to increase an officer's suspicion,¹⁵² and a "two-minute delay," which would be an immaterial fact that would not contribute to finding reasonable suspicion, before concluding Crutcher's delay belonged in the former category.¹⁵³ Notably, the court did not explicitly state that a four minute delay is "significant," nor did it explain what led to its conclusion. Instead, the court bypassed that inquiry, the dispute over which would normally be considered a matter of credibility, and merely asserted that the delay was relevant "based on its duration," Crutcher's status as a parolee, the tip Willingham allegedly received, and the alleged purpose of the investigation.¹⁵⁴ Apart from Crutcher's parolee status, each of the factors upon which the court relied were sources of dispute among the parties. The court thus could not have decided the issue as a matter of law without accepting the Defendant Officers' version of the facts as true.

Finally, while the district court agreed with Plaintiffs' contention that Willingham failed to provide evidence sufficient to establish the reliability of the "cooperating individual" from whom he received the tip about Crutcher possession guns, and therefore treated the individual like an anonymous tipster, the court nevertheless concluded that the Defendant Officers' discovery of the specific firearm allegedly mentioned in the tip—the fruit of their search—was

¹⁵¹ *Id.*

¹⁵² *United States v. Charleston*, No. 14 CR 009, 2014 WL 1329419, at *12 (E.D. Wis. Apr. 1, 2014).

¹⁵³ *United States v. Crasper*, 472 F. 3d 1141, 1156 (9th Cir. 2007).

¹⁵⁴ *Colbert v. Willingham et al.*, No. 13 Civ. 2397, 2015 U.S. Dist. LEXIS 67561, at *15 (N.D. Ill. May 26, 2015).

sufficient to retroactively corroborate the tip.¹⁵⁵ Thus, the court seemingly used one contested fact to validate the next before summarily concluding that no dispute of material fact remained.

2. Malicious Prosecution

Before analyzing the merits of Crutcher's malicious prosecution claim against Willingham and the City, the district court resolved a dispute between the parties regarding the date Crutcher's claim accrued. Defendant Officers contended that Crutcher's malicious prosecution claim accrued on April 19, 2011, when the state court judge issued a finding of no probable cause following Crutcher's preliminary hearing.¹⁵⁶ Crutcher, by contrast, argued that his claim accrued in February 28, 2012, when he was found not guilty of the charges brought via his subsequent grand jury indictment.¹⁵⁷ Thus, the question for the court was whether the two criminal prosecutions against Crutcher, which stemmed from the same arrest and were premised on the same operative facts and police reports, should be treated as separate actions or as a single action.

The district court concluded that the two prosecutions brought against Crutcher should be considered separately, thereby time-barring any action based on Crutcher's first criminal proceeding. Consequently, because the court found that "[t]he grand jury indictment of Crutcher [was] *prima facie* evidence of probable cause," Crutcher was required to present evidence "such as proof that the indictment was obtained by false or fraudulent testimony before the grand jury or other improper or fraudulent means," in the second matter in order to rebut that presumption.¹⁵⁸

¹⁵⁵ *Id.* at *17.

¹⁵⁶ *Id.* at *24.

¹⁵⁷ *Id.* at *24.

¹⁵⁸ *Id.* at *30 (citing *Freides v. Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 296 (1965); *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F. 3d 892, 901 (7th Cir. 2001)).

But by artificially separating the two criminal proceedings, the court discounted Crutcher’s argument that the two criminal proceedings had been initiated by one arrest and one police report for crimes different only in degree, which left the “chain of causation” intact. The court’s determination on that issue thus allowed it to conclude that Crutcher’s allegation of Willingham’s “improper act”—his drafting of a police report containing false statements regarding the facts of Crutcher’s arrest—related only to the initial, time-barred prosecution. Even in the light most favorable to Crutcher, the court stated, there was no evidence that Willingham had any influence over the grand jury’s decision to indict Crutcher in the second proceeding.¹⁵⁹

B. Christopher Colbert

Disagreeing with the IDOC Defendants, the court found that because Colbert alleged specific facts describing how the police damaged specific items within his home, and because Willingham admitted those allegations, there existed a disputed issue of fact materially sufficient to withstand summary judgment on those grounds.¹⁶⁰ Adhering to its strict individual liability standard for claims arising under §1983, however, the district court granted summary judgment to Defendant Officers because Colbert failed to provide evidence sufficient to establish an affirmative link between any individual Defendant Officer and the damage caused.¹⁶¹ Importantly, the court found Colbert’s argument that “[t]he question of which officers were responsible for trashing Colbert’s home should be left to the jury” unconvincing, citing *Hessel v. O’Hearn*¹⁶² for the principle that while it may be assumed that the property damage was

¹⁵⁹ *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *32.

¹⁶⁰ *Id.* at *42.

¹⁶¹ *Id.* at *44.

¹⁶² *Hessel v. O’Hearn*, 977 F. 2d 299, 305 (7th Cir. 1992) (asserting that “the principle of collective punishment is not generally part of our law.”).

caused by one or more of the officers who searched Colbert's home, "[t]hat [wa]s not good enough to fend off summary judgment."¹⁶³

COLBERT V. CITY OF CHICAGO, ET AL. – THE SEVENTH CIRCUIT
DECISION

Exhibiting the same uncritical approach to the disputed issues of fact material to Plaintiffs' claims and failing to review the lower court's ruling *de novo*, in *Colbert v. City of Chicago et al.*, a divided Seventh Circuit affirmed the district court's grant of summary judgment in favor of Defendant Officer-Appellees. Judge Joel Flaum, writing for the majority, was joined by Judge William Bauer, while Judge David Hamilton concurred in part and dissented in part.¹⁶⁴

A. The Majority Opinion

1. Jai Crutcher – Malicious Prosecution

Beginning its analysis of Crutcher's malicious prosecution claim with a footnote, the Seventh Circuit majority failed to review the lower court's treatment of Crutcher's underlying criminal proceedings as two separate actions despite owing no deference to the trial court's legal conclusion. In so doing, however, the Seventh Circuit majority both ignored the fact that the court's artificial separation of those proceedings ran counter to established law and discounted the dispositive effect of the district court's legal conclusion by conflating two elements of Crutcher's claim.¹⁶⁵

First, by failing to review the separation *de novo*, the majority neglected to adhere to the axiom that criminal proceedings do not terminate, and a criminal defendant's malicious prosecution claim does not accrue, "until such time as the State [is] precluded from

¹⁶³ *Colbert*, 2015 U.S. Dist. LEXIS 67561, at *45 (citing *Hessel*, 977 F. 2d at 305).

¹⁶⁴ *Colbert v. City of Chicago, et al.*, 851 F. 3d 649, 652 (7th Cir. 2017).

¹⁶⁵ *Id.* at 654, n.5.

seeking reinstatement of the charges.”¹⁶⁶ The record explicitly showed that the State was not only *permitted* to seek reinstatement of the charges against Crutcher, but that it *did in fact* reinstate the charges against Crutcher that resulted from the officers’ search of his residence on March 31, 2011, less than one month after the circuit court judge’s “no probable cause” finding.¹⁶⁷

More importantly, the majority predicated its judgment as a matter of law in favor of the Defendant Officers on the ultimate catchall: a broken “chain of causation.”¹⁶⁸ Because Crutcher was subsequently indicted on charges stemming from his arrest on March 31, 2011, the court concluded that the chain of causation linking Willingham’s arrest to Crutcher’s prosecution had been broken.¹⁶⁹ Though the majority admitted that Willingham’s allegedly false statement in the original case incident report he drafted constituted a post-arrest action, it nevertheless found that there was simply no evidence that the statement influenced the prosecutor’s decision to indict, or that the prosecutor relied on the contents of the report to obtain the indictment for Crutcher’s second proceeding.¹⁷⁰ In support, the court pointed to the fact that Willingham had not testified before the grand jury and found that Crutcher failed to provide any evidence connecting Willingham’s allegedly false report to the officer who did testify.¹⁷¹

Yet by focusing on the fact that Crutcher pointed to no evidence that Willingham committed perjury before the grand jury, the majority misapprehended the ways in which plaintiffs may rebut the presumption that an indictment is *prima facie* evidence of probable cause. The Supreme Court of Illinois explicitly addressed the issue of what may constitute a post-arrest “improper act” sufficient to leave the chain of causation intact, stating that “[n]o decision of the court ever

¹⁶⁶ Ferguson v. City of Chicago, 213 Ill. 2d 94, 104 (2004).

¹⁶⁷ *Colbert*, 851 F. 3d at 653.

¹⁶⁸ *Id.* at 654, n.5.

¹⁶⁹ *Id.* at 655.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

has restricted the rebutting evidence solely to proof of false or incomplete testimony” because no such “insuperable burden . . . would serve the ends of justice.”¹⁷² The Seventh Circuit majority thus improperly narrowed its analysis and refused to credit Crutcher’s testimony, which supported the allegation that Willingham committed an improper act by knowingly misrepresenting facts that satisfied a required element of the offense for which Crutcher was subsequently charged and indicted.

Moreover, the court went on to muse that, “it [was] likely that the prosecutor knew that a judge had already dismissed Willingham’s complaint, which was based in part on th[at] arrest report, for lack of probable cause.”¹⁷³ In so doing, however, the majority refused to confront the implausibility of its assumption. A grand jury entered a finding of no probable cause to indict Crutcher on two charges: one which required proof that Crutcher knowingly resided in a home with a firearm, the other which required proof that he had actual or constructive possession of a firearm.¹⁷⁴ Crutcher was subsequently indicted on three charges, all of which required actual or constructive possession.¹⁷⁵

The record is incontrovertibly devoid of evidence prior to the Defendant Officers’ search. Even the alleged tip which triggered Willingham and Tweedle to conduct the search of Crutcher’s residence failed to appear in the record until Crutcher had already been taken into custody.¹⁷⁶ According to the lower court, that anonymous tip and Crutcher’s “delay” formed the requisite reasonable suspicion for the Defendant Officers’ search, which in turn afforded them the opportunity to find the firearms in Colbert’s locked bedroom.¹⁷⁷ Those facts, taken as true, would likely be sufficient to show actual

¹⁷² *Friedes v. Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 296 (1965).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 653.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 666 (Hamilton, J., dissenting).

¹⁷⁷ *Colbert v. Willingham, et al.*, No. 13 Civ. 2397, 2015 U.S. Dist. LEXIS 67561, at *20-21 (N.D. Ill. May 26, 2015).

possession. Crutcher's false confession, in turn, supports constructive possession.

Yet it was patently impossible for the prosecutor to discover any one of those facts independent from Crutcher's arrest report, where they were all memorialized in writing by Willingham. Furthermore, Willingham testified in his deposition that he "related the facts of the case" to the prosecutor.¹⁷⁸ Not one of the Defendant Officers offered any evidence tending to prove that the prosecutor's decision to charge Crutcher was the result of his or her *independent* investigation. The majority did not explain what evidence a prosecutor might have had to support an indictment for possession other than the evidence that was exclusively within Willingham's control. Nonetheless, the court conclusively determined that there was no evidence that Willingham's arrest report played *any* part in Crutcher's second criminal proceeding which stemmed from the same operative facts as the first.¹⁷⁹

Therefore, one can reasonably conclude that the Seventh Circuit majority remained unperturbed by the fact that the only place from which evidence could be found supporting probable cause sufficient to initiate and continue Crutcher's second criminal proceeding was within Willingham's arrest report, which Crutcher alleged was falsified. Consequently, the district court's decision to separate Crutcher's two criminal proceedings was thus far from irrelevant. Rather, that decision effectively barred evidence of Willingham's post-arrest improper act. The majority thus tacitly deferred to Defendant Officers' version of events, and neglected to credit Crutcher's sworn testimony denying the veracity of salient facts in Willingham's arrest report from playing any role in his malicious prosecution claim. As a result, the presumption of probable cause inherent in Crutcher's indictment remained un rebutted. Consequently, by way of a procedural technicality, the majority avoided crediting testimony of the non-moving party, and, as a result, was not forced to explicitly state what it implicitly had done.

¹⁷⁸ Brief of Plaintiffs-Appellants at 22, *Colbert v. City of Chicago et al.* (7th Cir. Nov. 2, 2016) (No. 16-1362).

¹⁷⁹ *Colbert*, 851 F. 3d at 655.

2. Christopher Colbert – Unreasonable Search

Applying the test enunciated in *Wolf-Lillie v. Sonquist*,¹⁸⁰ the Seventh Circuit majority found Colbert unable to satisfy §1983's personal liability requirement due to the lack of an affirmative link between the individuals sued and the misconduct alleged.¹⁸¹ Particularly problematic for the court was the fact that Colbert sued four of ten searching officers, while admitting that he was unable to identify which officer had caused which type of property damage.¹⁸² Unmoved by the fact that Colbert's failure was a direct result of his removal from the rooms in which the officers were conducting the search, the majority concluded that because the officers denied personal responsibility and Colbert put forth "no evidence" to support his claim against them, no dispute of material fact remained.¹⁸³

The court did, however, recognize the "potential tension between §1983's individuality responsibility requirement and factual scenarios of the kind present [in this case]."¹⁸⁴ In its attempt to provide a solution for that inherent problem, however, the majority merely reiterated its prior suggestion to plaintiffs in two cases the court believed to be factually similar. First, in *Hessel v. O'Hearn*, a case in which officers allegedly stole items during a search of plaintiff's house, the court for the first time "recognized the plaintiff's bind,"¹⁸⁵ but affirmed summary judgment for defendant officers because the plaintiffs had "alleged no conspiracy."¹⁸⁶ Delving into the realm of fact-finding, the court opined that "[t]here is no more reason to fix

¹⁸⁰ *Wolf-Lillie v. Sonquist*, 699 F. 2d 864, 869 (7th Cir. 1983) (holding that because §1983 creates a cause of action based on personal liability and predicated upon fault, "a causal connection, or affirmative link, between the misconduct complained of and the official sued is necessary.").

¹⁸¹ *Colbert*, 851 F. 3d at 657.

¹⁸² *Id.* at 659.

¹⁸³ *Id.* at 660.

¹⁸⁴ *Id.* at 657.

¹⁸⁵ *Hessel v. O'Hearn*, 977 F. 2d 299, 305 (7th Cir. 1992).

¹⁸⁶ *Id.*

liability on [those] 14 police officers than on the entire population of Horicon, Wisconsin,”¹⁸⁷ later qualifying that with “[w]ell, maybe a little more reason.”¹⁸⁸ Nonetheless, the court surmised that because “[e]ach of the defendants c[ould] deny liability, a jury may find it impossible to determine who is lying,”¹⁸⁹ the plaintiff was not entitled to relief as a matter of law,¹⁹⁰ thereby evidencing a propensity to improperly weigh evidence at the summary judgment stage.

Similarly, in *Molina ex rel. Molina v. Cooper*,¹⁹¹ the court suggested that plaintiffs in such a “bind” might allege “something akin to a ‘conspiracy of silence among the officers,’ in which defendants refuse to disclose which of them has injured the plaintiff.”¹⁹² But because the officer named in Molina’s lawsuit was one of seventeen officers and because the plaintiff failed to specifically articulate a conspiracy among the officers, the court boldly asserted that, “[n]o jury could reasonably infer . . . that [the named officer] caused the damage to the truck.”¹⁹³ In so doing, the court refused to acknowledge the important role a jury plays—that of making credibility determinations at trial.

Thus, under the pretense of Colbert’s inability to satisfy the causal connection requirement, the court ignored the specific circumstances of Colbert’s case and held that because Colbert had not specifically alleged “anything like a ‘conspiracy of silence’ . . . no jury could reasonably conclude that these particular Defendant Officers had any individual involvement in Colbert’s alleged property damage.”¹⁹⁴ This most recent holding evidences a willingness to dismiss cases in which a plaintiff has offered undisputed direct evidence of extensive property damage as a result of an unreasonable search and circumstantial

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Molina ex rel. Molina v. Cooper*, 325 F. 3d 963 (7th Cir. 2003).

¹⁹² *Id.* at 974.

¹⁹³ *Id.*

¹⁹⁴ *Colbert v. City of Chicago et al.*, 851 F. 3d 649, 658 (7th Cir. 2017).

evidence supporting the plaintiff's argument that the officers failed to intervene on the pretense that no reasonable juror would *believe* the plaintiff standing before him. Regardless of the underlying intent, the resultant principle is that in cases in which a plaintiff is unable, due to the searching officers' own conduct, to provide evidence of an officer's direct involvement in the alleged misconduct, that claim necessarily must fail unless that plaintiff specifically pleads a conspiracy of silence in his or her complaint.

Recognizing the paradox of its assertion that plaintiffs in Colbert's situation are required to plead a specific phrase in order to survive summary judgment, the majority explicitly refuted the natural implication of its holding by stating "[t]his is not to suggest that plaintiffs in this context must plead a legal theory."¹⁹⁵ Rather, the court indicated, those plaintiffs must plead a claim that plausibly forms a causal connection between the officer sued and some alleged misconduct *and* introduce facts that give rise to a genuine dispute regarding that connection, bringing the impossibility of producing such evidence full circle.¹⁹⁶ As such, the Seventh Circuit majority's conclusion left much to be desired, particularly because Colbert's evidentiary showing seemed to meet that stated requirement.

Colbert's alternative argument alleging that the named officers at the very least failed to intervene was met with the same fate. The Seventh Circuit erroneously concluded that the Colbert's case was easily distinguishable from its precedent, *Miller v. Smith*,¹⁹⁷ based on no more than a circumstantial technicality.¹⁹⁸ This artificial differentiation evidenced the majority's refusal to take a critical look at the facts of a specific civil rights plaintiff's case using a "totality of the circumstances" approach, preferring instead to boil down those

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Miller v. Smith*, 220 F. 3d 491 (7th Cir. 2000).

¹⁹⁸ The majority seemed to differentiate the facts of *Miller* from those of *Colbert* based on the fact that, though the plaintiff in *Miller* "could not identify which of the two officers had used excessive force, he *did* identify the remaining for officers who stood by and, as a result, ignored a realistic opportunity to intervene." *Colbert*, 851 F. 3d at 660 (emphasis in the original).

facts and place the respective plaintiff in a category into which he may or may not belong. As a result, the court found that Colbert's assertion that the four named Defendant Officers caused the damage, or at least failed to intervene when they had a realistic opportunity to do so, proven in part by circumstances such as the loud volume of the destructive search coupled with the undisputedly small home, was simply insufficient to dispute the Defendant Officers' respective claims that "it wasn't me."

B. Judge David Hamilton's Dissent

The first sentence of Judge David Hamilton's dissenting opinion in *Colbert v. Chicago* summarily described the majority's error, stating "[t]he factual account provided by Crutcher and Colbert may or may not be true, but that question is not before us."¹⁹⁹ Implicitly attacking the rose-tinted glasses with which the majority read the Defendant Officers' barebones denial of all responsibility, Judge Hamilton reminded his colleagues that their duty in reviewing summary judgments is to treat the evidence of the *nonmoving* party as true and give *them* the benefit of all reasonable inferences from that evidence.²⁰⁰ Further, recognizing the gravity of the issue presented, Judge Hamilton properly framed the case at bar as one which raises larger questions about how courts should address claims of law enforcement misconduct, putting special emphasis on claims brought by people of color, who are disproportionately subject to police misconduct.²⁰¹ For Judge Hamilton, the issues raised in *Colbert* almost exclusively involved credibility determinations, which the majority either resolved themselves or summarily avoided by standing behind a proverbial shield of procedure.

First, Judge Hamilton took issue with the majority's suggestion that plaintiffs who hope to survive summary judgment after being subjected to an unreasonable search or seizure during which they are

¹⁹⁹ *Colbert*, 851 F. 3d at 661 (Hamilton, J., dissenting).

²⁰⁰ *Id.*

²⁰¹ *Id.*

effectively blindfolded should, in general, allege a “conspiracy of silence” to strengthen their claim.²⁰² Recognizing that the majority’s suggestion was founded on *Hessel* and *Molina*, Judge Hamilton clarified that nothing in those cases stood for the proposition that plaintiffs in Colbert’s position are required to meet a new pleading requirement.²⁰³ As a result, compelling a civil rights plaintiff to plead a fact patently obvious to every Chicago resident would require that plaintiff to interpret the Seventh Circuit’s suggestion as an actual pleading and/or evidentiary prerequisite. Yet neither *Hessel* nor *Molina* took a firm stance on that issue, and by categorizing Colbert as a *Hessel/Molina* case, the Seventh Circuit majority failed to recognize critical differences between those factual scenarios.

The fourteen officers in *Hessel* conducted a search of plaintiffs’ premises for evidence of illegal gambling pursuant to a valid warrant.²⁰⁴ Plaintiffs claimed that the officers exceeded the scope of that warrant and stole items of property, including three cans of soda, an antique chest and an envelope with six hundred dollars of cash inside.²⁰⁵ Declining to reverse the lower court’s grant of summary judgment for the officers, the Seventh Circuit cited a “controversial decision” that came out of a case in California, in which the court held that the doctrine of *res ipsa loquitur* could be used to thwart a “conspiracy of silence” of medical personnel.²⁰⁶ Importantly, however, the Seventh Circuit concluded *Hessel* by stating, “[w]hether any such approach might have been used by the plaintiffs in this case we need not decide.”²⁰⁷

Further, in *Molina*, the court refused to credit plaintiffs’ attempt to name the officer they believed to be responsible for causing damage to their truck during the search.²⁰⁸ In so doing, however, the court stated

²⁰² *Id.* at 662 (Hamilton, J., dissenting).

²⁰³ *Id.*

²⁰⁴ *Hessel v. O’Hearn*, 977 F. 2d 299, 301 (7th Cir. 1992).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 305 (citing *Ybarra v. Spangard*, 25 Cal. 2d 486 (1944)).

²⁰⁷ *Hessel*, 977 F. 2d at 305.

²⁰⁸ *See Molina ex rel. Molina v. Cooper*, 325 F. 3d 963 (7th Cir. 2003).

that the facts of the plaintiffs' case bore "a strong resemblance to those in *Hessel*,"²⁰⁹ thereby denying differentiation based on a "complete inability" in *Hessel* versus the "likely culprit" in *Molina*. What's more, the only reference the Seventh Circuit made to a supposed pleading requirement in *Molina* was when they noted that the plaintiffs "ha[d] not alleged a conspiracy of silence among the officers (a move that might have strengthened their argument that *Hessel* is inapplicable)."²¹⁰

Moreover, the majority's "conspiracy" suggestion stands in stark contrast to the recognized principle that a plaintiff is not required to plead legal theories in his complaint and is inherently ironic given the immeasurably liberal pleading requirements applied to claims for conspiracy in the Seventh Circuit.²¹¹ In fact, by asserting that Colbert should have explicitly alleged a "conspiracy of silence," the Seventh Circuit majority implicitly admitted the impossibility of Colbert's situation. Because conspiracies are "by their nature shrouded in mystery," courts have found that they "do not permit the plaintiff to allege, with complete particularity, all of the details of the conspiracy or the exact role of the defendants in the conspiracy."²¹² A plaintiff cannot be required to "allege facts with precision where the necessary information to do so is within the knowledge and control of the defendant and unknown to the plaintiff."²¹³

As a result, states under the Seventh Circuit's jurisdiction merely require a plaintiff to allege the parties involved, the general purpose, and the approximate date of the conspiracy.²¹⁴ Colbert incontrovertibly surpassed those minimal requirements. Further, Colbert's brief explicitly stated that because both Plaintiffs expect each Defendant

²⁰⁹ *Id.* at 973.

²¹⁰ *Id.* at 974.

²¹¹ *Walker v. Thompson*, 288 F. 3d 1005, 1007 (7th Cir. 2002) (stating "it is enough in pleading a conspiracy merely to indicate the parties, the general purpose, and approximate date, so that the defendant has notice of what he is charged with.").

²¹² *Adcock v. Brakegate Ltd.*, 164 Ill. 2d 54, 65-66 (1994) (emphasis added).

²¹³ *Id.* at 66.

²¹⁴ *Loubster v. Thacker*, 440 F. 3d 439, 443 (7th Cir. 2006).

Officer to deny wrongdoing, the jury should be permitted to assess the credibility of those claims. “It is unclear,” Judge Hamilton opined, “what else Colbert should have said to assert a ‘conspiracy of silence.’”²¹⁵

Judge Hamilton then contended that the majority also improperly denied Colbert’s claim that at a minimum, the four named officers failed to intervene when their fellow officers searched his home in an unreasonable manner. The majority stated that Colbert’s claim failed because he did not observe the officers failing to intervene. Noting that requiring an aggrieved plaintiff to observe officers failing to intervene would be a marked departure from circuit precedent, Judge Hamilton criticized the majority for its inconsistent and conflicting evidentiary requirements applied to individual liability under that theory.²¹⁶

In *Miller v. Smith*, the district court granted summary judgment to police officers on plaintiff’s claim of excessive force because Miller was unable to “identify the officers who allegedly attacked him or otherwise support his claim with sufficient facts.”²¹⁷ The Seventh Circuit reversed, concluding, “[i]f Miller can show at trial that an officer attacked him where another officer ignored a realistic opportunity to intervene, he can recover.”²¹⁸ The majority in *Colbert* attempted to differentiate *Miller* based on the fact that Miller “narrowed his excessive force allegation to two of the six arresting officers”²¹⁹ and was able to identify the remaining four officers who stood by.²²⁰ Though Colbert narrowed his unreasonable search claim to four of the ten officers who were present during the search, this was not enough for the majority. Failing to understand the way in which

²¹⁵ *Colbert v. City of Chicago et al.*, 851 F. 3d 649, 662 (7th Cir. 2017) (Hamilton, J. dissenting).

²¹⁶ *Id.* at 664 (Hamilton, J., dissenting) (citing *Miller v. Smith*, 220 F. 3d 491 (7th Cir. 2000) (“An official satisfies the personal responsibility requirement of §1983 if she acts *or fails to act* with a deliberate or reckless disregard of plaintiff’s constitutional rights.”)).

²¹⁷ *Miller*, 220 F. 3d at 493.

²¹⁸ *Id.* at 495.

²¹⁹ *Colbert*, 851 F. 3d at 661 (Hamilton, J., dissenting).

²²⁰ *Id.* at 660.

the two cases were distinguishable, Judge Hamilton argued that the Seventh Circuit should have taken the same approach to Colbert's unreasonable search claim as it did to that of Miller.²²¹

If it had, the result would have been quite different for Colbert. Taking an approach consistent with Seventh Circuit precedent, Judge Hamilton analyzed the issue using the totality of the circumstances and pointed to factors such as the officers' testimony, in which they stated that Colbert's home was "a very small residence" and testimony that the officers' search was "incredibly loud and disruptive, as one might expect when doors are torn from their hinges" to conclude that the four Defendant Officers *must* have been close to any other officer in the home.²²² The Seventh Circuit required no more than that in *Miller*, yet inexplicably came to the opposite result in *Colbert*, finding Colbert's case more similar to a case in which plaintiff complained about a stolen soda²²³ and one which involved a search of a truck,²²⁴ not a residence. Moreover, Judge Hamilton highlighted the dispositive issue of credibility the majority implicitly resolved, noting, "while the defendants might argue that they did not notice their colleagues in the next room putting holes in the walls, the plausibility of that argument should be a jury issue."²²⁵

Thus, rejecting the majority's "conspiracy" suggestion, Judge Hamilton ventured to find a legitimate and instructive solution to a plaintiff's predictable problem. In contrast to the majority, Judge Hamilton found persuasive the burden-shifting approach, which has been used in other circuits facing similar evidentiary issues and was propounded by Colbert.²²⁶²²⁷ In *Burley v. Gagacki*, the Sixth Circuit

²²¹ *Id.* at 664 (Hamilton, J., dissenting).

²²² *Id.* at 655 (Hamilton, J., dissenting).

²²³ *Hessel v. O'Hearn*, 977 F. 2d 299, 301 (7th Cir. 1992).

²²⁴ *Molina ex rel. Molina v. Cooper*, 325 F. 3d 963, 973 (7th Cir. 2003).

²²⁵ *Colbert*, 851 F. 3d at 665 (Hamilton, J., dissenting).

²²⁶ The majority summarily dismissed Colbert's proposed burden-shifting approach for two reasons: (1) the Seventh Circuit has never adopted such an approach; and (2) even using a burden-shifting approach, Colbert "at least would have needed to have sued all of the officers he had reason to believe were responsible for the alleged property damage." *Colbert*, 851 F. 3d at 659.

permitted the district court to shift the burden of production on remand from plaintiff to defendants after the involved officers masked their identities before ransacking the plaintiff's home, stating "while an officer's mere presence at the scene of the search is insufficient" to establish individual liability under §1983, "here the agents' intent to conceal contributed to plaintiffs' impaired ability to identify them."²²⁸

Judge Hamilton then cited the Ninth Circuit's decision in *Dubner v. City and County of San Francisco*,²²⁹ to clarify that such an approach is only a procedural adjustment, which shifts the burden of production based on the defendants' own actions when they act together.²³⁰ Under this approach, a defendant seeking summary judgment is required to present evidence that he is not personally liable for the unreasonable search, either by identifying who caused the damage or through some other means. Importantly, if the officers fail to present exculpatory evidence, Judge Hamilton argued, the matter should proceed to trial so a jury can evaluate credibility.²³¹

With regard to Crutcher's malicious prosecution claim, Judge Hamilton condemned the uncritical approach the majority took to conclude that Crutcher's grand jury indictment broke the requisite chain of causation between Willingham and the alleged constitutional deprivation for two reasons. First, Judge Hamilton correctly clarified that Crutcher's claim was based not on a wrongful arrest, but on Willingham's alleged lie after the officers arrested him.²³² Therefore, Crutcher's claim was by definition premised on the malicious steps Willingham took to ensure Crutcher's prosecution. Crutcher alleged

²²⁷ *Id.* at 663 (Hamilton, J., dissenting).

²²⁸ *Burley v. Gagacki*, 729 F. 3d 610, 622 (6th Cir. 2013) (citations omitted).

²²⁹ *Dubner v. City and County of San Francisco*, 266 F. 3d 959, 965 (9th Cir. 2001) (holding that "although the plaintiff bears the burden of proof on the unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest.").

²³⁰ *Colbert*, 851 F. 3d at 664.

²³¹ *Id.* at 663-64 (Hamilton, J., dissenting).

²³² *Id.* at 665 (Hamilton, J., dissenting).

that Willingham signed his name to his arrest report, knowing that the report contained a patently false admission that formed the basis of one of the elements of both crimes for which Crutcher was charged. Accordingly, the chain of causation remained intact after Crutcher's indictment in his second criminal proceeding.

Second, Judge Hamilton criticized the Seventh Circuit majority for refusing to confront the implausibility of its assumption.²³³ According to the majority, the prosecutor seeking the indictment for *knowing* possession of a firearm that was found in Colbert's locked bedroom never presented the grand jury with information that Crutcher had confessed he knew the gun was in the home.²³⁴ Notably, the majority remained silent as to what other evidence the prosecutor could have offered that would have provided the probable cause necessary to indict Crutcher on charges requiring actual or constructive possession. As Judge Hamilton correctly noted, Willingham's arrest report was the prosecutor's "*only* evidence [in the record presented] that Crutcher knew about the gun in Colbert's bedroom closet."²³⁵ Consequently, finding it unlikely that a competent prosecutor would have failed to present that evidence to the grand jury, Judge Hamilton criticized the majority for making "such an improbable assumption in favor of the defense" in reviewing summary judgment for the defense.²³⁶

Finally, the majority's disposal of Crutcher's claim based on the grand jury indictment allowed it to avoid addressing Defendant Officers' argument that they had probable cause to arrest Crutcher. Whether Willingham reasonably believed that Crutcher either knowingly resided in a home with or actually or constructively possessed a firearm was one of the most hotly contested of the aforementioned disputed facts, the truth of which only a jury could

²³³ *Id.*

²³⁴ *Id.* (emphasis added).

²³⁵ *Id.* (emphasis in the original).

²³⁶ *Id.*

determine.²³⁷ Understanding the pivotal role the probable cause analysis played in Crutcher’s malicious prosecution claim, Judge Hamilton took it upon himself to respond to Defendant Officers’ probable cause argument.²³⁸

There were two genuine disputes of material fact that the majority simply avoided by finding a broken chain of causation. That chain of causation would have remained intact, however, had the majority declined to implicitly resolve several credibility determinations in favor of Willingham. First, Crutcher claimed that he did not know about the gun that was found in Colbert’s locked bedroom.²³⁹ Willingham, by contrast, claimed that Crutcher confessed to knowing.²⁴⁰ Crutcher then testified denying that claim.²⁴¹ Because Crutcher’s “knowledge” of the gun was highly relevant to whether Crutcher could have been found in constructive possession of a firearm, this conflicting evidence, Judge Hamilton concluded, presented a genuine issue of material fact.²⁴²

Second, Defendant Officers attempted to lessen the impact of that genuine issue of material fact by arguing that the tip Willingham received about Crutcher being seen with a gun from a cooperating individual, combined with the corroborating evidence—the discovery of the gun itself—was also sufficient to establish probable cause.²⁴³ Yet by relying on that cooperating individual, the majority’s holding showed a willingness to ignore several facts that called Willingham’s version of events into question. In fact, there existed significant

²³⁷ See *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (Scalia, J., concurring, Stevens J., dissenting) (stating “[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment or a directed verdict in a §1983 action based on the lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.”).

²³⁸ *Colbert*, 851 F. 3d at 665-66 (Hamilton, J., dissenting).

²³⁹ *Id.* 666 (Hamilton, J. dissenting).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

problems in Willingham’s testimony about the “cooperating individual.”²⁴⁴

The parties did not dispute the fact that Willingham failed to provide any details about the purported reliability of the individual, “despite fervent questioning by Plaintiff’s counsel,”²⁴⁵ which forced the district court to treat the individual as an “anonymous tipster.”²⁴⁶ An anonymous tipster, without more, is insufficient at law to establish probable cause.²⁴⁷ Worse yet, neither the majority nor the district court addressed the genuine dispute as to which came first, the search or the supposed tip.²⁴⁸ Willingham provided no evidence of the tip prior to the search. In fact, Willingham’s arrest report did not even document the alleged tip.²⁴⁹ Rather, the first mention of that tip was in Willingham’s case incident report, which was drafted after Crutcher was taken into custody—a fact that was compounded by Crutcher’s sworn testimony in which he stated that when the officers first arrived they were searching not for guns but for drugs.²⁵⁰

Taken together, those determinations evidenced the Seventh Circuit majority’s perfunctory acceptance of the Defendant Officers’ version of events as undisputed despite testimonial evidence put forth by the nonmoving party that called the veracity of the officers’ testimony into question. The facts of *Colbert*, like those of *Tolan*, considered together, thus lead to the “inescapable conclusion” that the majority credited the evidence of the party seeking summary judgment—Chicago Police Officers—and failed to properly consider key evidence offered by the non-moving party—two black men, one

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* As discussed *infra*, Crutcher supported his allegation that the officers were looking for drugs with specific statements Willingham made and actions the Defendant Officers took, including that Willingham said he had received a tip that “[they] had some drugs,” specifically cocaine, and searched through the sugar in Colbert’s kitchen. *Id.*

with a criminal conviction, living in a predominantly black neighborhood. In so doing, the court neglected to adhere to the fundamental principle that “at the summary judgment stage, all facts and the reasonable inferences therefrom should be drawn in favor of the nonmoving party.”²⁵¹

CONCLUSION

While the Department of Justice’s Investigation of the Chicago Police Department and the events preceding it have triggered the Mayor’s promise to redouble the City’s efforts to combat police misconduct,²⁵² that type of response from the city’s chief executive is far from novel. The Chicago Police Department has cycled in and out of the national consciousness almost since its inception, yet its practices apparently have remained unchanged. Further, as the DOJ stated, “[w]hen officers falsify reports and affirmatively lie in interviews and testimony, this goes well beyond any passive code of silence; it constitutes a deliberate, fundamental, and corrosive violation of CPD policy that must be dealt with independently and without reservation if the City and the CPD are genuine in their efforts to have a functioning system of accountability that vindicates the rights of individuals who are abused by CPD officers.”²⁵³

Thus, while it is encouraging that public outrage has forced the City to yet again commit to structural changes within the CPD, if we have learned anything from Chicago’s history, it is that the type of change this City so desperately needs will require cooperation from each branch of government. Included in that is the United States Court of Appeals for the Seventh Circuit. Yet the way in which the Seventh Circuit has handled factual disputes between police officers defendants

²⁵¹ Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014).

²⁵² U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIVISION & U.S. ATTORNEY’S OFFICE NORTHERN DISTRICT OF ILL., *supra* note 1, 19 (Mayor Rahm Emmanuel responded by establishing the Police Accountability Task Force (PATF) and charged PATF with assessing and making recommendation for change in five years, including “oversight and accountability.”) *Id.*

²⁵³ *Id.* at 75.

and civil rights plaintiffs based largely upon incomplete pretrial records only perpetuates the already near impossible task of holding officers accountable for misconduct.

As meritorious claims of officer misconduct continue to be disposed of in the pretrial phases of litigation, officers are afforded the opportunity to patrol the streets of Chicago with a judicially fortified shield against liability for their unlawful actions. The judiciary must work together with the executive branch in order to effect meaningful change, rather than merely accepting officer misconduct—both prior and subsequent to an arrest—as an immutable trait inherent in the CPD. Accordingly, the Seventh Circuit must heed the DOJ’s warnings against allowing and effectively encouraging officer misconduct to continue and resist the temptation to use procedural tools to validate the perfunctory grant of deference to Chicago Police Officers. At the very least, the Seventh Circuit must decline the invitation to go beyond the traditional summary judgment inquiry and instead allow meritorious claims of police misconduct to go to a jury.