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FOURTH AMENDMENT — UNREASONABLE SEARCHES — SEVENTH CIRCUIT SUGGESTS CONSPIRACY-OF-SILENCE CLAIM FOR PLAINTIFFS WHO ARE PREVENTED FROM WITNESSING SEARCH. — *Colbert v. City of Chicago*, 851 F.3d 649 (7th Cir. 2017), *reh'g denied*, No. 16-1362 (7th Cir. July 20, 2017).

Police sometimes cause significant damage while executing a search.<sup>1</sup> If that damage is unreasonable, the property owner may bring a Fourth Amendment claim against the individual officers under 42 U.S.C. § 1983, which provides a cause of action for those whose constitutional rights are violated by a person acting in a governmental capacity.<sup>2</sup> But if the owner cannot identify which officers caused the damage, her claim will fail,<sup>3</sup> giving officers a way out of liability: prohibit the owner from witnessing the search.<sup>4</sup> Recently, in *Colbert v. City of Chicago*,<sup>5</sup> the Seventh Circuit upheld summary judgment for the defendant officers who allegedly caused unreasonable property damage during a search because the plaintiffs, who were prevented from witnessing the search, could not identify which officers damaged the property.<sup>6</sup> The court, noting the tension between this fact scenario and the individual-responsibility requirement, proposed that Colbert could have alleged a “conspiracy of silence” among the officers.<sup>7</sup> This commentary marks at least the third and the most explicit time the Seventh Circuit has made such a suggestion.<sup>8</sup> However, there are reasons to expect that a conspiracy claim in this situation may not be as viable as the court’s repeated suggestions make it seem.

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<sup>1</sup> See, e.g., Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), <https://nyti.ms/2nCuXev> [<http://perma.cc/D9XC-S6AQ>] (describing common results of no-knock searches, including “demolished property” and physical injury caused by the use of flash-bang grenades); Cathy Woodruff, *Who Pays for Damage from Police Raid?*, TIMES UNION (Albany) (Sept. 19, 2011, 8:35 AM), <http://www.timesunion.com/local/article/Who-pays-for-damage-from-police-raid-2176034.php> [<http://perma.cc/PY8J-EFUU>] (cataloging damage caused by police search of an empty apartment for which officers were provided keys by the landlord, including a “wrecked” door frame, a “dislodged” wall, holes in the ceiling, and a torn-off stove door).

<sup>2</sup> 42 U.S.C. § 1983 (2012); see *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (“Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful . . .”).

<sup>3</sup> See *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983) (“An *individual* cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation.”).

<sup>4</sup> Police officers can have legitimate reasons for detaining someone while conducting a search, such as “preventing flight” or “minimizing the risk of harm to the officers.” *Michigan v. Summers*, 452 U.S. 692, 702 (1981). This detention may prevent someone from witnessing the search. Therefore, requiring officers to permit owners to witness the search may not be a feasible solution.

<sup>5</sup> 851 F.3d 649 (7th Cir. 2017), *reh'g denied*, No. 16-1362 (7th Cir. July 20, 2017).

<sup>6</sup> *Id.* at 657.

<sup>7</sup> *Id.* at 657–58.

<sup>8</sup> In addition to *Colbert*, the Seventh Circuit gestured toward conspiracy-of-silence claims in *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 974 (7th Cir. 2003); and *Hessel v. O’Hearn*, 977 F.2d 299, 305 (7th Cir. 1992).

In March 2011, Jai Crutcher was discharged from prison and moved in with his brother, Christopher Colbert.<sup>9</sup> Shortly thereafter, Chicago Police Department Officer Russell Willingham was tipped off that Crutcher was in possession of firearms, a violation of the terms of his supervisory release.<sup>10</sup> Willingham and at least nine other officers went to Crutcher's residence, and Crutcher consented to a search as part of his release terms.<sup>11</sup> Both Colbert and Crutcher were handcuffed and prohibited from witnessing the search.<sup>12</sup> The officers allegedly heavily damaged the apartment: "pull[ing] out insulation, put[ting] holes in the walls, ripp[ing] the couch open,"<sup>13</sup> and damaging the kitchen countertop and shelves.<sup>14</sup> The officers obtained Colbert's key to his bedroom — Colbert asserted that they did so violently — and found an unregistered shotgun, ammunition, and a handgun case.<sup>15</sup> The officers arrested both men.<sup>16</sup> After a trial, Crutcher was found not guilty of unlawfully possessing a firearm and of being "an armed habitual criminal."<sup>17</sup> Colbert was charged under a municipal gun control ordinance, but these charges were later dismissed.<sup>18</sup> Colbert and Crutcher sued four of the ten officers and the City of Chicago.<sup>19</sup> Crutcher claimed that he had been falsely arrested and maliciously prosecuted under Illinois law.<sup>20</sup> Colbert claimed that the officers violated his Fourth Amendment rights by causing unreasonable damage to his property.<sup>21</sup> The defendants moved for summary judgment and the plaintiffs moved for partial summary judgment on the false arrest claim.<sup>22</sup>

<sup>9</sup> *Colbert*, 851 F.3d at 652.

<sup>10</sup> *Id.* at 652 & n.1.

<sup>11</sup> *Id.* at 652.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 653.

<sup>15</sup> *Id.* Both the trial and circuit courts found that Colbert did not adequately state a claim for excessive force used in obtaining the key. *Id.* at 656–57; *Colbert v. Willingham*, No. 13-cv-2397, 2015 WL 3397035, at \*13 (N.D. Ill. May 26, 2015).

<sup>16</sup> *Colbert*, 851 F.3d at 653. In his arrest report, Willingham wrote that Crutcher knew the firearm was in the residence, in violation of his parole; Crutcher claimed that this report was false and that he did not knowingly possess a firearm in his residence. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 653–54, 657. The four officers were the only ones listed on the incident report for the search, minus the supervising officer. See CHI. POLICE DEP'T, CASE NO. 7996042, ORIGINAL CASE INCIDENT REPORT 3 (2011).

<sup>20</sup> *Colbert*, 2015 WL 3397035, at \*4, \*8.

<sup>21</sup> *Colbert*, 851 F.3d at 654, 657. Colbert also claimed that the City falsely arrested him because he was officially charged under section 8-20-040 of Chicago's municipal code, which he argued is unconstitutional. *Id.* at 660. However, Willingham said Colbert should have been charged under section 8-20-140, and the discrepancy was the result of a "scrivener's error." *Id.* The circuit and trial courts accepted this explanation in dismissing Colbert's false arrest claims. *Id.*; *Colbert*, 2015 WL 3397035, at \*11.

<sup>22</sup> *Colbert*, 851 F.3d at 654.

The trial court granted the defendants' motion for summary judgment on all claims.<sup>23</sup> First, it found that the officers did not falsely arrest Crutcher because they had reasonable suspicion to believe that Crutcher was violating his parole.<sup>24</sup> Further, it found that neither Willingham nor the City maliciously prosecuted Crutcher.<sup>25</sup> On the property damage claim, the district court granted summary judgment for the officers because Colbert could not identify which officers damaged his property.<sup>26</sup> The plaintiffs appealed.

The Seventh Circuit affirmed. Writing for the panel, Judge Flaum<sup>27</sup> agreed with the district court's ruling on Crutcher's malicious prosecution claim.<sup>28</sup> On Colbert's property damage claim, the circuit court also found Colbert "unable to satisfy § 1983's personal-responsibility requirement" as he could not identify which officer caused the alleged damage.<sup>29</sup> The court recognized the evidentiary difficulties Colbert faced because he had not witnessed the search,<sup>30</sup> but noted that the Seventh Circuit upheld summary judgment for officers in two similar cases.<sup>31</sup> In both these cases and *Colbert*, the court suggested that the plaintiffs could allege that the officers participated in a conspiracy of silence to conceal their identities.<sup>32</sup>

Colbert proposed two alternatives. First, he argued that this fact pattern should trigger a burden shift — that, at summary judgment, individual officers should have the burden of production to show that they did not damage the property.<sup>33</sup> The court rejected this proposal

<sup>23</sup> *Colbert*, 2015 WL 3397035, at \*13.

<sup>24</sup> *Id.* at \*4–7. Crutcher did not appeal this finding. *Colbert*, 851 F.3d at 653 n.2.

<sup>25</sup> *Colbert*, 2015 WL 3397035, at \*8–10. To succeed on a malicious prosecution claim against police officers, the plaintiff must show that, after the arrest, "the officers committed some improper act" that contributed to the prosecution. *Id.* at \*9 (quoting *Snodderly v. R.U.F.F. Drug Enf't Task Force*, 239 F.3d 892, 901 (7th Cir. 2001)). Because the improper act — including allegedly false information in the arrest report — occurred more than a year prior to Crutcher's claim, the trial court found the claim time barred. *Id.* at \*10. To succeed on a malicious prosecution claim against a municipality, a plaintiff must show that a custom or policy violated his constitutional rights. *Id.* Because Crutcher did not properly allege such a violation, the claim failed. *Id.*

<sup>26</sup> *Id.* at \*12–13. The court noted that the identification requirement is an "Achilles' heel" for plaintiffs. *Id.* at \*12.

<sup>27</sup> Judge Flaum was joined by Senior Judge Bauer.

<sup>28</sup> *Colbert*, 851 F.3d at 654–56, 654 n.6. Although the circuit court agreed with the trial court's ruling, it focused on different reasoning. It explained that even if the alleged falsification of the arrest report were not time barred, "the chain of causation between Crutcher's arrest and prosecution" was broken by the indictment. *Id.* at 655.

<sup>29</sup> *Id.* at 657.

<sup>30</sup> *Id.* at 657–58 (noting the "risk [of] effectively immunizing officers from property-damage claims by preventing a plaintiff from observing the person responsible for the damage").

<sup>31</sup> *Id.* at 658 (citing *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 974 (7th Cir. 2003); *Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir. 1992)).

<sup>32</sup> *Id.*; *Molina*, 325 F.3d at 974; *Hessel*, 977 F.2d at 305.

<sup>33</sup> Brief and Short Appendix of Plaintiffs-Appellants at 25–27, *Colbert*, 851 F.3d 649 (No. 16-1362), 2016 WL 3521908. Colbert relied on *Burley v. Gagacki*, 729 F.3d 610 (6th Cir. 2013), which

because it would rely on “collective punishment”<sup>34</sup> and require the assumption that “one of the searching officers must have been responsible for the alleged misconduct.”<sup>35</sup> Second, Colbert argued that, even if the defendant officers had not caused the property damage, they could be held personally responsible because of their failure to intervene.<sup>36</sup> He relied on *Miller v. Smith*,<sup>37</sup> where a plaintiff was unable to identify which of six officers present at his arrest allegedly beat him. Miller survived summary judgment because he identified which two of the six officers may have used excessive force.<sup>38</sup> The *Colbert* court distinguished *Miller* because Colbert did not identify which officers caused the alleged damage and which failed to intervene.<sup>39</sup>

Judge Hamilton concurred in part and dissented in part.<sup>40</sup> Regarding the property damage claim, he first asserted that Colbert did plead facts sufficient to show a conspiracy among the accused officers, and that to conclude otherwise would be to require a plaintiff to plead legal theories in her complaint, inconsistent with Seventh Circuit precedent.<sup>41</sup> He next argued for the adoption of Colbert’s burden-shifting proposal, reasoning that this “procedural adjustment” meets § 1983’s individual-responsibility requirement while “prevent[ing] the unjust effect of allowing officers to sequester residents and then destroy a home with impunity.”<sup>42</sup> Judge Hamilton then criticized the majority’s treatment of the failure-to-intervene argument and its distinction of *Miller*, explaining that the *Miller* court assumed that an officer not responsible for using

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approved of a burden shift when searching officers concealed their identity and employed “an ‘I wasn’t there’ defense,” *id.* at 613.

<sup>34</sup> *Colbert*, 851 F.3d at 659 (quoting *Hessel*, 977 F.2d at 305).

<sup>35</sup> *Id.* The court also reasoned that, even if it allowed burden shifting, Colbert would have had to sue all officers present because the burden shift is similar to *res ipsa loquitur*, which, in Illinois, requires plaintiffs to join all possible injurers. *Id.* (quoting *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 339–40 (Ill. 1990)).

<sup>36</sup> *Id.* at 659–60. The Seventh Circuit previously reasoned that “[a]n official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff’s constitutional rights.” *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982).

<sup>37</sup> 220 F.3d 491 (7th Cir. 2000).

<sup>38</sup> *Id.* at 495. Six officers were at the scene of Miller’s arrest. *Id.* at 493. Miller was able to identify four that did not use excessive force, but could not identify which of the remaining two did. *Id.* at 495. Because both of these two officers were nearest to Miller, the court assumed that “whichever officer was not directly responsible for the beating was idly standing by.” *Id.*

<sup>39</sup> *Colbert*, 851 F.3d at 659–60. As described by Judge Hamilton in his dissent on this issue, reading *Miller* as requiring an identification of which officers violated rights and which failed to intervene is likely not the most plausible interpretation, as Miller could not identify which of the two officers did what but still survived summary judgment. *Id.* at 664 (Hamilton, J., concurring in part and dissenting in part). Therefore, the court appears to be adding an element to a failure-to-intervene claim not required by *Miller* — identifying which officers violated constitutional rights and which failed to intervene.

<sup>40</sup> *Id.* at 661 (Hamilton, J., concurring in part and dissenting in part).

<sup>41</sup> *Id.* at 662 (citing *King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014)).

<sup>42</sup> *Id.* at 664; *see also id.* at 663–64.

excessive force was “standing by” and therefore failed to intervene.<sup>43</sup> In contrast, the majority did not allow for a similar plausible assumption<sup>44</sup> and instead refuted the argument because Colbert did not specify which officers failed to intervene and which damaged his property.<sup>45</sup>

*Colbert* marks at least the third time the Seventh Circuit has suggested that plaintiffs unable to individually identify officers who violated constitutional rights should allege that the officers were engaged in a “conspiracy of silence.”<sup>46</sup> But what would such a claim look like? Because the plaintiff would not argue that the officers conspired to damage her property, she would need to identify an additional deprivation of a “right[] protected by federal law.”<sup>47</sup> In this instance — where the alleged conspiracy hindered a plaintiff’s ability to proceed in court on a separate § 1983 claim — one likely candidate is the deprivation of the right to access the courts.<sup>48</sup> However, the court’s conspiracy-of-silence proposal may not be an easy solution for future plaintiffs. First, and most obviously, there must have actually been a conspiracy actionable under § 1983 — a more nuanced requirement than might seem apparent. Second, the court has announced principles regarding group liability of police officers, including in *Colbert* itself, that are arguably in tension with an access-to-the-courts conspiracy claim.

In alleging a conspiracy of silence, a plaintiff in Colbert’s position is likely to ground her claim in a denial of the right of access to the courts. Any § 1983 conspiracy claim does not itself state an independent cause of action and instead requires an underlying deprivation of rights.<sup>49</sup> Therefore, Colbert would have had to allege a conspiracy of silence that violated a right. The court did not suggest what that right could be,

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<sup>43</sup> *Id.* at 664 (quoting *Miller*, 220 F.3d at 495).

<sup>44</sup> Colbert’s home was “a very small residence” and allegedly the search was “incredibly loud and disruptive,” *id.* at 664, making it reasonable for a jury to have concluded that an officer not damaging property would have noticed that property was, indeed, being damaged. *Id.* at 664–65.

<sup>45</sup> *Id.* at 664. Judge Hamilton also dissented with regard to the malicious prosecution claim. *Id.* at 665. He argued that the indictment did not break the chain of causation between the improper act and prosecution, and he accused the majority of making the “improbable assumption” that the prosecutor never presented information in Willingham’s arrest report to the grand jury when the report “was the prosecutor’s *only* evidence that Crutcher knew about the gun.” *Id.*

<sup>46</sup> See *id.* at 658 (majority opinion); see also *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 974 (7th Cir. 2003); *Hessel v. O’Hearn*, 977 F.2d 299, 305 (7th Cir. 1992).

<sup>47</sup> *Vasquez v. Hernandez*, 60 F.3d 325, 330 (7th Cir. 1995).

<sup>48</sup> See, e.g., MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2:42 (3d ed.), Westlaw (database updated Oct. 2017) (explaining that police cover-ups can give rise to “a cause of action based on the . . . deprivation of [the] . . . right [of] access to the courts to litigate the underlying misconduct”).

<sup>49</sup> See, e.g., *Vasquez*, 60 F.3d at 330 (“To sustain a cause of action for conspiracy under § 1983, plaintiffs must show that a conspiracy existed and that it deprived them of rights protected by federal law.” (citing *Bell v. City of Milwaukee*, 746 F.2d 1205, 1254 (7th Cir. 1984), *overruled on other grounds* by *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005))).

though it did indicate that Colbert could have alleged that “officers colluded, or conspired, to conceal the identities of those responsible for the damage.”<sup>50</sup> This frustration of Colbert’s ability to make his Fourth Amendment property damage claim points to a conspiracy to deny access to the courts, a common claim associated with alleged police cover-ups.<sup>51</sup> For example, in *Bell v. City of Milwaukee*,<sup>52</sup> the plaintiffs succeeded in their access-to-the-courts conspiracy claim after police officers shot the victim, placed a knife in his hand, falsified police reports to indicate that he was the attacker, and originally settled with his family for relatively little.<sup>53</sup> The constitutional right to access the courts is lost where, as in *Bell*, “police officials shield from the [plaintiffs] key facts which would form the basis of the . . . claims for redress.”<sup>54</sup>

While grounding the conspiracy claim in an underlying right is necessary for establishing the cause of action, it’s not sufficient: a conspiracy must have indeed existed. For numerous reasons, conspiracy doctrine under § 1983 is nuanced. First, although plaintiffs can prove conspiracies using circumstantial evidence,<sup>55</sup> defendants must have formed an agreement,<sup>56</sup> such as, in this conspiracy-of-silence context, to conceal the identities of the officers. The officers in *Colbert* claimed that they did not recall details from the search.<sup>57</sup> It is entirely plausible that, even if the officers intended to conceal the identities of those officers who damaged the property, they would have made this decision independently of each other. As the court noted, Colbert “pointed to no evidence to support [allegations of conspiratorial] misconduct.”<sup>58</sup> Moreover, general allegations of a departmental “code of silence” are typically not successful in claims against individual officers as such allegations do not show a specific agreement among defendants.<sup>59</sup>

<sup>50</sup> *Colbert*, 851 F.3d at 658.

<sup>51</sup> AVERY ET AL., *supra* note 48, § 2:42; *see also* Una A. Kim, Note, *Government Corruption and the Right of Access to Courts*, 103 MICH. L. REV. 554, 563 (2004) (“Backward-looking access-to-the-courts claims typically arise as a result of police misconduct.”).

<sup>52</sup> 746 F.2d 1205.

<sup>53</sup> *Id.* at 1217, 1222–23, 1265–66.

<sup>54</sup> *Id.* at 1261.

<sup>55</sup> *See Hoffman-La Roche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971).

<sup>56</sup> *See, e.g., Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000).

<sup>57</sup> *Colbert*, 851 F.3d at 662 (Hamilton, J., concurring in part and dissenting in part).

<sup>58</sup> *Id.* at 658 (majority opinion); *see also Benton v. Bocian*, No. 86-C-5367, 1987 WL 26068, at \*3–5 (N.D. Ill. Dec. 1, 1987) (dismissing conspiracy claim against police officers who allegedly falsified a police report and destroyed evidence because “[a]llegations of the acts done in furtherance of the goals of the conspiracy are insufficient . . . [without] facts from which one can infer that the conspirators made an agreement,” *id.* at \*4–5).

<sup>59</sup> *See, e.g., Sledd v. Lindsay*, 780 F. Supp. 554, 559 (N.D. Ill. 1991); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 763–64 (1993) (explaining that the “code of silence turns section 1983 suits into credibility contests,” making it harder for plaintiffs to succeed, *id.* at 764); *cf. Gabriel J. Chin & Scott C. Wells, The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach*

Second, even if Colbert were able to demonstrate that officers had formed an agreement, he still may not have stated a claim because not all conspiratorial acts involved in a cover-up are actionable under § 1983. *Sanders v. City of Indianapolis*<sup>60</sup> both offers a framework for Colbert's potential conspiracy claim and provides insight into obstacles the claim may have faced. Sanders claimed that police officers used excessive force when arresting him and then formed a conspiracy to conceal the identities of those involved in the beating, thereby denying him access to the courts.<sup>61</sup> Although the jury found for Sanders on his excessive force and conspiracy claims, the court then directed a verdict for the officers on the conspiracy claim.<sup>62</sup> The court noted that Sanders did not present evidence such as "non-responsive affidavits, interrogatories, or depositions" or "evidence that the defendants fabricated or concealed" relevant facts.<sup>63</sup> Therefore, his conspiracy claim "was simply that the police officers conspired to commit perjury,"<sup>64</sup> for which there is no § 1983 liability — even for police officers.<sup>65</sup> Similarly, the *Colbert* court suggested that Colbert could have alleged that the officers conspired "to conceal the identities of those responsible for the damage."<sup>66</sup> Nothing in *Colbert* indicates that officers falsified evidence or refused to comply with discovery.<sup>67</sup> Moreover, successful access-to-the-courts conspiracy claims grounded in police cover-ups often involve extensive action, such as in *Bell*.<sup>68</sup> While there is not a clear threshold for when cover-ups can become access-to-the-courts conspiracy claims, the precedent discussed suggests that officers' mere refusal to disclose the identity of those who violated a plaintiff's rights may be insufficient.

In addition to raising concerns regarding whether an actionable conspiracy is likely to exist, a conspiracy-of-silence claim is arguably in ten-

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to *Police Perjury*, 59 U. PITT. L. REV. 233, 272-73, 277-79 (1998) (arguing for allowing evidence of a code of silence to impeach officers in criminal trials).

<sup>60</sup> 837 F. Supp. 959 (S.D. Ind. 1992).

<sup>61</sup> *Id.* at 962.

<sup>62</sup> *Id.* at 960-61.

<sup>63</sup> *Id.* at 962 (citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *overruled on other grounds by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 962-63 (citing *Briscoe v. LaHue*, 460 U.S. 325 (1983); *House v. Belford*, 956 F.2d 711 (7th Cir. 1992)).

<sup>66</sup> *Colbert*, 851 F.3d at 658.

<sup>67</sup> For example, the officers sat for depositions. *Id.* at 662 (Hamilton, J., concurring in part and dissenting in part).

<sup>68</sup> 746 F.2d at 1222-23, 1265; *see also* *Stone v. City of Chicago*, 738 F.2d 806, 900 (7th Cir. 1984) (upholding a successful access-to-the-courts conspiracy claim when police officers falsified multiple police reports, failed to report a hit-and-run, and did not interview bystanders who may have witnessed excessive use of force). Moreover, in *Bell*, the court explained that "[n]ot every act of deception in connection with a judicial proceeding gives rise to an action," 746 F.2d at 1265, and limited its holding "to the particularly egregious set of facts herein," *id.* at 1264.

sion with principles the court used to refute Colbert's burden-shift proposal. The court rejected this proposal in part because it would require the court to "assum[e] one of the searching officers must have been responsible for the alleged misconduct" and rely on "the pure principle of collective punishment."<sup>69</sup> However, the Seventh Circuit has also likened conspiracy-of-silence claims to collective punishment. In *Hessel v. O'Hearn*,<sup>70</sup> the plaintiffs alleged that some of the fourteen officers who searched their property stole their belongings, but they did not identify which individual officers did so.<sup>71</sup> The *Hessel* court also hinted that the plaintiffs might have fared better had they alleged a conspiracy of silence.<sup>72</sup> In doing so, however, it did not indicate whether it would accept such a claim, cautioning that a conspiracy of silence is "so redolent of collective punishment."<sup>73</sup> *Hessel* gives rise to the question of whether a court faced squarely with a conspiracy-of-silence claim based in facts similar to *Colbert's* would have the same collective-punishment concerns.

Further, in rejecting the plaintiff's conspiracy claim, the *Sanders* court rebuffed the idea of holding an officer liable for conspiracy due to her mere presence at the scene of the alleged constitutional deprivation.<sup>74</sup> The court explained that the claim requires the "untenable" assumption that the officers present "'must' have seen something, and . . . 'must' have conspired to conceal what they saw."<sup>75</sup> Similarly, the *Colbert* court rejected the burden-shifting proposal in part because it would require the court to "assum[e] one of the searching officers must have been responsible for the alleged misconduct."<sup>76</sup> This tension may suggest either further vulnerabilities in the court's conspiracy solution or a weakness in its refutation of Colbert's burden-shift proposal.

The *Colbert* court recognized the "tension between § 1983's individual-responsibility requirement and factual scenarios" similar to Colbert's.<sup>77</sup> Or, as the dissent bluntly stated, the potential "unjust effect of allowing officers to sequester residents and then destroy a home with impunity."<sup>78</sup> Perhaps out of a desire to avoid such an effect, the court felt compelled to suggest for the third time a solution for future plaintiffs. While not entirely implausible, *Colbert* may overstate the likelihood that its conspiracy-of-silence solution would succeed.

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<sup>69</sup> *Colbert*, 851 F.3d at 659 (quoting *Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir. 1992)).

<sup>70</sup> 977 F.2d 299.

<sup>71</sup> *Id.* at 301.

<sup>72</sup> *See id.* at 305.

<sup>73</sup> *Id.*

<sup>74</sup> *Sanders v. City of Indianapolis*, 837 F. Supp. 959, 963 (S.D. Ind. 1992).

<sup>75</sup> *Id.*

<sup>76</sup> *Colbert*, 851 F.3d at 659.

<sup>77</sup> *Id.* at 657.

<sup>78</sup> *Id.* at 664 (Hamilton, J., concurring in part and dissenting in part).