# Integrating the Morton Act and *Colorado County v. Staff* into Law Enforcement Disciplinary Practices

Introduction:

Where to begin? When working with my father on projects at the house when I was a child, he guided my approach by informing me of what the project was, and then he had me lay out all the pieces and tools anticipated to be needed for the project. Once that was accomplished, he would then have me fit the pieces together, one after the other, but not tighten them up. This was intended to leave some wiggle room so that the pieces were still slightly adjustable during the construction process, so I could get the pieces to fit properly. Once put together, I then had to go back and tighten all the fasteners in place, so the pieces were straight and tight. This I learned, made the project stand strong and straight, when completed. I used my father's teachings to present this article – So, here we go!

***The Project***

***Law Enforcement Discipline?***

When one sits down and looks at how the United States is dealing with law enforcement discipline today, one wonders if it can stand strong and straight. Only last year, Duke Law Journal published "Police Union Contracts", in which its author states: "This Article empirically demonstrates that police departments' internal disciplinary procedures, often established through the collective bargaining process, can serve as barriers to officer accountability.[1]" Another article from the same author to be published this year presents a strong argument illustrating how "police disciplinary appeals serve as an underappreciated barrier to officer accountability and organizational reform."[2]

As many of the attendees know from first-hand experience, the conclusions reached in the above-

[1] Stephen Rushin, *Police Union Contracts*, 66 Duke L.J. 1191 (2017)

[2] Rushin, Stephen, Police Disciplinary Appeals (March 1, 2018). University of Pennsylvania Law Review, Vol. 167 (Forthcoming). Available at SSRN: https://ssrn.com/abstract=3134718

referenced articles are not isolated nor limited to geographic area. Seven years ago, this month, the U.S. Department of Justice, National Institute of Justice published: Police Discipline: A Case for Change.[3] It begins with a candid introduction that I share with you below:

> Police disciplinary procedures have long been a source of frustration for nearly everyone involved in the process and those interested in the outcomes. Police executives are commonly upset by the months — and sometimes years — it takes from an allegation of misconduct through the investigation and resolution. Their frustration is even greater with the frequency with which their decisions are reversed or modified by arbitrators, civil service boards and grievance panels. Police officers and their unions generally feel discipline is arbitrary and fails to meet the fundamental requirements of consistency and fairness. Unless it is a high-profile case, or one is directly involved, few in the community are interested in the police disciplinary process. Those interested are mystified by both the time involved in dealing with complaints of misconduct and the various steps in a lengthy, confusing and overly legal process. The one area about the administration of police discipline where there is general agreement: it is a frustrating experience that leaves everyone with a sense that it has ***fallen well short of the primary purpose of holding officers accountable for their actions and encouraging behavior that falls within departmental expectations and values.***"[4]

The article goes on to further illustrate how news media attention reinforces the overall dissatisfaction with police discipline matters.

[3] Stephens, Darrel W., Police Discipline: A Case for Change, Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2011.

[4] *Id. [emphasis added]*

Now, compare the above illustrated state of police disciplinary practices, with a universally adopted standard for police conduct, adopted by both the Texas Police Association and the International Association of Chiefs of Police. Many police department policies also adopt this standard as well:

## Law Enforcement

## Code of Ethics

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice. I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty. I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities. I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held as long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God

> to my chosen profession ... law enforcement.[5]

After reading this standard, consider whether the police officer behavior in your department that comes across your desk meets this ethical standard. I would venture that this code or something like it is adopted in your city.

So as attorneys, we take a set of facts provided by the circumstances, identify and apply the legal standards applicable to the facts and circumstances through learned skill, and provide advice and opinions on whether the facts fail, meet or will exceed the standards applicable. If one were to compare even the routine actual disciplinary issues that one finds in police departments with the most commonly adopted standards set by the Law Enforcement Code of Ethics, one would be perplexed as to the state in which law enforcement disciplinary practices exist today.

When taking a moment to view the police disciplinary circumstances with which we are faced within our roles as legal advisors and the available research articles, and news stories available[6], and take some time to examine the actual outcome of challenged police disciplinary matters, one cannot retreat from the conclusion that traditional Law Enforcement Disciplinary Practices can be very ineffective.

***Reinventing Law Enforcement Disciplinary Practices is the project facing local government today.***

## ***The Pieces and Tools***

The pieces and tools to be fit together in this project are varied and listed below:

1) The Morton Act (Texas Code of Criminal Procedure § 39.14);
2) Texas Code of Criminal Procedure § 2.01;

[5] www.theiacp.org/Portals/0/pdfs/Essential_Leadership_Handouts.pdf and http://www.texaspoliceassociation.com/codeofethics.php

[6] (e.g. Austin City Council unanimously agrees to $425,000 settlement in the *King v. City of Austin* excessive force lawsuit where the department's disciplinary process issued no discipline, but the officer received a "Conduct Counseling Memo".

3) Texas Disciplinary Rule of Professional Conduct 3.03 – Candor Toward the Tribunal;
4) *Stem v. Hearne, Texas* (813 F.3d 205 (5th Cir. 2016);
5) *Colorado County, Texas v. Staff,* 510 S.W.3d (Tex. 2017); and,
6) *King v. City of Austin,* 2018 WL 2027748 (May 1, 2018).

Each one of the "pieces and tools" above have enough content by themselves to fill the time provided for this presentation; so, I can offer only highlights.

*Michael Morton*

After Michael Morton was exonerated for the 1986 murder of his wife in Williamson County, the legislature enacted the Michael Morton Act in 2013, which amended Tex. Code Crim. Proc art. 39.14. The Act intended to prevent and reduce wrongful convictions. Despite being codified in the Code of Criminal Procedure, the Morton Act has become a valuable tool used by both criminal and civil trial lawyers to gain the upper hand in certain discovery disputes involving law enforcement.

Prior to the 2013 amendments, Texas law did not regulate a prosecutor's "open-file" policies. Legislative action bringing Morton into law appeared to bolster obligations of attorneys and extend those obligations to information possessed by law enforcement, which is not possessed by the prosecutor.

The Act made open-file discovery a statewide requirement. However, subsection (e) of the Act statutorily bars criminal defendants and their attorneys from disclosing "any documents, evidence, materials, or witness statements received from the state" to any third-party unless a court orders disclosure upon a showing of good cause or the information has been publicly disclosed. And, subsection (f) allows the defendant to only view—but not possess or control—any of the state-produced materials, except a copy of the defendant's own statement.

This was the balance struck by the legislature when considering the needs of the criminal defendant on the one hand, with the privacy rights of witnesses and victims on the other.

What many do not know however, is how the Morton Act impacts civil cases. The Morton Act can be applied to a civil defendant who is being sued for an incident for which the defendant is also being criminally charged. In other words, it may be available to civil attorneys in civil proceedings running parallel to criminal proceedings. The District Attorney's Office and any criminal defense counsel will have essentially all documents which may be sought and obtained this way for the civil case.

If you are faced with a discovery request for such information, one way a party may resist such discovery is to use the Morton Act as a shield, asserting it bars an employee (criminal defendant) from possessing or controlling any state provided files or material, except for a copy of his own witness statement. One may also argue that the employee is further statutorily barred from disclosing any state provided materials to a third party.

However, as prosecutor instead of civil defense lawyer, failing to provide information which should be disclosed by the prosecution (or undisclosed to the prosecution by the police) can result in both individual and municipal liability, ranging from sanctions to civil rights violations.

One critical aspect of this "new law" was that the duty, while spelled out in the Morton Act, is not a new obligation of every prosecutor in Texas. Whether prosecuting a felony capital murder or a Class C misdemeanor status offense, every prosecutor in Texas is charged by law **"not to convict, but to see that justice is done."** Texas Code of Criminal Procedure art. 2.01. This section of the Code continues with: **"They shall not suppress evidence or secrete witnesses capable of establishing the innocence of the accused."** This is and has been the law for decades. The Morton Act expanded this obligation and further specified the conduct necessary to meet it. Further, it extended this obligation to police employees based on information not in possession of the prosecutor.

*The Duty of "Candor"*

We as attorneys, have had Morton-like obligations not imposed by the legislature, but imposed by the Texas

State Bar, for many years. The Texas Disciplinary Rules of Professional Conduct (TDRPC") place specific obligations on attorneys with regard to "candor". The term "candor" is merely a noun used to represent the quality of being open and honest in expression; frankness. **Texas attorneys maintain an obligation in court to only make factual assertions which are true or reasonably believed to be true *based upon a reasonably diligent inquiry*.** TDRPC 3.03 n.2.

The Rule Comment states that if a lawyer ascertains that material testimony or other evidence is false, the lawyer must first seek to persuade the client to correct the false testimony or to withdraw the false evidence. If the persuasion is ineffective, the lawyer must take additional remedial measures. *Id.* n.7. Note 8 commands that when a lawyer learns that the lawyer's services have been improperly utilized in a civil case to place false testimony or other material into evidence, the rule generally recognized is that "the lawyer must disclose the existence of the deception to the court or to the other party, if necessary to rectify the deception." *Id.* n. 8. A lawyer may not aid in a deception of the tribunal or jury and subvert the truth-finding process which our adversary system is designed to implement. *Id*.

Note 14 of Rule 3.03 further defines the time period within which an attorney is obligated to act to rectify the presentation of false testimony or other evidence. It sets the standard to "as long as there is a reasonable possibility of taking corrective legal action before a tribunal."

Reviving the essence of "candor" in law enforcement disciplinary practices is no easy accomplishment. The advent of the "*Brady* file" or "*Morton* file" and procedures used by prosecuting authorities has raised new employment issues for the law enforcement employer.

Because criminal cases are built on a police officer's credibility, prosecutors maintain *Brady* files or *Morton* files on police officers. The prosecutors disclose those charged with crime about any evidence that may help in their defense. These files maintain information that the prosecuting authority uses and determines is necessary

regarding police officers whose histories including allegations of lying or other misconduct, which would have to be revealed to defense lawyers.

Many prosecutors have elected to declare certain officers as not credible and informing police departments that they will not risk placing them in front of a jury and will reject cases where the employee in needed as a witness.[7]

The indirect impact of the Morton Act reveals a catch-22 for law enforcement employers. ***If a police officer is deemed unsuitable as a witness by the District Attorney, if the District Attorney then rejects cases in which the officer is involved and if the acts used by the District Attorney in making this determination have been discounted in an employment matter resulting in the officer avoiding separation from employment with the department, what is the employer to do?***

This circumstance happens with frequency in law enforcement disciplinary matters. A police chief has an internal investigation conducted in which an officer did not exercise candor in the investigation. The police chief may or may not know what the investigative materials will do to the employee's reputation for being truthful with the prosecutors; however, the police chief does know that the officer is a civil service employee subject to arbitration appeal or, is an at-will employee that is well-liked in the community and the local blow-back in alleging this officer has been less than truthful will be a burden that results in public scrutiny of the police chief, the department, and that CLEAT, TMPA, FOP or other representation will attack the department for unfair treatment of the officer. This is especially true if the officer has also had meritorious commendations based on his or her past performance as an officer.

The degree of the untruthfulness can also be a factor. What if it was a white lie? What if the officer lied about being ill so he or she could stay home to be with an elderly parent or a family pet that is dying, or some other embarrassing

[7] https://www.mystatesman.com/news/crime--law/district-attorneys-system-for-tracking-untrustworthy-cops-chaotic/SJ1kLUDG0BZDgEoU0TFFCN/

situation? What if that is why they elected to withhold the truth?

There can me other workplace circumstances which may arise that do not question the integrity of the officer, but still cause workplace conflict. What if an employee's hygiene is not acceptable to co-workers, or they appear lazy and unproductive, but do not violate a specific rule? Or, an employee is found unsuitable by the unit, the shift or the department he is assigned or suitable by the general public? What if you hired a police officer in a predominately Hispanic community that was involved in a questionable shooting of a Hispanic in another city several years prior and the community is outraged that the employee was hired in the first place?

What if an officer clearly committed an unlawful or wrongful act but was not disciplined within the appropriate time frame through active concealment of the incident in a civil service city where discipline must occur in 180 days of the event. Or, what if an arbitrator returns the employee to work after an indefinite suspension issued by the Chief? What is the city's liability risk?

What are you doing with these employees? Did you know that Texas has criminalized the act of offering or accepting anything of value in exchange for a civil service employee to retire or resign? It is a Class B misdemeanor.

The law journal articles cited in this paper provide a comprehensive account of police officer disciplinary circumstances where the facts presented strongly indicate the need to separate the police officer from employment, yet the practice allows the officer to return to duty. This is the epitome of the system failure.

Moreover, most police department polices do not provide for non-misconduct separations. There is no policy and there is no procedure. How do you separate the officer that is too aggressive for your community when the conduct would still fall within the realm of objectively reasonable?

Let's examine the separation of Stephen Stem from the Police

Department of the City of Hearne, Texas:[8]

> On May 6, 2014, Stephen Stem, a second-year officer of the Hearne Police Department, was dispatched to Hearne resident Pearlie Golden's home on a 9–1–1 call. Roy Jones, Golden's nephew, placed the emergency call. Jones said Golden, who had recently failed a driver's license renewal test, threatened him with a gun after he had taken away her car keys. Stem alleged that when he arrived at the home, Golden pointed the gun at him and refused to put it down upon Stem's direction. Stem said he then fired his weapon 'in response to the immediate and deadly threat.' Golden was wounded and later died.
>
> Stem alleged that following the shooting there were 'considerable protests from residents of Hearne' and groups from outside Hearne. The Hearne City Council posted a notice for a May 10 meeting, listing Stem's employment as an agenda item. The mayor and city attorney announced prior to the meeting that they would recommend terminating Stem. At the May 10 meeting, councilmembers discharged Stem. Stem said he never received a signed, written complaint from any city official prior to his dismissal.

The court considered a litany of claims under both federal and state law and found that Mr. Stem's federal claims were to be dismissed for lack of jurisdiction, but without being prejudiced from filing state court claims raised for declaratory relief pursuant to state law in State court. Therefore, he filed in Texas District court seeking an injunction that his termination did not comply with Chapter 614 of the Government Code to be refiled in Texas District Court.

[8] *Stem v. Hearne, Texas,* 813 F.3d 205 (5th Cir. 2016).

One of the issues that makes this case interesting is that in fact, Mr. Stem was not separated for misconduct and was not actually separated by the City Council. Rather, Mr. Stem was honorably discharged from the police department by the Police Chief after the City Council vote. The City Council held no control over Mr. Stem's employment by virtue of the City Charter.

However, what else was the Chief of Police to do? Despite the horrible circumstances, Stem shot and killed an elderly lady. The event exploded the community. His separation was an excellent example of the at-will employment doctrine at its best.

So, in dealing with the refiled claims in state court seeking declaratory relief and reinstatement and back pay for Mr. Stem, I was able to negotiate an abatement of the case pending the Texas Supreme Court's decision in *Colorado County v. Staff.*[9]

In *Staff,* Staff was a deputy sheriff who served as a Colorado County Deputy Sheriff for nearly five years. Then, Staff received a "Performance Deficiency Notice" and was abruptly terminated. The County is an at-will employer with "the right to terminate employment for any legal reason or no reason," and, the Deficiency Notice identified and provided details about three specific incidents in which Staff's interactions with the public were characterized as "rude," "unacceptable," "unprofessional," "grossly unprofessional" and contrary to departmental policy. Other unspecified performance issues may have impacted the termination decision. The Sheriff's Office conducted an internal investigation after the County Attorney informed the Sheriff that Staff's behavior during a recorded traffic incident was "inappropriate and needed to be addressed."

The Court, after considering the circumstances and the varied interpretations of Texas Government Code § 614, ruled:

> Chapter 614, Subchapter B does not alter the at-will

[9] *Colorado County, Texas v. Staff,* 510 S.W.3d (Tex. 2017).

> relationship, but prescribes procedures that apply ***when the employer elects to terminate employment based on a complaint of misconduct rather than terminating at will;*** (2) the statutory phrase "the person making the complaint" is not limited to the "victim" of the alleged misconduct; and (3) in this case, a signed disciplinary notice provided to the employee contemporaneously with suspension of employment was sufficient to meet Chapter 614, Subchapter B's notice requirements and allowed the officer ample opportunity to defend himself to the final decisionmaker. We therefore reverse the court of appeals' judgment and render judgment in the employer's favor.[10]

Therefore, as with Mr. Stem's federal claims, the Texas Supreme Court likewise held that an employer does not have to investigate, plead and prove misconduct to separate an at-will employee when the employee is peace officer whose employment is regulated in part by Texas Government Code Chapter 614.

***Tighten all the Fasteners***

Law enforcement disciplinary practices must change with the times. Considering the current practices, the findings by the Department of Justice article in 2011, coupled with the detailed information reveled in the law journal articles attached hereto, the traditional process which has been used in the past appears no longer viable. Strategies are available and may be implemented to change the existing and outdated methods of resolving disciplinary matters into practices that quickly, efficiently and with transparency bring the necessary level of control back and can be established in your community.

Officer conduct which only a few years ago would not lend itself to risk of liability is now dangerous behavior resulting in six-figure settlements. Law enforcement management should open

[10] *Id.*

up to novel means to achieve balance in the workplace between the obligations of the position and the consequences of inappropriate behavior.

As illustrated in at-will law enforcement positions where the head of the agency is elected, such as Sheriffs, and where at-will employees are routinely subject to at-will termination without an allegation of misconduct every time there is an election, for instance, the aspect of the at-will employment relationship which is not regularly used in the municipality context. The failure to use at-will employment separation when appropriate has hindered the workplace in many police departments.

Others who are trying to compete and attract applicants have adopted practices which are being used in neighboring civil service and collective bargaining cities that just do not have the same statutory framework surrounding the employment relationship and fail in application.

The independent hearing examiner's authority to obligate a municipal employer to retain an employee who is a high-liability risk for civil right infringement or illegal workplace harassment must be examined. Jurisdictional control of the appropriate adverse disciplinary action deprives a municipality with the ability to control the workplace and the people enforcing the law.

Departments should develop and enforce consistent standards. When acceptable officer behavior and written policy are notably different and are enforcement of those standards, while perceived to be innocent, still allows for selective application and creates opportunities for meritorious legal challenges. This environment leaves the organization open to claims of discrimination, retaliation and state law whistleblower liability and must be curtailed.

Civil service, meet-and-confer, and collective bargaining representatives must re-invent the disciplinary provisions in their employment agreements to reflect provisions that are consistent with community expectations and the department standards associated with operating a law enforcement organization in the current environment

and such provisions should be continually updated to keep up with that environment.

Such provisions should address ways to resolve conflict related to the Brady file/Morton file held by prosecutors, should address reinstatements based on conduct determined to be inconsistent with future law enforcement service and rebalance the disciplinary process by means which will facilitate early resolution and cooperative disposition.

Agencies should develop clear policies that reflect that non-misconduct separations for inappropriate behavior are necessary to maintain a healthy, efficient and effective workplace. Organizations should update and inform employees regarding the nature of the employment relationship in an at-will employment environment.

Considerable work with the collective bargaining groups and employee representatives for meet-and-confer and collective bargaining should be done to address the circumstances discussed in the articles on discipline to maintain and encourage professional behavior rather than be used as a means to retain a position in law enforcement when practically the position will serve little value to the mission of the department to protect and serve its community.

There are multiple pieces and tools necessary to make effective change in law enforcement disciplinary practices, beyond what is discussed here. Employees, who are willing to set and live by a clear standard, understanding and accepting the consequences if they fail to meet it. Supervisors, who will maintain standards. Command personnel, who will lead without waiver. City management, who will support the standards and, elected officials, who will support management to effect change. They are all important and necessary.

In a civil service environment, commission rules should be revisited, even legislative changes may be necessary. In meet and confer or collective bargaining environments, the city leaders and the employee representation must find a way to develop meaningful measures to allow the employer to maintain constitutional

compliant control over the conduct of employees. Ultimately it appears that the U.S. community is demanding it, and it will eventually change your organization.

Setting realistic goals in writing and then working diligently to only maintain the appearance of success, instead of actually succeeding, is a hollow victory, is short lived and equals failure. I repeatedly tell clients:

> ***To avoid conflict in many employment relationships you have two choices, change the behavior of the employees to meet the written standard, or change your written standard to meet the behavior of your employees (that is so long as the behavior is not illegal).***

The more aberrant of behaviors that you client accepts (tolerates) that deviate from the written standards, the more legal risk your client takes, especially when conflict occurs. These deviations are what makes the "slippery slope" leading to failed disciplinary practices in your organization and must be constantly kept in check.

Department members that can operate within the standards set for your Department is ultimately the key to maintaining the strong disciplinary practices. Employees who are committed to doing the right thing, when everybody is watching, and the right thing is the unpopular thing to do, are employees who will establish an environment where peer-pressure promotes appropriate behavior, not misconduct. In contrast, the Department must be willing to let ***any*** employee go. ". . . I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions."[11]

Evaluating the content and employing the suggested effort necessary to return candor and integrity to law enforcement disciplinary policies is necessary to maintain police powers in the local context. I encourage all municipalities to take a hard look at the volcano-like eruption that can occur when the disciplinary practices of a law

[11] *Id.* at 5.

enforcement organization are challenged.

***Strong and Straight***

Law Enforcement Disciplinary Practices should be developed as my father suggested I approach projects:

1) Define the project;
2) lay out all the pieces and tools;
3) loosely fit the pieces together
4) tighten all the fasteners
5) keep it straight and tight.

Applying these steps to re-invent your law enforcement disciplinary practices will keep the project strong and straight.

Duke Law Journal

VOLUME 66 MARCH 2017 NUMBER 6

# POLICE UNION CONTRACTS

STEPHEN RUSHIN†

ABSTRACT

*This Article empirically demonstrates that police departments' internal disciplinary procedures, often established through the collective bargaining process, can serve as barriers to officer accountability.*

*Policymakers have long relied on a handful of external legal mechanisms like the exclusionary rule, civil litigation, and criminal prosecution to incentivize reform in American police departments. In theory, these external legal mechanisms should increase the costs borne by police departments in cases of officer misconduct, forcing rational police supervisors to enact rigorous disciplinary procedures. But these external mechanisms have failed to bring about organizational change in local police departments. This Article argues that state labor law may partially explain this failure. Most states permit police officers to bargain collectively over the terms of their employment, including the content of internal disciplinary procedures. This means that police*



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*union contracts—largely negotiated outside of public view—shape the content of disciplinary procedures used by American police departments.*

*By collecting and analyzing an original dataset of 178 union contracts from many of the nation's largest police departments, this Article shows how these agreements can frustrate police accountability efforts. A substantial number of these agreements limit officer interrogations after alleged misconduct, mandate the destruction of disciplinary records, ban civilian oversight, prevent anonymous civilian complaints, indemnify officers in the event of civil suits, and limit the length of internal investigations. In light of these findings, this Article theorizes that the structure of the collective bargaining process may contribute to the prevalence of these problematic procedures. It concludes by considering how states could amend labor laws to increase transparency and community participation in the negotiation of police union contracts.*

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## INTRODUCTION

In October 2014, police encountered seventeen-year-old Laquan McDonald carrying a three-inch blade and breaking into vehicles in southwest Chicago.[1] Officers on the scene claimed that McDonald advanced toward them, swinging the knife in an "aggressive, exaggerated manner,"[2] forcing Officer Jason Van Dyke to shoot and kill McDonald in self-defense.[3] Like most of the other estimated 1110 civilians killed by police officers in 2014,[4] McDonald's death initially received little media attention. That all changed in November 2015, when a county judge ordered Chicago officials to release dash-camera footage of the event.[5] The video shocked many Chicago residents and spurred a federal investigation of the Chicago Police Department.[6]

The video showed that McDonald never charged the officers.[7] In fact, McDonald appeared to be walking away from them when Van

1. Steve Mills et al., *Laquan McDonald Police Reports Differ Dramatically from Video*, CHI. TRIB. (Dec. 5, 2015, 1:25 AM), http://www.chicagotribune.com/news/ct-laquan-mcdonald-chicago-police-reports-met-20151204-story.html [https://perma.cc/YWY9-B5RE]; Stacy St. Clair, Jeff Coen & Todd Lighty, *Officers in Laquan McDonald Shooting Taken off Streets—14 Months Later*, CHI. TRIB. (Jan. 22, 2016), http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-police-laquan-mcdonald-officers-20160121-story.html [https://perma.cc/JL9M-C2NV] (explaining how the discrepancies between the police reports and the dash-cam footage in the Laquan McDonald case ultimately resulted in the officers involved being taken off the streets).

2. Mills et al., *supra* note 1.

3. *Id.* (noting that in the police reports, the officers involved referred to Officer Jason Van Dyke as VD and called McDonald "O," shorthand for "offender"). Even after McDonald fell to the ground, officers claimed that he attempted to lift himself up and pointed the knife at them, prompting Van Dyke to fire several additional shots. *Id.* Based on these reports, Van Dyke's supervisor ruled McDonald's death a justifiable homicide. *Id.*

4. There are currently no national statistics on the number of individuals killed by police officers each year. Media outlets and private individuals have attempted to fill this gap by crowdsourcing and scouring media sources for reports of these sorts of deaths. *See, e.g.*, *Killed by Police 2014*, KILLED BY POLICE, http://www.killedbypolice.net/kbp2014.html [https://perma.cc/MS9Z-2VYV] (estimating the total number of verifiable killings of individuals by police officers in 2014 at 1111, including Laquan McDonald's death).

5. Carol Marin & Don Mosely, *Judge Orders Release of Video Showing Shooting Death of Chicago Teen*, NBC CHI. (Nov. 19, 2015, 2:59 PM), http://www.nbcchicago.com/news/national-international/Judge-to-Decide-on-Release-of-Laquan-McDonald-Video-351741261.html [https://perma.cc/EQX8-XNMJ] ("Cook County Judge Franklin Valderrama told a packed courtroom Thursday the department must reveal the dashcam footage that capture[d] the death of 17-year-old Laquan McDonald in October 2014 at the hands of a white police officer.").

6. Monica Davey & Mitch Smith, *Justice Officials to Investigate Chicago Police Department After Laquan McDonald Case*, N.Y. TIMES (Dec. 6, 2015), http://www.nytimes.com/2015/12/07/us/justice-dept-expected-to-investigate-chicago-police-after-laquan-mcdonald-case.html [https://perma.cc/5YWL-DKVG].

7. *Id.*

Dyke exited his vehicle and shot McDonald sixteen times in fourteen seconds from a distance of ten to fifteen feet.[8] Perhaps most egregiously, the video showed Van Dyke firing multiple shots into McDonald's lifeless body as "white puffs of smoke bec[a]me visible."[9]

This was not the first time Van Dyke's behavior should have raised red flags. Since 2001, he had been the subject of more than twenty civilian complaints, including ten complaints about excessive use of force, two involving the use of firearms and one alleging the use of a racial slur.[10] Van Dyke had more complaints than 96.7 percent of all Chicago police officers over that time period.[11] Although Van Dyke had never before faced criminal charges, a jury awarded one man $350,000 after determining that Van Dyke "employed excessive force during a traffic stop."[12] Despite all of this, the Chicago Police

8. Jason Meisner, Jeremy Gorner & Steve Schmadeke, *Chicago Releases Dash-Cam Video of Fatal Shooting After Cop Charged with Murder*, CHI. TRIB. (Nov. 24, 2015, 7:14 PM), http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-laquan-mcdonald-charges-20151124-story.html [https://perma.cc/X258-3FEA] (citing the number of shots fired by Van Dyke in a short period of time); Josh Sanburn, *Chicago Releases Video of Laquan McDonald Shooting*, TIME (Nov. 24, 2015), http://time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting [https://perma.cc/2KVT-ZJLF] ("The deadly incident occurred just before 10 p.m. on Oct. 20, 2014, after police were told that an individual was carrying a knife and breaking into vehicles on Chicago's Southwest Side. Officers also reported that McDonald slashed the tires of a squad car before the shooting occurred.").

9. Sanburn, *supra* note 8. Soon thereafter, protesters filled the streets of downtown Chicago. Monica Davey & Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES (Nov. 25, 2015), http://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html [https://perma.cc/9FYW-RKPJ] (explaining that "protesters led clusters of police officers on a march through the streets of Chicago's Loop, blocking intersections, chanting outside a police station and, along a major road to the city's largest highways, unfurling a banner that cited deaths at the hands of the police"). It is also worth mentioning that the shooting of Laquan McDonald appeared to have contributed to the initiation of a federal investigation of the Chicago Police Department by the U.S. Department of Justice (DOJ) under 42 U.S.C. § 14141. Davey & Smith, *supra* note 6 (describing the shooting of Laquan McDonald by a Chicago police officer). Van Dyke is now facing murder charges for McDonald's death, and Chicago's Fraternal Order of Police has hired Van Dyke as a janitor as he awaits trial. *Police Union Hires Officer Charged in Laquan McDonald Slaying as Janitor*, CHI. TRIB. (Mar. 31, 2016, 2:18 PM), http://www.chicagotribune.com/news/laquanmcdonald/ct-jason-van-dyke-police-union-job-20160331-story.html [https://perma.cc/P4DR-BFN6].

10. Elliot C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN (Nov. 26, 2015, 5:45 PM), http://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits [https://perma.cc/VQ86-TV2T].

11. Of the approximately 12,000 officers working for the Chicago Police Department (CPD), 402, or 3.35 percent, had twenty or more complaints over this time period. *Id.*

12. *Id.*

Department had never pursued disciplinary action against Van Dyke.[13] In fact, Chicago officials had not even flagged Van Dyke's behavior as potentially problematic.[14]

This lack of corrective action in cases of systemic officer misconduct is, in part, a consequence of public-employee labor law. Like most states, Illinois permits police officers "to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment."[15] Courts have interpreted phrases like "terms and conditions of employment" in Illinois and elsewhere to permit or require the negotiation of internal procedures used by police management to investigate or punish officers suspected of misconduct.[16]

As part of its collective bargaining agreement with the Fraternal Order of Police, the union representing police officers, the City of Chicago has agreed "to erase decades worth of records that document complaints against police officers and the resolution of these complaints."[17] Because of this, Chicago's Independent Police Review

13. *Id*. ("Five complaints in the database were 'not sustained,' five were unfounded, four resulted in exoneration, five had unknown outcomes and one resulted in no action taken.").

14. Editorial, *Save the Police Conduct Records*, CHI. TRIB. (Dec. 16, 2015, 5:20 PM), http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-police-union-records-edit-1217-20151216-story.html [https://perma.cc/UGA2-4TYM] [hereinafter *Save the Police Conduct Records*] ("That's how the system failed to flag Officer Jason Van Dyke, whose tally of complaints rose to 20 when the database was last updated. Half of those complaints concerned use of force, but Van Dyke was never disciplined or even flagged as a potential problem.").

15. 5 ILL. COMP. STAT. ANN. § 315/4 (2014), *invalidated in part on other grounds by* Heaton v. Quinn, 32 N.E.3d 1 (Ill. 2015).

16. *See infra* Part I.A.

17. *Save the Police Conduct Records*, CHI. TRIB. *supra* note 14. The police department initially pushed back against civilian attempts to view personnel files. After a prolonged court battle, an appellate judge ruled that the Illinois Freedom of Information Act trumped the CPD's collective bargaining agreement, requiring the release of these personnel files. Rob Wildeboer, *Complaints Against Chicago Cops Published After 20-Year Saga*, WBEZ CHI. (Nov. 10, 2015), http://www.wbez.org/news/complaints-against-chicago-cops-published-after-20-year-saga-113715 [https://perma.cc/EZJ2-CBBY] (explaining how after seven years of litigation, University of Chicago law professor Craig Futterman won a protective order requiring Chicago to release a portion of its police disciplinary records from the period between 2001 and 2015). The records showed that the CPD had determined that 95.34 percent of the 56,384 citizen complaints were unsubstantiated and required no action. *Findings*, CITIZENS POLICE DATA PROJECT, http://cpdb.co/findings [https://perma.cc/D25N-F8KV]. The most common punishment in the small number of substantiated complaints was a short suspension or letter of reprimand. *Id*. Black residents filed 61 percent of complaints but accounted for only 25 percent of sustained complaints; for white residents, the figures were 21 percent and 58 percent respectively. *Id*.

Authority does not consider an officer's history of complaints when examining a new complaint against the same officer.[18] The Chicago union contract also delays interrogations of officers involved in alleged wrongdoing[19] and prevents the investigation of most anonymous complaints.[20] Perhaps it is no coincidence that less than 2 percent of all civilian complaints against Chicago police officers result in any sort of disciplinary action.[21]

Chicago is hardly alone. In recent years, civil rights advocates have uncovered a number of collective bargaining agreements that provide frontline officers with a laundry list of procedural protections during internal investigations. For example, Baltimore's police union

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The data also revealed that the police department did not provide adequate oversight of police officers. A large number of complaints were directed at a small number of officers (less than 10 percent of the CPD). *Id*. The Los Angeles Police Department (LAPD) was in a similar position in 1991. While the vast majority of LAPD officers had only one or two allegations of excessive force against them, some 183 officers had four or more allegations; forty-four had six or more; sixteen had eight or more; and one had sixteen. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 36 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT]. Likewise, a small cohort of officers was involved in many of the department's use-of-force cases. *Id.* at 36. The CPD and LAPD cases are consistent with the belief among many academics that "10 percent of . . . officers cause 90 percent of the problems." Samuel Walker, Geoffrey P. Alpert & Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer*, NAT'L INST. JUST. RES. BRIEF, July 2001, at 1, http://www.ncjrs.gov/pdffiles1/nij/188565.pdf [https://perma.cc/873T-V4AP].

18. *Save the Police Conduct Records*, CHI. TRIB. *supra* note 14.

19. CITY OF CHI., AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7, at 6 (June 2, 2012) (on file with the *Duke Law Journal*) ("The interview shall be postponed for a reasonable time, but in no case more than forty-eight (48) hours from the time the Officer is informed of the request for an interview and the general subject matter thereof and his or her counsel or representative can be present.").

20. *Id*. at 4 ("No anonymous complaint made against an Officer shall be made the subject of a Complaint Register investigation unless the allegation is a violation of the Illinois Criminal Code, the criminal code of another state of the United States or a criminal violation of a federal statute.").

21. CITIZENS POLICE DATA PROJECT, *supra* note 17 (showing that 2 percent of the 28,567 civilian complaints submitted between 2011 and 2015 resulted in discipline). It is also worth noting that the DOJ has released an investigative findings report that finds the Chicago Police Department is engaged in a pattern or practice of unconstitutional misconduct in violation of 42 U.S.C. § 14141. The parties have since agreed to negotiate in good faith a consent decree to remedy these problems. Rebecca Hersher, *DOJ: 'Severely Deficient Training' Has Led to Pattern of Abuse by Chicago Police*, NPR (Jan. 13, 2017), http://www.npr.org/sections/thetwo-way/2017/01/13/509646186/doj-severely-deficient-training-has-led-to-pattern-of-abuse-by-chicago-police [https://perma.cc/J859-VWYU].

contract[22] includes provisions that allow for the expungement of officer performance records,[23] bar the public disclosure of disciplinary actions,[24] and limit civilian oversight of police officers.[25] And in Cleveland, the U.S. Department of Justice (DOJ) found it challenging to investigate the Cleveland Police Department in part because its

22. On the morning of April 12, 2015, Baltimore police arrested a twenty-five-year-old African American man named Freddie Gray for allegedly possessing an illegal switchblade. Eyder Peralta, *Timeline: What We Know About the Freddie Gray Arrest*, NPR (May 1, 2015, 8:23 PM), http://www.npr.org/sections/thetwo-way/2015/05/01/403629104/baltimore-protests-what-we-know-about-the-freddie-gray-arrest [https://perma.cc/4B6G-8GQ2] (explaining that the prosecutor later confirmed that the knife was not illegal, making the stop illegal). Officers claimed that they did not use significant force in arresting Gray—a claim that is "mostly corroborated by video shot by bystanders." David A. Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119 [https://perma.cc/Z3VY-C6KB]. Video and eyewitness testimony do seem to confirm that Gray screamed in pain during the arrest and his legs appeared to be injured as police placed him in a police van. Gray also apparently requested his inhaler during the arrest—a request officers denied. *Id.* By the time Gray arrived at the police station "a half hour later, he was unable to breathe or talk, suffering from wounds that would kill him" the following week. *Id*. Gray had suffered a grave spinal injury similar to that experienced in serious car accidents. Scott Dance, *Freddie Gray's Spinal Injury Suggests 'Forceful Trauma,' Doctors Say*, BALT. SUN (Apr. 21, 2015), http://www.baltimoresun.com/health/bs-hs-gray-injuries-20150420-story.html [https://perma.cc/NBH8-4554]. Gray's death led to criminal charges against the officers involved. *See* Jess Bidgood, *Freddie Gray Trials Resume with Prosecution of 2nd Baltimore Officer*, N.Y. TIMES (May 12, 2016), http://www.nytimes.com/2016/05/13/us/freddie-gray-trials-resume-with-prosecution-of-2nd-baltimore-officer.html [https://perma.cc/WR9D-54XL] ("Six police officers were charged in the events that preceded the death of Mr. Gray."). But prosecutors eventually dropped the charges against the officers. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN. (July 27, 2016, 8:57 PM), http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html [https://perma.cc/HY9M-ZR8C].

Questions surrounding the investigation of this incident inspired civil rights advocates to take a closer look at the Baltimore police union contract, which governs such investigations. *See generally* SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICERS'S BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY (2015), http://s3.documentcloud.org/documents/2086432/baltimore-police-union-contract.pdf [https://perma.cc/SYZ8-VRUX] (examining the ways that the Baltimore police union contract may impede effective investigation of police misconduct).

23. WALKER, *supra* note 22, at 5 (citing "Article 16, Paragraph O of the Baltimore union contract," which "provides that after three years an officer can request" deletion of formal complaints from his or her personnel file).

24. *Id*. at 7 (citing Article 16, Paragraph K, which states that "notice of disciplinary actions may not be made public").

25. CITY OF BALT., MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BALTIMORE POLICE DEPARTMENT AND THE BALTIMORE CITY LODGE NO. 3, FRATERNAL ORDER OF POLICE, INC. UNIT I, at 22 (2015) (on file with the *Duke Law Journal*) (stating that "[n]o civilians other than an Administrative Law Judge may serve on a Departmental Hearing Board").

collective bargaining contract mandated the removal of disciplinary records from department databases after two years.[26]

These examples bolster the hypothesis that some union contract provisions may impede effective investigations of police misconduct and shield problematic officers from discipline.[27] Although this hypothesis is gaining popularity,[28] virtually no comprehensive empirical work has examined the prevalence of such provisions in police union contracts across the country. This lack of research is troubling, as the majority of American police officers are part of labor unions that collectively bargain for the terms of their employment.[29]

To begin filling this gap in the existing literature, this Article analyzes an original dataset of 178 collective bargaining agreements that govern the working conditions of around 40 percent of municipal officers in states that permit or require collective bargaining in police departments.[30] This analysis reveals that a substantial number of these contracts unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable for their actions. For example, many of these contracts limit officer interrogations after alleged wrongdoing,[31] mandate the destruction of officer disciplinary records,[32] ban civilian oversight of police misconduct,[33] prevent anonymous civilian complaints,[34] indemnify officers in civil suits,[35] or require arbitration in cases of disciplinary action.[36]

These findings suggest that state labor law may pose a greater barrier to police reform than scholars have previously recognized. For

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26. Rosa Flores & Mallory Simon, *Chicago's Next Fight: Trying to Purge Police Misconduct Records*, CNN (Dec. 20, 2015, 1:58 AM), http://www.cnn.com/2015/12/18/us/chicago-police-misconduct-records [https://perma.cc/GTM5-QD3T].

27. *See* WALKER, *supra* note 22, at 1 ("In Baltimore, and in other cities and counties across the country, police-union contracts contain provisions that impede the effective investigation of reported misconduct and shield officers who are in fact guilty of misconduct from meaningful discipline."). For a discussion of existing research which has hypothesized that there is a link between police-union contracts and limitations on police accountability, see *infra* Part II.

28. *See infra* Part II.

29. *See infra* note 59 and accompanying text.

30. For more information on the methodology used in this Article, see *infra* Part III.

31. *See infra* Part IV.A

32. *See infra* Part IV.B.

33. *See infra* Part IV.C.

34. *See infra* Part IV.D.

35. *See infra* note 135 and accompanying text.

36. *See infra* note 135 and accompanying text.

decades, policymakers have based reform efforts on a handful of external legal mechanisms including the exclusionary rule, civil litigation, criminal prosecution, and structural reform litigation. These external mechanisms supposedly give police departments incentives to enact internal reforms aimed at protecting the constitutional rights of criminal suspects. In theory, these external legal mechanisms should increase the costs borne by police departments in cases of officer misconduct. For instance, when faced with a significant civil judgment under 42 U.S.C. § 1983, rational police supervisors should respond by punishing any officers who engage in wrongdoing that could give rise to a similar judgment in the future.[37]

But across many of the nation's largest cities, supervisors cannot easily respond to external legal pressure by punishing problematic officers or implementing rigorous disciplinary procedures. Instead, many courts have held that internal-investigation and disciplinary procedures are appropriate subjects for collective bargaining under public-employee labor laws.[38] This collective bargaining process happens largely outside of the public view and with minimal input from community stakeholders most at risk of experiencing police misconduct.[39]

In light of these findings, this Article argues that states should amend labor laws to increase transparency and community participation in the development of police disciplinary procedures. To be clear, municipalities ought to provide police officers with adequate due process protections during internal investigations. It is also important for frontline police officers to have a voice in the development of internal policies and procedures to reduce the probability of organizational resistance. However, these internal disciplinary protections should not be so burdensome as to thwart legitimate efforts to investigate or punish officers engaged in wrongdoing.

This Article suggests several different ways that states could increase transparency and public participation in the development of police disciplinary procedures. States could require municipalities and

37. *See infra* note 41 and accompanying text.

38. *See infra* notes 64–68 and accompanying text.

39. *See* PRIYA M. ABRAHAM, OPENING THE CURTAIN ON GOVERNMENT UNIONS 5–8 (2015), http://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf [https://perma.cc/H9Z5-7PHM] (providing links to various state statutes that limit public participation and transparency in collective bargaining negotiations).

police unions to negotiate disciplinary procedures in public hearings rather than behind closed doors. Alternatively, states could require municipalities to establish notice-and-comment procedures, similar to those employed by administrative agencies, before agreeing to a package of disciplinary procedures via the collective bargaining process. Perhaps most radically, states could amend labor laws to remove police disciplinary procedures from the list of appropriate subjects for collective bargaining. This Article concludes by considering some of the benefits and drawbacks of these proposals. Ultimately, it seeks to reorient the scholarly discussion by fully recognizing how state labor law complicates police-reform efforts.

This Article proceeds in five parts. Part I describes the complex array of modern police labor and employment protections, including collective bargaining agreements, civil service statutes, and law enforcement officers' bills of rights (LEOBRs). Part II explores the existing literature on collective bargaining agreements in police departments, and Part III describes the methodology used in this Article for coding the frequency of problematic disciplinary provisions in police union contracts. Part IV breaks down the content of collective bargaining agreements in some of the largest police departments in the United States. Finally, Part V makes some normative recommendations regarding how policymakers could increase transparency and public participation in the development of police disciplinary procedures.

## I. POLICE LABOR AND EMPLOYMENT PROTECTIONS

Numerous criminal law scholars have written on the merits of the exclusionary rule,[40] civil litigation,[41] criminal prosecution,[42] and

40. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to wrongdoing by state and local police); Wolf v. Colorado, 338 U.S. 25, 33 (1949), (declining to extend the exclusionary rule to states), *overruled by Mapp*, 367 U.S. 643; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920) (expanding the exclusionary rule to cover not just illegally obtained material but also copies of illegally obtained material—the precursor to the "fruit of the poisonous tree" doctrine); Weeks v. United States, 232 U.S. 383, 398 (1914) (initially establishing the exclusionary rule, while limiting its application to federal law enforcement), *overruled by Mapp*, 367 U.S. 643. The purpose of the exclusionary rule, the prohibition on the use of evidence at trial which has been obtained in violation of a defendant's constitutional rights, is to deter police from committing such violations by eliminating any benefit that would be achieved. Elkins v. United States, 364 U.S. 206, 217 (1960).

Scholars have split on whether the exclusionary rule contributes to meaningful change in police departments. *See, e.g.*, William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 355 (1991) (suggesting that the exclusionary rule has a meaningful impact on the likelihood that a police department would adopt reforms); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (finding that the CPD did respond "to deter—to compel respect for the constitutional guarantee in the only effective way—by removing the incentive to disregard it"). *But cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 322 (2d ed. 2008) (rejecting the influence of courts in bringing about social change through mechanisms like the exclusionary rule).

41. Victims of police misconduct can file civil suits in federal court against police officers, and in some cases police departments or municipalities. 42 U.S.C. § 1983 (2012); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700–01 (1978) (establishing that a claimant is permitted to recover civil penalties from a department based on the unconstitutional actions of an officer employed by that department under § 1983). Research suggests that § 1983 may have influenced the availability of insurance for police departments, contributing to policy change. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 95 (2009). Nevertheless, some scholars worry that the organization of municipal government and indemnification policies limit the impact of civil litigation on police reform. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (showing that indemnification policies are prevalent across American police departments); Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2009) (discussing how the organization of municipal governments lessens the impact of any individual civil settlement on police departments).

42. *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999) ("[C]riminal law standards define 'the outer limits of what is permissible in society'—not the good police practices that police reformers aspire to institute in a wayward department." (quoting PAUL CHEVIGNY, EDGE OF THE KNIFE 101 (1995))).

structural reform litigation[43] as tools for police reform.[44] Only recently, however, have legal scholars begun to discuss the incidental impact of labor and employment law on police behavior.[45]

This Part evaluates labor and employment laws that affect internal investigations and disciplinary action in American police departments, while the latter portions of this Article focus on the content of union contracts negotiated pursuant to state collective bargaining statutes.[46] In the overwhelming majority of states, collective bargaining statutes give police unions the power to negotiate salaries, benefits, and other conditions of employment for frontline police officers.[47] Courts have

43. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417 (2000) (offering a creative way that the DOJ could deputize private citizens to expand 42 U.S.C. § 14141 enforcement). *See generally* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2010) (suggesting a worst-first approach to enforcing § 14141); Livingston, *supra* note 42, at 820. ("Section 14141 represents an important new remedial tool that offers enhanced opportunities for the radical reform of lax police administrative practices."); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) [hereinafter Rushin, *Federal Enforcement*] (discussing the federal government's enforcement of § 14141); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015) (providing an empirical assessment of the use of § 14141, a statute that gives the U.S. attorney general the authority to seek equitable relief against police departments engaged in a pattern or practice of unconstitutional misconduct); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008) (making an argument for more collaboration in § 14141 interventions).

44. Others have written about how private insurers regulate public law enforcement agencies. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. (forthcoming 2017). Still others have discussed how decertifying problematic officers could help address misconduct. *See generally* Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 546 (2001) ("Without a mechanism at the state or national level to remove the certificate of law enforcement officials who engage in such misconduct, it is likely that there will be more such instances of repeated misconduct.").

45. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (suggesting that labor and employment protections may act as a "tax" on police reform); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014) (discussing in broad terms the effect of labor laws and collective bargaining on policing).

46. *See infra* Part IV.

47. *See infra* Part I.A. This Article focuses primarily on disciplinary terms found in union contracts that dictate the working conditions for frontline police officers. Police departments generally rely on top-down command structures with a police commissioner or chief (or chiefs) at the top who are responsible for official policymaking. *See* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 9) (on file with the *Duke Law Journal*); *see also* Peter K. Manning, *A Dialectic of Organisational and Occupational Culture*, *in* POLICE OCCUPATIONAL CULTURE: NEW DEBATES AND DIRECTIONS 49, 70 (Megan O'Neill, Monique Marks & Anne-Marie Singh eds., 2007) (explaining that the top command in a police department is typically "composed of officers above the rank of

generally interpreted collective bargaining statutes to permit police unions to negotiate the methods that management may use to investigate and punish officers suspected of misconduct.[48]

It is worth noting, though, that collective bargaining statutes represent just one part of a larger web of police labor and employment laws. Several other labor and employment laws also dictate the disciplinary standards for frontline police officers, including LEOBRs[49] and civil service statutes.[50] This Part discusses each in turn.

### *A. Collective Bargaining*

Police officers are a relatively new addition to the labor movement.[51] The public initially viewed police unions with some suspicion—in part because of the "disastrous Boston Police Department strike of 1919, in which over a thousand officers—about two-thirds of Boston's police force at the time—made a bid for higher pay and better hours by walking off the job or refusing to report for duty," resulting in riots, numerous fatalities, and significant property damage.[52] Around the time of the strike in Boston, officers faced deplorable working conditions. Although Boston had voted to give police officers a raise in 1898, it was not put into effect until 1913.[53] Even then, officers still earned meager wages for long hours. In the years leading up to the strike, experienced Boston police officers typically earned around $1200 a year and no officer could earn more than $1400 a year, even though officers had to buy their own uniforms

superintendent (or commander) including chief, and deputy chief or assistant chief"). The significant "bulk of the department consists of the rank and file, who sit at the bottom of the organization." Fisk & Richardson, *supra* (manuscript at 9).

48. Fisk & Richardson, *supra* note 47 (manuscript at 25).

49. *See infra* Part I.C.

50. *See infra* Part I.B.

51. Stoughton, *supra* note 45, at 2206.

52. *Id*. For more information on the 1919 strike of the Boston Police Department, see generally JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE: 1900–1962 (2004). As Slater chronicles, in September of 1919, "practically all of Boston's police officers went on strike," concerned primarily with their wages, hours, and working conditions. Crowds of thousands of people then went on "a looting spree." A group of rioters chanted "[k]ill them all" at a group of reserve park police. State guards were eventually brought in to quell the riot, resulting in officers firing "point-blank into the crowds, killing 9 and wounding 23 others." *Id*. at 13–14. When peace was ultimately restored, all 1147 striking officers were fired. This event would become infamous. Court opinions, labor opponents, and policymakers frequently cited the Boston strike "as a cautionary tale of the evils of such [police] unions." *Id*.

53. *See id.* at 25.

at a cost of $200.[54] Day-shift officers typically worked seventy-three hours a week, while night-shift officers worked around eighty-three hours a week; some officers were even forced to work as many as ninety-eight hours a week.[55]

So, faced with few options for increasing their pay or improving their working conditions, a majority of Boston's police force went on strike. Rather than helping Boston police, the strike of 1919 led to the firing of all 1147 officers and was met with widespread public condemnation.[56] It would be decades after the Boston riots before states finally permitted police officers to unionize.[57]

Today, though, the tables have turned. A majority of American states now permit or require municipalities to bargain collectively with police unions.[58] According to the best estimates, around two-thirds of American police officers are part of a labor union.[59] Police unions generally benefit from broad, bipartisan support—even from conservative politicians who have fought against unionization for other government employees.[60]

Unionization has had some major and undeniable benefits for frontline officers. The average starting salary for sworn officers in

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54. *See id.*

55. *Id*. (explaining that some officers were forced to work seventeen-hour days and that supervisors were limited in their travel or movement on days off).

56. *Id*. at 14.

57. Fisk & Richardson, *supra* note 47 (manuscript at 21) (stating that "[u]nions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s").

58. According to a recent study, four states—Georgia, North Carolina, South Carolina, and Virginia—generally prohibit police departments from collectively bargaining. Five states—Alabama, Colorado, Florida, Mississippi, and Wyoming—have no clear statute or case law that has settled whether police officers may collectively bargain. The remaining forty-one states appear to have statutes that generally require or permit local police departments to bargain collectively with police unions about salaries, benefits, and other terms of employment. MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POL'Y RES., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 7 (2014), http://cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/5YSB-YALN].

59. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf [https://perma.cc/XM4U-55UH] (showing that around 66 percent of officers are employed by departments that engage in collective bargaining).

60. Stoughton, *supra* note 45, at 2207 ("Times have changed, and today police unions enjoy broad legal and social support."); A.J. Delgado, *It's Time for Conservatives to Stop Defending Police*, NAT'L REV. (July 21, 2014, 6:10 PM), http://www.nationalreview.com/article/383312/its-time-conservatives-stop-defending-police-j-delgado [https://perma.cc/PLS2-TWVH] (arguing that conservatives too often defend police unions while trying to fight against unionization in other contexts, like public schools).

police departments with collective bargaining is around 38 percent higher than in police departments without it.[61] Unionization has also allowed frontline officers to have a greater say in internal policy matters. The typical police union contract now governs "a broad range of topics in excruciating detail."[62]

State statutes regulating these collective bargaining agreements typically define their scope broadly, permitting public employees to negotiate on any "matters of wages, hours, and other conditions of employment."[63] Courts have generally understood terms like "wages" to permit public employees to bargain about anything that directly or indirectly affects their compensation, including direct wages or salaries, fringe benefits, health insurance, life insurance, retirement benefits, sick leave, vacation time, and any indirect form of compensation.[64]

Phrases like "conditions of employment" are trickier to interpret. If read broadly, this sort of language can become a "catchall phrase

61. REAVES, *supra* note 59, at 13 (noting that the average salary for entry-level officers was approximately $10,887 higher in departments with collective bargaining—$39,263 in agencies with collective bargaining, compared to $28,376 in agencies without it—and that this discrepancy existed in all population categories).

62. Stoughton, *supra* note 45, at 2208 (using as examples of the intricate nature of modern collective bargaining agreements the CPD contract, which is 150 pages long, the Boston Police Department contract, which is sixty-three pages long, and the New York Police Department contract, which is twenty-eight pages long). It is also worth mentioning that municipalities frequently must negotiate with multiple police unions that represent different segments of the police department. *Id*. at 2207–08. As an example, Stoughton explains that the City of Dallas must negotiate with both the "chapter of the Fraternal Order of Police and the Dallas Police Association." *Id*. at 2208. Likewise, the City of New York must negotiate with five different unions. *Id*. And in Los Angeles, the city must bargain with eight different unions. *Id*.

63. *See, e.g.*, ALASKA STAT. § 23.040.070 (2014); CONN. GEN. STAT. ANN. § 5-271 (West 2007); DEL. CODE ANN. tit. 19, § 1301 (2013); FLA. STAT. ANN. § 447.309 (West 2013); HAW. REV. STAT. ANN. § 89-9 (LexisNexis 2014); 5 ILL. COMP. STAT. ANN. § 315/2 (West 2013); IND. CODE ANN. § 36-8-22-3 (LexisNexis 2009); IOWA CODE ANN. § 20.9 (West 2010); KY. REV. STAT. ANN. § 67A.6902 (West 2016); MASS. ANN. LAWS ch. 150E, § 6 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 423.215(1) (West 2016); MINN. STAT. ANN. § 179A.06-5 (West 2016); MO. ANN. STAT. § 105.520 (West 2015); MONT. CODE ANN. § 39-31-305(2) (West 2015); NEB. REV. STAT. ANN. § 48-816 (LexisNexis 2012); NEV. REV. STAT. ANN. § 288.150(2) (LexisNexis 2012); N.H. REV. STAT. ANN. § 273-A:1 (LexisNexis 2016); N.J. STAT. ANN. § 34:13A-5.3 (West 2011); N.M. STAT. ANN. § 10-7E-17(A)(1) (2013; N.Y. CIV. SERV. LAW § 204(2) (McKinney 2011); OHIO REV. CODE ANN. § 4117.03 (West 2016); OKLA. STAT. ANN. tit. 11, § 51-101 (West 2012; OR. REV. STAT. § 243.650(7)(a) (2015); 43 PA. STAT. AND CONS. STAT. ANN. § 217.1 (West 2009); 28 R.I. GEN. LAWS § 28-9.1-4 (2003); S.D. CODIFIED LAWS § 3-18-3 (2013; TEX. GOV'T CODE ANN. § 174.002 (West 2016); UTAH CODE ANN. § 34-20a-3 (LexisNexis 2015); VT. STAT. ANN. tit. 21, § 1725 (2009); WASH. REV. CODE ANN. § 41.56.030 (West 2016).

64. *See generally* Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Relations*, 84 A.L.R. Fed. 3d Art. 3, at 242 (1978 & Supp. 2015) (analyzing permissible public-employee bargaining for direct and indirect compensation).

into which almost any proposal may fall."[65] To limit the scope of collective bargaining statutes, courts and state labor relations boards have generally held that managerial prerogatives should not be subject to negotiation as so-called "conditions of employment."[66]

In practice, though, courts have proved fairly deferential to public-employee unions. Only a handful of courts have examined whether disciplinary procedures in police departments are considered "conditions of employment," thereby making them subject to collective bargaining. A number of these courts have held that police disciplinary procedure is an appropriate subject of collective bargaining.[67] Some courts, though, have carved out exceptions for specific disciplinary topics.[68]

In sum, political leaders on both sides of the aisle who once rejected police unionization as a threat to public safety have now widely embraced it. Collective bargaining has emerged as a major

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65. Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723, 727 (Tex. App. 1999).

66. Tussey, *supra* note 64, at 242–43. As the *American Law Reports* has explained:

> Perhaps the single greatest . . . limitation on the scope of bargaining or negotiation by . . . public employees is the concept of managerial prerogative as it has developed in the public sector. In essence, the concept creates a dichotomy between "bargainable" issues, that is, those issues which affect conditions of employment, and issues of "policy" which are exclusively reserved to government discretion and cannot be made mandatory subjects of bargaining.

*Id.* at 255–56.

67. *See, e.g.*, City of Casselberry v. Orange Cty. Police Benevolent Ass'n, 482 So. 2d 336, 340 (Fla. 1986) (holding that even though the state civil service law established some procedures for demotion and discharge, municipalities were still required to bargain collectively on those issues to the extent necessary to potentially establish alternate grievance procedures); City of Reno v. Reno Police Protective Ass'n, 653 P.2d 156, 158 (Nev. 1982) (holding that Nevada law requires municipalities to negotiate with police departments over disciplinary measures); Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112, 766 N.E.2d 1027, 1031–32 (Ohio Ct. App. 2001) (holding that discipline was a mandatory subject of bargaining, so that when the township refused to bargain, a conciliator could select the union's proposal on discipline in its final settlement award).

68. *See, e.g.*, Berkeley Police Ass'n v. City of Berkeley, 143 Cal. Rptr. 255, 260 (Cal. Ct. App. 1977) (affirming the lower court's judgment and order declining to enjoin the city police department's practice of permitting members of the citizens' police review commission to meet and confer with the police union when new civil oversight mechanisms were being implemented); Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n, 462 N.E.2d 96, 102 (Mass. 1984) (holding that a police department has an overriding interest in the integrity of its officers, which exempts it from having to negotiate over the use of polygraph examinations when investigating criminal activity by police officers); State v. State Troopers Fraternal Ass'n, 634 A.2d 478, 493 (N.J. 1993) (limiting mandatory subjects of collective bargaining for police in disciplinary cases because of the uniqueness of police work).

avenue through which labor unions shape the internal policies and practices of American police departments.

### *B. Civil Service Protections*

A parallel source of employment regulations in American police departments is state civil service law.[69] A large majority of American states have civil service laws on the books that regulate the appointment and discharge of public employees, including police officers.[70] Over time, the scope of civil service protections has expanded to regulate a wide range of employment actions, including "demotions, transfers, layoffs and recalls, discharges, training, salary administration, attendance control, safety, grievances, pay and benefit determination, and classification of positions."[71]

The driving force behind civil service laws is a desire to establish a merit system in public employment[72]—a far cry from much of American history, when government jobs were allocated on the basis of political patronage.[73] Historians trace the origins of modern civil service laws to the assassination of President James Garfield in 1881 by a "disappointed office seeker," which ultimately contributed to the passage of the Civil Service Act, or Pendleton Act, in 1883.[74] Since then, civil service statutes have slowly spread across the United States. By 1970, one survey estimated that some sort of civil service statute

69. It appears that a strong majority of states have civil service statutes that apply to municipal police officers. For some representative examples of these state civil service laws, see ALA. CODE §§ 11-43-180 to 190 (2008) (establishing a civil service system for municipal law enforcement); ARIZ. REV. STAT. §§ 38-1001 to 1007 (1956) (establishing a civil service system for law enforcement officers); ARK. CODE ANN. §§ 14-51-301 to 311 (2013 & Supp. 2015) (establishing a civil service system for firefighters and police officers); COLO. REV. STAT. §§ 31-30-101 to 107 (2016) (establishing a civil service system for municipal police officers); D.C. CODE §§ 5-101.01–5.133-21, 5-1302 to 1305 (2001 & Supp. 2016) (establishing a civil service system for police); TEX. LOC. GOV'T CODE §§ 143.001–143.403 (2008 & Supp. 2016) (establishing a civil service system for municipal police and fire department personnel). A handful of states do not appear to have civil service protections for police officers, including Georgia, Maryland, Montana, New Hampshire, Virginia, West Virginia, and Wyoming.

70. Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95, 103 (1990).

71. *Id.* at 102.

72. *Id.* (stating that a driving purpose behind civil service laws was to ensure the "selection, promotion, and retention of government employees on the basis of merit").

73. R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW 1–3 (1976).

74. *Id.*

protected around 80 percent of all state and local government employees.[75]

As Professor Rachel Harmon has observed, civil service laws empower frontline police officers "to challenge any internal managerial action that affects them on both substantive and procedural grounds in a formal adversarial process," which ultimately leads to "costly legal battles" when "police departments demote, transfer, or fire any officer."[76] This arguably makes civil service laws "an especially efficient disincentive" to police reform.[77] States are split about whether collective bargaining agreements can supersede civil service laws and establish more protective procedures for hiring, promotion, disciplinary action, and grievance procedures.[78] Thus, in many states, civil service laws establish a floor for police officer employment protections, which police unions can raise through collective bargaining.

### *C. Law Enforcement Officers' Bills of Rights*

In addition to collective bargaining and civil service statutes, a handful of states have passed yet another layer of employment protections for frontline police officers: LEOBRs.[79] Unlike civil service laws, which protect a wide range of public employees, LEOBRs provide police officers with due process protections during disciplinary

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75. Hodges, *supra* note 70, at 101 n.32.

76. Harmon, *supra* note 45, at 796.

77. *Id*. at 797.

78. Hodges, *supra* note 70, at 107–09 (describing how states have taken three different approaches in interpreting the tension between civil service laws and collective bargaining agreements, and walking through the possible strengths and weaknesses of each approach).

79. Craig Whitlock, *Power Urged for Police Panel*, WASH. POST, Apr. 7, 2000, at B1. *See, e.g.*, Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B. U. PUB. INT. L.J. 185, 185 (2005). (using the term "Law Enforcement Officers' Bills of Rights," as have numerous major media outlets); Paul Butler, *The Police Officers' Bill of Rights Creates a Double Standard*, N.Y. TIMES (June 27, 2015, 9:13 PM), http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard [https://perma.cc/8H86-Z879] (using the "Law Enforcement Officers Bill of Rights" as a term); Adam May, *Maryland Police Lawyer: Officers' Bill of Rights Is Not Wrong*, AL JAZEERA AM. (May 3, 2015, 6:00 PM), http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/3/maryland-police-lawyer-officers-bill-of-rights-is-not-wrong.html [https://perma.cc/EA2R-34BD] (same).

For another helpful analysis of LEOBRs, which describes their proliferation and ultimately argues that these laws could serve as a useful way to reform civilian interrogations, see generally Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197 (2016).

investigations that are not given to other classes of public employees. LEOBRs themselves came about in part because of the Supreme Court's 1967 decision in *Garrity v. New Jersey*,[80] which prevented states from using compelled statements made by police officers during disciplinary investigations in future criminal proceedings.[81] Modern LEOBR protections, though, go well beyond limitations on officer interrogations.

An example from Prince George's County, Maryland, demonstrates the power of these LEOBRs. In 2000, the DOJ initiated an investigation of the Prince George's County Police Department after an unusual pattern of fatal shootings and allegations of excessive use of force.[82] In response, community activists proposed the creation of a civilian review board tasked with investigating citizen complaints against law enforcement officers.[83]

But the activists faced a major obstacle: the state of Maryland is one of at least sixteen states that have LEOBRs. Like other states with LEOBRs, Maryland provides additional protections to police officers facing internal disciplinary investigations.[84] The Maryland LEOBR specifically prevents civilians from investigating police officers, effectively preventing meaningful community oversight of local officers.[85] The Maryland LEOBR also prevents localities from

80. Garrity v. New Jersey, 385 U.S. 493 (1967).

81. Levine, *supra* note 79, at 1220–21; *see also Garrity*, 385 U.S. at 500 (holding that the "protection . . . against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic"). *See generally* Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309 (2001) (providing a review of the *Garrity* doctrine and the use of compelled testimony from police officers during trial).

82. For more information about the circumstances that spurred federal involvement, see Craig Whitlock & Jamie Stockwell, *U.S. to Probe Pr. George's Police Force*, WASH. POST, Nov. 2, 2000, at A1. The DOJ's investigation of the Prince George's County Police Department officially began on July 1, 1999. The DOJ reached a settlement with the police department on January 22, 2004. *See* Rushin, *Federal Enforcement*, *supra* note 43, at 3244–47 (showing these dates in Appendices A & B). The DOJ's involvement in the Prince George's County investigations ended in early 2009. Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. (forthcoming 2017) (showing these closing dates in Appendices A & B).

83. Keenan & Walker, *supra* note 79, at 189 .

84. *Id.* at 185 (describing how LEOBRs have added a "special layer of employee due process protections when [officers face] investigations for official misconduct").

85. MD. CODE ANN., PUB. SAFETY § 3-104(b) (West 2015) (stating that the investigating officer for any investigation of a Maryland police officer should be a "sworn law enforcement officer" unless a different party is specifically designated by the Governor, Attorney General, or Attorney General's designee).

punishing officers for "brutality" unless a complaint is filed within ninety days of the alleged incident.[86] It strictly limits officer interrogation procedures.[87] And it allows police officers to remove civilian complaints from their personnel files after three years.[88] Across the country, virtually "[n]o other group of public employees enjoys equivalent" legislative protection during disciplinary proceedings.[89] Predictably, civil rights advocates have argued that the Maryland LEOBR "is a major obstacle to those locales that wish to establish a system of civilian review" and other types of disciplinary procedures.[90]

Some states have LEOBR provisions that are even more protective of police officers than Maryland's. For example, Delaware bars municipalities from requiring police officers to disclose their personal assets.[91] Such a directive is likely an attempt to protect Delaware officers from the kind of anticorruption measures that the DOJ required the Los Angeles Police Department to implement as part of a federal consent decree.[92] California is among several states that bar the use of polygraphs when interrogating police officers.[93] Illinois requires all citizen complaints to be accompanied by a sworn affidavit, essentially preventing citizens from filing anonymous complaints.[94]

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86. *Id*. § 3-104(c)(2) ("Unless a complaint is filed within 90 days after the alleged brutality, an investigation that may lead to disciplinary action under this subtitle for brutality may not be initiated and an action may not be taken.").

87. *Id*. § 3-104(d)–(k) (providing limits on the time, methods, place, and conduct of interrogations of police officers).

88. *Id*. § 3-110 (providing that police officers may have their complaints in personnel files deleted after three years and setting forth procedures for the removal of complaints that are not sustained after an investigation).

89. Keenan & Walker, *supra* note 79, at 186.

90. *Testimony for the Senate Judicial Proceedings Committee: Senate Bill 655: Law Enforcement Officers' Bill of Rights Act 2002*: *Support with Amendments*, 2000 Leg., 416th Sess. 2 (Md. 2002) (statement of the American Civil Liberties Union and the ACLU of the National Capital Area).

91. DEL. CODE ANN. tit. 11, § 9202 (2015) ("No officer shall be required or requested to disclose any item of personal property, income, assets, sources of income, debts, personal or domestic expenditures . . . .").

92. Randal C. Archibold, *Los Angeles Police Told to Disclose Their Finances*, N.Y. TIMES, Dec. 21, 2007, at A28 (explaining how, as part of a federal consent decree under 42 U.S.C. § 14141, the LAPD had to require "an array of personal financial" disclosures to fight corruption in the department's gang and narcotics divisions; this measure faced fierce opposition from police union leaders who argued that it would lead to a "mass exodus from the units").

93. CAL. GOV'T CODE § 3307(a) (West 2015) ("No public safety officer shall be compelled to submit to a lie detector test against his or her will.").

94. 85 ILL. COMP. STAT. ANN. 725/3.8(b) (West 2011).

Police officers have secured such extensive protections by arguing that special disciplinary procedures are necessary, as police "must be granted the widest latitude to exercise their discretion in handling difficult and often dangerous situations, and should not be second-guessed if a decision appears in retrospect to have been incorrect."[95] Critics have argued that LEOBRs represent an attempt by police officers to take advantage of their "knowledge of how the criminal justice system works . . . [to] shield themselves from its operation[]."[96] But Professor Kate Levine has suggested that the interrogation limitations included in some LEOBRs are "more in line with our current notions of humane treatment of those who are suspected of violating the criminal law."[97] Thus, she imagines how policymakers could use these highly protective LEOBRs as a starting point for "reinvigorat[ing] the debate over how to protect criminal suspects" during interrogations.[98]

The approximately sixteen states that have passed generally applicable LEOBRs employ roughly 37.4 percent of all municipal police officers in the United States.[99] That number may rise in the near future. Eleven other states have recently considered passing their own LEOBRs.[100] And Congress has periodically considered the passage of a national LEOBR, although such proposals have yet to gain significant traction.[101] Appendix C breaks down some of the most

95. Keenan & Walker, *supra* note 79, at 186.

96. Levine, *supra* note 79, at 1211–12.

97. *Id*. at 1212.

98. *Id*.

99. The sixteen states that have generally applicable LEOBRs are Arizona, California, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. Eli Hager, *Blue Shield: Did You Know Police Have Their Own Bill of Rights?*, MARSHALL PROJECT (Apr. 27, 2015, 12:06 PM), https://www.themarshallproject.org/2015/04/27/blue-shield [https://perma.cc/KH8F-MEP7] (identifying all of these statutes, except Iowa's); *see* IOWA CODE § 80F.1 (2007) (establishing Iowa's so-called "Peace Officer, Public Safety, and Emergency Personnel Bill of Rights"). These sixteen states have approximately 238,028 of the nation's 635,781 law enforcement officers, or around 37.4 percent. *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: FULL-TIME LAW ENFORCEMENT EMPLOYEES, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-77 [https://perma.cc/5RDS-W4NZ] (showing the number of police officers employed in each state). Texas has passed a LEOBR that only applies to cities with a population of over 1.5 million citizens. *See* TEX. LOC. GOV'T CODE ANN. § 143.123 (West 1987). This means that this state law only applies to one city—Houston. Other states have more generally applicable state LEOBRs.

100. Hager, *supra* note 99.

101. *Id*.

highly protective and potentially problematic provisions in state LEOBRs.

### *D. Other Police Protections*

In addition to collective bargaining statutes, civil service statutes, and LEOBRs, a number of states have passed or recently considered additional employment protections designed to shield police officers from harassment or privacy violations. Events in Philadelphia demonstrate the growing demand for additional labor and employment protections for frontline police officers. When then-Philadelphia Police Commissioner Charles Ramsey attempted to pass an internal regulation that would have provided for the release of the names of officers involved in civilian shootings, the Fraternal Order of Police filed an unfair labor practices charge, alleging that Chief Ramsey had not properly negotiated with the union over this policy change.[102] The union then lobbied the Pennsylvania legislature for a bill that would protect the identities of police involved in civilian shootings.[103]

Pennsylvania is one of several states that have considered such bills over the last several years.[104] For example, a substantial number of states have enacted legislative limitations on open records laws to prevent the public from accessing officers' personnel and disciplinary files.[105] And a number of states and localities have acted to prevent the

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102. John Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers' Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html [https://perma.cc/7L2T-CUPL].

103. *Id*.

104. *Id*. (stating that "[i]n Oregon, lawmakers in the state House in February passed a bill that would have allowed police departments to withhold for 90 days the names of officers who have received threats," and in Phoenix, "police unions objected when the department there released the name of the officer who fatally shot" a civilian).

105. *See* Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), http://www.wnyc.org/story/police-misconduct-records [https://perma.cc/UBM8-KNC6] ("In these states, police disciplinary records are generally available to the public. Many of these states still make records of unsubstantiated complaints or active investigations confidential."); *see also* Jim Miller, *California Has Tightest Restrictions on Law Enforcement Records, Access Advocates Say*, MODESTO BEE (Mar. 17, 2014, 12:00 AM), http://www.modbee.com/news/state/article3162015.html [https://perma.cc/Y68F-5LV5] ("[O]pen records advocates say California residents today have some of the least access to law enforcement records of anywhere in the country."). It is also worth noting that when the California measure was passed in 1978, Governor Jerry Brown hailed it as a "substantial step forward in protecting the rights of law enforcement officers," and it received strong support. *Id*.

public from accessing police body-camera footage without a court order.[106]

## II. EXISTING RESEARCH

Police union contracts, civil service laws, and LEOBRs provide police officers with an array of legal protections in cases of internal disciplinary investigations. While each of these mechanisms could theoretically insulate officers from accountability and oversight, this Article focuses specifically on the content of disciplinary procedures in police union contracts. More specifically, it evaluates how modern police union contracts limit disciplinary investigation and oversight of frontline police officers. The existing literature contains little discussion of the disciplinary procedures that police unions have obtained through collective bargaining. This is in part because there are thousands of decentralized police departments in the United States, and each negotiates its own collective bargaining agreements, largely outside public view.[107]

Only a few legal scholars have discussed the relationship between police union contracts and internal disciplinary action. Professor Seth Stoughton hypothesizes that grievance procedures found in collective bargaining agreements may "both discourage and frustrate attempts to discipline officers."[108] Harmon observes that collective bargaining

106. *See, e.g.*, Emanuella Grinberg, *North Carolina Law Blocks Release of Police Recordings*, CNN (July 13, 2016, 11:08 PM), http://www.cnn.com/2016/07/12/politics/north-carolina-police-recording-law/index.html [https://perma.cc/W4XZ-Y5TU] ("North Carolina . . . [passed] legislation this week that blocks the release of law enforcement recordings from body cameras or dashboard cameras with limited exceptions."); Peter Hermann & Aaron C. Davis, *As Police Body Cameras Catch On, a Debate Surfaces: Who Gets to Watch?*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html [https://perma.cc/5MNR-X3RY] (explaining that "[o]fficials in more than a dozen states—as well as the District [of Columbia]—have proposed restricting access or completely withholding the footage from the public, citing concerns over privacy and the time and cost of blurring images that identify victims, witnesses or bystanders caught in front of the lens").

107. BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (Bureau of Justice Statistics, Bulletin No. 233982, 2011), http://www.bjs.gov/content/pub/pdf/csllea08.pdf [https://perma.cc/J7YL-LQA2] (putting the number of state and local law enforcement agencies at 17,985).

108. Stoughton, *supra* note 45, at 2211. Professor Seth Stoughton also theorizes that collective bargaining might create or aggravate "intradepartmental tensions." *Id.* at 2214. One other fascinating consequence of collective bargaining in police departments, as hypothesized by Stoughton, is the increasingly long and complex "petty military and bureaucratic regulations" that codify acceptable and unacceptable behavior in "shockingly great and verbose detail." *Id.* at 2213. For example, Stoughton cites the more than 1600 pages of manuals which New York City police

rights might "deter department-wide changes intended to prevent constitutional violations."[109] Professor Samuel Walker wrote on the relationship between collective bargaining and disciplinary procedures, pointing out that provisions in police union contracts like Baltimore's prevent supervisors from responding forcefully to officer wrongdoing.[110] Professors Catherine Fisk and L. Song Richardson have written an important and detailed account of how unions can both impede and promote reform in police departments.[111] Fisk and Richardson ultimately argue that states should permit a limited form of minority union bargaining—that is, bargaining by a minority of the employees in a bargaining unit—in hopes of empowering officer groups supportive of reform in their efforts to influence policing practices.[112]

Combined, the existing legal literature provides some evidence for the hypothesis that collective bargaining can impede police accountability efforts. But this literature is largely theoretical rather than empirical.[113] Two existing studies outside of legal academia have shed some light on the content of police union contracts. First, Professors David Carter and Allen Sapp completed one of the only other empirical studies on the content of police union contracts in 1992.[114] In their analysis, though, Carter and Sapp did not focus specifically on language within these contracts dealing with disciplinary procedures. Instead, they provided a descriptive analysis of the common topics of negotiation in union contracts. Additionally,

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must master. Even smaller cities like Madison have policy manuals around four hundred pages in length. *Id*.

109. Harmon, *supra* note 45, at 799.

110. WALKER, *supra* note 22, at 2.

111. *See generally* Fisk & Richardson, *supra* note 47 (providing in a forthcoming paper a historical account of how unions may both impede and facilitate reform in police departments).

112. *Id*. (manuscript at 65) ("We would allow officers to belong both to the minority union and to the majority union so that they would not have to give up the benefits of majority union membership . . . but also could gain the benefits of membership in the minority union [like] . . . (the ability to have a voice in the minority union's governance and priority-setting policies).").

113. One previous empirical study has examined how labor protections in the CPD's union contract in the early 1990s may have resulted in a reduction in disciplinary action against police officers. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 216 (1998) (citing how mandatory arbitration resulted in disciplinary action essentially being cut in half for many officers in Chicago).

114. David L. Carter & Allen D. Sapp, *A Comparative Analysis of Clauses in Police Collective Bargaining Agreements as Indicators of Change in Labor Relations*, 12 AM. J. POLICE 17, 17 (1992).

because they completed their study over two decades ago, Carter and Sapp's work may no longer reflect the state of police union contracts today.[115]

Second, community activists, in part associated with groups like Black Lives Matter, have organized grassroots efforts to collect and consider the merits of police union contracts from around eighty large cities.[116] While this work has shed some important light on potentially troubling patterns in police union contracts, it by no means forecloses the need for additional research.

As discussed more in Part IV, this Article improves on the methodology used in these previous studies of police union contracts in several ways. It relies on a substantially larger collection of police union contracts than the recent work done by community activists. It also considers different categories of disciplinary procedures when analyzing police union contracts. In addition, it explicitly evaluates the legal issues surrounding police unionization and offers normative recommendations. In sum, the existing literature—particularly the existing literature within legal academia—lacks a comprehensive study of the content of police union contracts.

This gap in the literature is increasingly problematic for two reasons. First, at least theoretically, the conditions under which most municipalities negotiate police union contracts are susceptible to regulatory capture.[117] Negotiations typically happen outside of the public view.[118] Police unions are also a powerful political

115. *Id*. at 17–18 (explaining that their article was intended to provide a descriptive analysis of the common topics of negotiation in union contracts, as specifically requested by those in the field).

116. The website *Check the Police*, which is associated with the Black Lives Matter movement, has been collecting police union contracts contemporaneously with the writing of this article. CHECK THE POLICE, http://www.checkthepolice.org [https://perma.cc/SQX2-6BGS].

117. Regulatory capture describes a form of government failure in which a regulatory entity responsible for protecting the public interest instead advances the interests of the entity it was tasked with regulating. For further explanation, see generally Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006). For a recent example of alleged regulatory capture, see *Regulatory Capture 101: Impressionable Journalists Finally Meet George Stigler*, WALL STREET J. (Oct. 6, 2014, 1:49 PM), http://www.wsj.com/articles/regulatory-capture-101-1412544509 [https://perma.cc/ZU35-3XC6] (describing the regulatory capture that occurred when the Federal Reserve Bank of New York relaxed its oversight of Goldman Sachs).

118. Only eight states require public hearings for police union negotiations and only four states require that municipalities make these agreements public before ratification. *See* ABRAHAM, *supra* note 39, at 5–8 (providing links to various state statutes).

constituency.[119] For this reason, municipal leaders may be strongly incentivized to offer concessions to police unions on disciplinary procedures in exchange for lower officer salaries.[120] Because municipal expenditures can dominate local headlines, the result is a sort of moral hazard.[121] Municipal leaders may be incentivized to offer concessions on police disciplinary procedures because they are less likely to bear the costs of those concessions in the immediate future. After all, the typical victim of police misconduct is often a member of a relatively small and politically disadvantaged minority of municipal voters.[122] Thus, it seems theoretically plausible that police unions may be able to obtain unreasonably favorable disciplinary procedures through collective bargaining—perhaps beyond those that exist in civil service statutes or LEOBRs.

Second, this gap in the literature is problematic in an age in which police accountability has dominated headlines. In a handful of individual cases, the media and community groups have uncovered provisions in police union contracts that appear to limit officer

119. Delgado, *supra* note 60 (arguing that conservatives have helped police unions become too politically powerful); Stoughton, *supra* note 45, at 2207 (describing the wide political and social support for police unions).

For some examples of the modern power of police unions in shaping political decisions and the national dialogue, see Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT (Apr. 28, 2015, 9:42 AM), https://theintercept.com/2015/04/28/balltimore-freddie-gray-prosecute [https://perma.cc/L2YV-222A] (describing police unions as a "major force in state politics" in Maryland, which have been able to block legislation they view as unfavorable to police officers); David Firestone, *The Rise of New York's Police Unions*, GUARDIAN (Jan. 13, 2015, 8:46 AM), https://www.theguardian.com/us-news/2015/jan/13/new-york-police-unions-powerful [https://perma.cc/FP5N-YE5P] (describing how New York's police unions have "flexed their muscles to help their members" and even "orchestrat[ed] a politically motivated slowdown in arrests and ticket-writing" to protest new regulation); Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Streets*, ATLANTIC (Dec. 2, 2014), http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258 [https://perma.cc/XZ5N-E96N] (walking through how police unions have developed enough power that they can effectively prevent discipline against officers); Michael Tracey, *The Pernicious Power of the Police Lobby*, VICE (Dec. 4, 2014, 9:42 AM), http://www.vice.com/read/the-pernicious-power-of-police-unions [https://perma.cc/A6SM-DYNL] (describing how powerful police unions have blocked meaningful reforms of police behavior).

120. *See infra* notes 273–77 and accompanying text.

121. *See* Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 416 (2012) ("In general, moral hazard problems arise in the context of information asymmetry: one party (politicians) has more information and less concern about the consequences of their behavior than the party that must pay (taxpayers).").

122. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 145–50 (2016) [hereinafter Rushin, *Using Data*] (describing how those victimized by police misconduct are often marginalized and have little political power to fight back).

accountability.[123] A hack of the Fraternal Order of Police's server has revealed dozens of additional contracts—many of which appeared to contain unusually deferential disciplinary standards for officers.[124] All of this suggests that the relationship between union contracts and police accountability is an issue of serious national concern warranting additional empirical examination.

## III. METHODOLOGY

While the existing literature has shown the presence of problematic provisions in a handful of police union contracts, there is a need for a contemporary, empirical examination of the frequency of such provisions. To begin filling this gap in the existing literature, I collected and coded police union contracts from American cities with a population of over one hundred thousand residents.[125] Public record

123. *See, e.g.*, David C. Couper, *To Address Shootings, Start by Diminishing the Power of the Unions*, USA TODAY (July 7, 2016, 8:31 PM), http://www.usatoday.com/story/opinion/policing/spotlight/2016/07/07/address-shootings-start-diminishing-power-unions-column/84944524 [https://perma.cc/KZ52-2W4C] (linking the lack of accountability in police departments to the power of police unions and collective bargaining); Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html [https://perma.cc/LKN8-TPZQ] (connecting the lack of accountability in police departments to unionization); Adeshina Emmanuel, *State Law Protects Police Contract Provisions Blasted by Task Force*, CHI. MAG. (Apr. 26, 2016), http://www.chicagomag.com/city-life/April-2016/State-Law-Protects-Police-Contract-Provisions-Blasted-by-Task-Force [https://perma.cc/3TCN-QQ68] (discussing the link between union contracts and accountability).

124. *See* George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016, 7:00 AM), https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret [https://perma.cc/K5A9-BUKN] (describing the hack of the Fraternal Order of Police database and a follow-up study conducted by reporters at the *Guardian* who found that a substantial number of the sixty-seven contracts studied had some limitations on disciplinary action against officers accused of misconduct).

125. This study uses the 2010 U.S. Census to identify 252 cities with a population of at least one hundred thousand. This study added a handful of additional cities that appeared to have surpassed one hundred thousand residents in the years since the census. *Annual Estimates of Resident Population for Incorporated Places of 50,000 or More in 2014*, U.S. CENSUS BUREAU (May 2016), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPANNCHIP>US12A&prodType=table [https://perma.cc/KT2W-5VFN]. Of these 252 cities with over one hundred thousand residents, 223 are located in states favorable to police unionization. A substantial number of these 223 cities are located in states that permit, but do not require unionization of frontline police officers, like Texas. Thus, the actual number of cities with over one hundred thousand residents that actually collectively bargain with their police force appears to be lower than 223—likely closer to two hundred.

It is not uncommon for municipalities to negotiate separately with different labor unions that represent different segments of a police department. For example, Boston, Buffalo,

requests, examinations of municipal government websites, and online searches resulted in the collection of police union contracts from 178 municipalities between 2014 and 2016.[126] Appendix A provides a full list of all the municipalities included in this dataset.

The contracts in this dataset govern the working conditions in police departments that employ around 170,625 municipal police officers.[127] While police departments commonly negotiate collective bargaining agreements with a number of different unions,[128] this Article focuses specifically on those agreements governing the working conditions of frontline police officers—a category distinct from contracts that govern police supervisors like sergeants, lieutenants, or captains. Approximately 411,682 officers work in states with laws that permit or require collective bargaining in police departments.[129] Thus,

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Cincinnati, Cleveland, and New York are just a handful of cities in this sample that negotiate contracts with multiple police unions.

126. In a small number of cases, when I could not obtain the union contract directly from the municipality, I relied on the most recently available union contract I could find through the municipal or other state website. Even when I received the union contract directly from the municipality, some of these contracts may have lapsed between the time of collection and the time of publication. That is, the municipality and the local police union may have since agreed to a new contract, which has since replaced the contract analyzed in this Article. This is an unavoidable consequence of collecting so many contracts and the long publication process. Nevertheless, this potential limitation should have little effect on the overall analysis in this Article. For those contracts that recently lapsed, there is little reason to think that police union contracts have changed significantly in the last few years. The ultimate goal of this Article is not to examine the contents of any one particular union contract, but to instead provide some statistical sense about the frequency of problematic disciplinary provisions across the entire universe of police union contracts in large American cities. Before making any conclusions about the contents of a specific city's police union contract, I strongly advise readers to check for the most up-to-date version of their targeted contract.

127. The total number of officers serving in each department included in this dataset can be found in Appendix A.

128. Stoughton, *supra* note 45, at 2207 ("Large law enforcement agencies typically bargain with multiple unions.").

129. I obtained this number by first estimating the number of municipal police officers in states that permit or require police unionization. There are an estimated 461,063 municipal police officers in the United States. This figure does not include officers that work at the federal level, state level, or for sheriff's departments. It only includes officers who work for municipal police departments in incorporated cities. The states that are not favorable to police unionization employ 49,381 municipal police officers. Thus, the entire population of police officers in states that permit or require police unionization is 411,682.

It is important to recognize that the *actual* number of officers whose working conditions are governed by a union contract is likely substantially lower than 411,682, as many cities in states that permit unionization have chosen not to negotiate with police unions. However, using this conservative estimate, this study can safely claim to examine the union contracts that govern the working conditions of 170,625 municipal officers, or 41.4 percent of the population of municipal

the dataset in this study covers approximately 41.4 percent of municipal police officers in states that permit or require collective bargaining. While this dataset helps readers understand the content of police union contracts in many large American cities, it is not necessarily generalizable to all police departments, particularly those in smaller municipalities.[130] This analysis is also focused specifically on disciplinary procedures. More research may be helpful in identifying other important trends in these contracts.

Before coding my dataset to identify the frequency of problematic disciplinary provisions, I first developed a coding scheme. To do this, I conducted a preliminary examination of the dataset, surveyed the existing literature, and consulted media reports. Through this iterative process, I settled on a coding scheme that included seven recurring and potentially problematic disciplinary provisions. Figure 1 defines these seven common categories of problematic police union provisions.

officers working in states that permit or require unionization. *See* REAVES, *supra* note 59, at 2, 16.

130. A few words of caution about the generalizability of this study are in order. The sample used in this study is not necessarily representative of the entire population of unionized police departments in the United States. The sampling methodology used in this study focused specifically on the nation's largest police departments. Since these agencies serve a larger cross-section of the American population, this methodology allows this Article to get the biggest proverbial "bang for the buck." But readers should be cautious when speaking about the generalizability of these findings. No doubt, this sample provides a detailed look at the content of police union contracts in large American cities. It remains unclear, however, whether union contracts in large municipalities differ in any systematic way from union contracts in smaller communities.

*Figure 1: Coding Scheme*

| Problematic Provision | Definition |
|---|---|
| Delays Interrogations of Officers Suspected of Misconduct | The contract includes any stipulation that delays officer interviews or interrogations after alleged wrongdoing for a set length of time (for example, two days or twenty-four hours). |
| Provides Access to Evidence Before Interview | The contract provides officers with access to evidence before interviews or interrogations about alleged wrongdoing (for example, complete investigative files or statements from other witnesses). |
| Limits Consideration of Disciplinary History | The contract mandates the destruction or purging of disciplinary records from personnel files after a set length of time, or limits the consideration of disciplinary records in future employment actions. |
| Limits Length of Investigation or Establishes Statute of Limitations | The contract prohibits the interrogation, investigation, or punishment of officers on the basis of alleged wrongdoing if too much time has elapsed since its alleged occurrence, or since the initiation of the investigation. |
| Limits Anonymous Complaints | The contract prohibits supervisors from interrogating, investigating, or disciplining officers on the basis of anonymous civilian complaints. |
| Limits Civilian Oversight | The contract prohibits civilian groups from acquiring the authority to investigate, discipline, or terminate officers for alleged wrongdoing. |
| Permits or Requires Arbitration | The contract permits or requires arbitration of disputes related to disciplinary penalties or termination. |

Using the definitions in Figure 1, I then coded the sample of 178 police union contracts to determine the frequency of each of these categories of potentially problematic disciplinary provisions—that is, to determine whether each contract contained language consistent with the definition listed in Figure 1. To ensure reliability, I analyzed each contract two separate times. To ensure replicability, I have made all of

the union contracts examined in this study publicly available.[131] The full results of this analysis can be found in Appendix B.

Admittedly, this analysis does not capture all potentially problematic provisions in police union contracts. In examining each union contract, I also identified a number of somewhat less frequent but nonetheless troubling provisions that may directly or indirectly impede officer accountability. For instance, one contract requires the police chief to solicit union approval before enacting any policy changes not explicitly identified in the contract.[132] At least one contract bars internal investigators from using lineups during internal investigations.[133] A few contracts bar internal investigators from searching officers' lockers.[134] And a significant number of contracts require the municipality to indemnify officers in cases of civil judgments.[135]

Police-reform advocates may argue that any of these provisions constitutes a significant limitation on officer accountability. However, these sorts of provisions seemed less prevalent than the categories identified in Figure 1. The next Part discusses the content of police union contracts and demonstrates how these problematic provisions limit officer accountability.

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131. All of these collective bargaining agreements are available to the public for download with a Dropbox account at the following link, temporarily housed at https://goo.gl/Jy8aQg [https://perma.cc/8CC2-ZJW5]. They are also on file with the *Duke Law Journal*.

132. SALT LAKE CITY CORP., MEMORANDUM OF UNDERSTANDING BETWEEN SALT LAKE CITY CORPORATION AND THE SALT LAKE POLICE ASSOCIATION 9 (2014) (on file with the *Duke Law Journal*).

133. CITY OF EVANSVILLE, A RESOLUTION OF THE COMMON COUNCIL OF THE CITY OF EVANSVILLE RATIFYING, CONFIRMING, AUTHORIZING AND APPROVING AN AGREEMENT BETWEEN THE CITY OF EVANSVILLE AND THE FRATERNAL ORDER OF POLICE EVANSVILLE NO. 73 INC. 25 (2016) (on file with the *Duke Law Journal*) ("A member shall not be compelled to appear in a formal police line-up in any administrative investigation . . . .").

134. *See, e.g.*, *id*. at 24; CITY OF TOPEKA, AGREEMENT BETWEEN CITY OF TOPEKA AND FRATERNAL ORDER OF POLICE LODGE NO. 3, at 75 (2016) (on file with the *Duke Law Journal*) ("Topeka Police Officers shall not have their lockers or other space for storage that is assigned to the officer searched, except with the officer's permission and in his/her presence.").

135. *See, e.g.*, CITY OF ANN ARBOR, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF ANN ARBOR AND ANN ARBOR POLICE OFFICERS' ASSOCIATION FOR POLICE SERVICE SPECIALISTS 51 (2013) (on file with the *Duke Law Journal*) ("[T]he Employer will indemnify and defend employees in connection with liability claims arising out of the performance of the employee's police duties."); CITY OF DAVENPORT, AGREEMENT BETWEEN CITY OF DAVENPORT, IOWA AND UNION OF PROFESSIONAL POLICE, INC. 28 (July 1, 2013) ("[T]he city shall fully indemnify and hold harmless the employees of the Union with respect to any liability arising out of the performance of their duties.").

## IV. HOW MANY POLICE UNION CONTRACTS LIMIT ACCOUNTABILITY

I find that police union contracts commonly contain provisions that can insulate frontline officers from accountability and oversight. A large number of police union contracts delay officer interrogations after alleged misconduct and require investigators to provide officers with access to evidence before beginning interrogations.[136] Many call for the destruction of officer personnel records after a set period of time.[137] Multiple contracts attempt to ban or limit the scope of civilian oversight.[138] And many bar management from investigating anonymous complaints, limit the statute of limitations, or limit the length of investigations.[139] Figure 2 offers a detailed breakdown of the prevalence of these common provisions in the twenty-five largest cities that permit collective bargaining.

*Figure 2: Problematic Provisions in Contracts Governing Police Unions in the Largest Cities*

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Austin | ■ | ■ | ■ | ■ | | ■ | ■ |
| Boston | | | | | | | ■ |
| Chicago | ■ | | ■ | | ■ | | ■ |
| Columbus | ■ | | ■ | ■ | ■ | ■ | ■ |
| Dallas | | | | | | | |
| Denver | | | | | | | |

136. *See infra* Part IV.A.
137. *See infra* Part IV.B.
138. *See infra* Part IV.C.
139. *See infra* Part IV.D.

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Detroit | ■ | | ■ | | | | ■ |
| El Paso | ■ | | | ■ | | ■ | ■ |
| Fort Worth | ■ | | | | | ■ | |
| Houston | ■ | | | ■ | | ■ | |
| Indianapolis | | | ■ | ■ | | | |
| Jacksonville | ■ | ■ | ■ | | | | ■ |
| Las Vegas | ■ | ■ | ■ | | | | ■ |
| Los Angeles | ■ | | | | | ■ | |
| Memphis | | ■ | ■ | | | | ■ |
| New York | | | ■ | | | | |
| Philadelphia | | | ■ | | | | |
| Phoenix | | ■ | ■ | | | | |
| Portland | ■ | ■ | ■ | | ■ | | ■ |
| San Antonio | ■ | ■ | ■ | ■ | | ■ | |
| San Diego | ■ | | ■ | ■ | | | |
| San Francisco | ■ | ■ | | | | ■ | |
| San Jose | | | | | | ■ | ■ |
| Seattle | ■ | | ■ | ■ | | ■ | |
| Washington, D.C. | | ■ | ■ | ■ | | ■ | ■ |

Note: The darkened boxes indicate the presence of a problematic provision identified in the coding scheme.

A full breakdown of the collective bargaining agreements from all 178 cities can be found in Appendix B.[140] Overall, 156 of the 178 police union contracts examined in this study—around 88 percent—contained at least one provision that could thwart legitimate disciplinary actions against officers engaged in misconduct. The sections that follow discuss some of the most common ways that police union contracts limit investigations of officer misconduct.

### *A. Officer Interrogations*

Imagine if, before interrogating a suspect, police officers had to provide the suspect with written statements from all other witnesses with knowledge of the crime. Imagine if, prior to conducting interrogations, police officers were required to provide suspects and their attorneys with a full and truthful accounting of all the evidence against them. And imagine if police were required to provide all suspects and their attorneys with advance notice—anywhere from twenty-four hours to ten days in length—before conducting interrogations. Most experienced police officers would balk at such hindrances on their ability to interrogate criminal suspects. They might understandably tell you that such limitations would make it unreasonably difficult to elicit incriminating statements from suspects.

These are just a handful of the procedural requirements that some union contracts promise to police officers during internal investigations.[141] Many of the collective bargaining agreements in this study place some significant limitation on the interrogations of police officers—particularly those in states that do not already provide comparable protections through LEOBRs. A few of these limitations are uncontroversial. For instance, many collective bargaining agreements allow officers to obtain advice from legal counsel.[142] Some

140. In addition to the problematic provisions identified in Figure 2, some collective bargaining agreements also include language that indemnifies police officers found liable in the event of civil judgments, mandates paid time off for police officers who kill civilians in the line of duty, and places additional limitations on the interrogation of police officers.

141. The discovery of just a few of these procedural protections in individual departments has led some in the press to observe that officers are treated significantly better than private citizens during interrogations. *See, e.g.*, Mark Joseph Stern, *The Special Treatment Louisiana Gives to Police Officers Suspected of a Crime*, SLATE (July 6, 2016, 2:20 PM), http://www.slate.com/blogs/the_slatest/2016/07/06/alton_sterling_police_officers_won_t_have_police_bill_of_rights_to_protect.html [https://perma.cc/95H3-ELES] (examining the treatment of Louisiana police officers after allegations of criminal conduct in the wake of the Alton Sterling shooting).

142. *See, e.g.*, CITY OF LOUISVILLE, COLLECTIVE BARGAINING AGREEMENT BY AND BETWEEN LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT AND RIVER CITY

contracts also provide officers with basic protections against abuse during interrogations. Professor Kate Levine has persuasively argued that it is advantageous to provide basic interrogation protections that insulate frontline officers from undergoing lengthy interrogations, discourage inducements through threats or promises of leniency, and guarantee basic necessities like regular meals, sleep, and bathroom use.[143] This Article makes no objection to such reasonable accommodations during interrogations.

Some other limitations on the interrogation of frontline officers, though, appear designed to insulate them from accountability rather than to protect their basic rights. For instance, a number of cities, including Albuquerque,[144] Anchorage,[145] Austin,[146] Chandler,[147]

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FRATERNAL ORDER OF POLICE LODGE #614, POLICE OFFICER AND SERGEANTS 18–19 (2013) (on file with the *Duke Law Journal*) (providing the right to counsel for officers facing questions after using deadly force); CITY OF ORLANDO, AGREEMENT BETWEEN THE CITY OF ORLANDO AND ORLANDO LODGE #25, FRATERNAL ORDER OF POLICE, INC. 3–4 (2013) (on file with the *Duke Law Journal*) (giving officers implicated in a disciplinary investigation the right to have a union representative and/or counsel present during interactions with internal-affairs investigators).

143. Levine, *supra* note 79, at 1241–46.

144. CITY OF ALBUQUERQUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF ALBUQUERQUE AND ALBUQUERQUE POLICE OFFICERS ASSOCIATION 31 (2014) (on file with the *Duke Law Journal*) (permitting officers to have two hours to consult with counsel before providing statements).

145. MUNICIPALITY OF ANCHORAGE, COLLECTIVE BARGAINING AGREEMENT BETWEEN ANCHORAGE POLICE DEPARTMENT EMPLOYEES ASSOCIATION AND MUNICIPALITY OF ANCHORAGE 8 (2015) (on file with the *Duke Law Journal*) (guaranteeing officers at least twenty-four hours' notice before any noncriminal misconduct interview).

146. CITY OF AUSTIN, AGREEMENT BETWEEN THE CITY OF AUSTIN AND THE AUSTIN POLICE ASSOCIATION 50 (2013) (on file with the *Duke Law Journal*) (guaranteeing officers at least forty-eight hours' notice before providing a statement regarding a disciplinary investigation, and requiring that officers receive a copy of the complaint, including the names of the person(s) making the complaint).

147. CITY OF CHANDLER, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF CHANDLER AND CHANDLER LAW ENFORCEMENT ASSOCIATION 11 (2013) (on file with the *Duke Law Journal*) (designating a forty-eight-hour waiting period for interviews of officers after officer-involved shootings, but providing an exception that would allow the chief to dismiss this waiting period under certain circumstances).

Chicago,[148] Columbus,[149] Corpus Christi,[150] El Paso,[151] Fort Worth,[152] Houston,[153] Kansas City,[154] Louisville,[155] Miami,[156] Minneapolis,[157] San

148. CITY OF CHI., AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7, at 6 (2012) (on file with the *Duke Law Journal*) (providing that an interview be "postponed for a reasonable time," but for no more than forty-eight hours from the time the officer is informed of a request for an interview).

149. CITY OF COLUMBUS, AGREEMENT BETWEEN CITY OF COLUMBUS AND FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9, at 14 (2014) (on file with the *Duke Law Journal*) (guaranteeing officers at least twenty-four hours' notice before disciplinary interviews, unless otherwise necessary).

150. CITY OF CORPUS CHRISTI, AGREEMENT BETWEEN THE CITY OF CORPUS CHRISTI AND THE CORPUS CHRISTI POLICE OFFICERS' ASSOCIATION 16 (2015) (on file with the *Duke Law Journal*) (guaranteeing officers at least forty-eight hours' notice before disciplinary interviews, absent exigent circumstances).

151. CITY OF EL PASO, ARTICLES OF AGREEMENT BETWEEN CITY OF EL PASO, TEXAS AND EL PASO MUNICIPAL POLICE OFFICERS' ASSOCIATION 55 (2014) (on file with the *Duke Law Journal*) (establishing a forty-eight hour waiting period, except in exigent circumstances, before any disciplinary interviews of officers regarding critical incidents, officer-involved shootings, and deaths in custody).

152. CITY OF FORT WORTH, MEET AND CONFER LABOR AGREEMENT BETWEEN CITY OF FORT WORTH, TEXAS AND FORT WORTH POLICE OFFICERS ASSOCIATION 15 (2013) (on file with the *Duke Law Journal*) (establishing a forty-eight-hour waiting period before any disciplinary interviews of officers, except in exigent circumstances, and guaranteeing that officers receive a signed explanation of the basis for an interview).

153. CITY OF HOUSTON, MEET & CONFER AGREEMENT BETWEEN THE HOUSTON POLICE OFFICERS' UNION AND THE CITY OF HOUSTON, TEXAS 39–40 (2015) (on file with the *Duke Law Journal*) (establishing a forty-eight-hour waiting period before any disciplinary interviews of officers).

154. CITY OF KAN. CITY, MEMORANDUM OF AGREEMENT BETWEEN THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI AND FRATERNAL ORDER OF POLICE LODGE NO. 99, at 9 (2014) (on file with the *Duke Law Journal*) (providing officers with twenty-four hours to secure counsel and forty-eight hours to provide statements).

155. CITY OF LOUISVILLE, *supra* note 142, at 16 (requiring that investigators provide officers with written notice of upcoming interrogations at least forty-eight hours in advance).

156. CITY OF MIAMI, AGREEMENT BETWEEN CITY OF MIAMI, MIAMI, FLORIDA AND FRATERNAL ORDER OF POLICE, WALTER E. HEADLEY, JR., MIAMI LODGE NO. 20, at 15–16 (2012) (on file with the *Duke Law Journal*) (choosing not to designate a specific period of time for the delay of officer interviews, but stipulating that before any officer interview happens, all identifiable witnesses must be interviewed, if possible, and the officer must be given "all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation").

157. CITY OF MINNEAPOLIS, LABOR AGREEMENT BETWEEN THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS 4 (2012) (on file with the *Duke Law Journal*) (establishing a forty-eight-hour waiting period before any disciplinary interviews).

Antonio,[158] San Diego,[159] Seattle,[160] and Washington, D.C.,[161] delay officer interrogations anywhere from a few hours to several days after suspected misconduct—and, in many cities, even after officer-involved shootings. In total, fifty of the municipalities in this study delay interrogations by some substantial period of time.[162] A smaller, but still significant, number of municipalities (thirty-four) mandate that supervisors provide frontline officers with copies of all evidence of wrongdoing against them hours or even days in advance of interrogations.[163]

Union leaders may argue that by delaying interrogations and providing officers with access to the evidence against them, these contracts prevent investigators from taking advantage of officers. While concerns about coercion are understandable, these policies are contrary to recognized best practices in law enforcement.[164] Federal consent decrees, including those in Los Angeles,[165] Seattle,[166] New

158. CITY OF SAN ANTONIO, AGREEMENT BY AND BETWEEN THE CITY OF SAN ANTONIO, TEXAS AND THE SAN ANTONIO POLICE OFFICERS' ASSOCIATION 81 (2009) (on file with the *Duke Law Journal*) (providing a forty-eight-hour waiting period before any disciplinary interviews of officers).

159. CITY OF SAN DIEGO, MEMORANDUM OF UNDERSTANDING BY AND BETWEEN CITY OF SAN DIEGO AND SAN DIEGO POLICE OFFICERS ASSOCIATION 49 (2015) (on file with the *Duke Law Journal*) (establishing a three-working-day delay before investigators can conduct an interview with an officer under suspicion for a disciplinary violation, unless the delay will hamper the gathering of evidence).

160. CITY OF SEATTLE, AGREEMENT BY AND BETWEEN THE CITY OF SEATTLE AND SEATTLE POLICE OFFICERS' GUILD 11–12 (2013) (on file with the *Duke Law Journal*) (guaranteeing officers anywhere from five to thirty days of notice before disciplinary interviews, except in exigent circumstances).

161. DISTRICT OF COLUMBIA, LABOR AGREEMENT BETWEEN THE GOVERNMENT OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT AND THE FRATERNAL ORDER OF POLICE MPD LABOR COMMITTEE 14 (2005) (on file with the *Duke Law Journal*) (providing a waiting period of up to two hours before investigators can interview an officer).

162. *See infra* Appendix C (first column entitled "Delays Interview").

163. *See supra* note 156 and accompanying text; *see also infra* Appendix C (second column entitled "Access to Evidence Before Interview").

164. WALKER, *supra* note 22, at 3 (explaining that it is a "best practice" for investigators to question officers involved in shootings or other possible incidents of misconduct as soon after the incident as possible and noting that any delays in questioning may impair the ability to uncover what happened).

165. Consent Decree at 23–25, United States v. City of Los Angeles, No. 00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001), http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf [http://perma.cc/J2GK-PHXU] (mandating that supervisors report to the scene of categorical uses of force twenty-four hours a day and immediately separate officers before taking their statements).

166. Settlement Agreement and Stipulated [Proposed] Order of Resolution at 25–28, United States v. Seattle, No. 12-cv-01282-JLR (W.D. Wash. July 27, 2013), http://www.justice.

Orleans,[167] and Albuquerque,[168] require independent investigators to report to the scene of a serious use of force as soon as possible.[169] All individuals involved in the incident should be separated immediately to prevent officers from "conspiring to create a story that exonerates any and all officers of misconduct."[170] These consent decrees require independent investigators to take statements as quickly as possible—generally at the scene of the incident.[171]

However, many police union contracts prevent management from adopting these sorts of best practices. By delaying interrogations, and in some cases providing officers with full access to all evidence against them, these contracts provide officers with ample time to coordinate stories in a way that shifts blame away from the police.

### *B. Disciplinary Records*

As discussed in Part I.D, a handful of state laws already limit public access to police disciplinary records.[172] Such laws are troubling because they prevent public oversight of internal police disciplinary decisions. Perhaps even more troubling, though, is that many police union contracts prevent *even police chiefs* from fully using officer disciplinary records. Instead, many police union contracts mandate the destruction of disciplinary records from officer personnel files after a set period, or prevent supervisors from considering prior disciplinary history when taking future employment action.

For example, the City of Cleveland's contract requires management to remove all verbal and written reprimands from

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gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf [https://perma.cc/RW8X-WFEV] (requiring supervisors to both report to the scene of a use of injurious force and interview officers separately as soon as possible thereafter).

167. Consent Decree at 25–26, United States v. City of New Orleans, No. 12-cv-01924-SM-JCW (E.D. La. July 24, 2012) http://www.clearinghouse.net/chDocs/public/PN-LA-0001-0001.pdf [http://perma.cc/PY76-PRBS] (requiring supervisors to report to the scene of serious uses of force, separate officers, and take statements from both officers and witnesses soon thereafter).

168. Settlement Agreement at 22–25, United States v. City of Albuquerque, No. 1:14-cv-1025-RB-SMV (D. N.M. Nov. 14, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd_settlement_11-14-14.pdf [http://perma.cc/C5VA-X4RJ] (mandating an immediate response and interviews by supervisors of officers involved in uses of force).

169. WALKER, *supra* note 22, at 3.

170. *Id.*

171. *Id.*

172. Lewis, Veltman & Landen, *supra* note 105 (listing states where police personnel records are confidential either under a specific state statute—as in California, Delaware, and New York—or under privacy or public-employee personnel exemptions to state open-record laws).

officers' personnel files after six months.[173] Further, it requires that supervisors must remove all disciplinary actions and penalties from officers' personnel files after two years.[174] This means that after two years, a police officer in Cleveland can have his or her personnel file wiped clean—even if that officer has previously engaged in a pattern of egregious misconduct that raises serious questions about whether he or she is fit to serve as a police officer.

173. CITY OF CLEVELAND, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION NON-CIVILIAN PERSONNEL 7 (2013) (on file with the *Duke Law Journal*).

174. *Id.*

Austin,[175] Baltimore,[176] Chicago,[177] Cincinnati,[178] Columbus,[179] Honolulu,[180] Jacksonville,[181] Las Vegas,[182] Louisville,[183] Miami,[184] Minneapolis,[185] Seattle,[186] and Washington, D.C.,[187] are just a few of the cities from this study that mandate the removal of disciplinary records from personnel files over time. In total, eighty-seven of the cities studied have language in their collective bargaining agreements that

175. CITY OF AUSTIN, *supra* note 146, at 54 (reducing suspensions of one to three days down to a written reprimand after two or three years, depending on the officers' conduct during that time period).

176. CITY OF BALT., MEMORANDUM OF UNDERSTANDING BETWEEN THE BALTIMORE CITY POLICE DEPARTMENT AND THE BALTIMORE CITY LODGE NO. 3, FRATERNAL ORDER OF POLICE, INC. UNIT I, at 24 (2015) (on file with the *Duke Law Journal*) (agreeing to expunge allegations of misconduct from employees' files after three years, if the complaint was found to be unsustained or unfounded, or if the employee was otherwise found not guilty).

177. CITY OF CHI., *supra* note 148, at 10–11 (retaining a record of reprimands and suspensions for between three and five years, but requiring the destruction of disciplinary records after five years for most complaints and after seven years for complaints of criminal conduct or excessive force).

178. CITY OF CINCINNATI, LABOR AGREEMENT BY AND BETWEEN QUEEN CITY LODGE NO. 69 FRATERNAL ORDER OF POLICE AND THE CITY OF CINCINNATI 41–42 (2014) (on file with the *Duke Law Journal*) (allowing the retention of records on disciplinary action that resulted in fewer than thirty days of punishment to be kept for three years, while allowing their retention for up to five years if the act resulted in thirty days or more of punishment).

179. CITY OF COLUMBUS, *supra* note 149, at 25–28 (mandating the retention of disciplinary records in personnel files for between one and six years, depending on the type of record).

180. STATE OF HAWAII, AGREEMENT BETWEEN STATE OF HAWAII, CITY & COUNTY OF HONOLULU, COUNTY OF HAWAII, COUNTY OF MAUI, AND COUNTY OF KAUAI AND STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS BARGAINING UNIT 12, at 42 (2011) (on file with the *Duke Law Journal*) (requiring the removal of disciplinary records from personnel files after two years, and mandating their destruction after four years, retaining only a summary notation).

181. CITY OF JACKSONVILLE, AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE, POLICE OFFICERS THROUGH SERGEANTS 41 (2011) (on file with the *Duke Law Journal*) (requiring that disciplinary information be discarded from personnel files one to five years after the incident, depending on the severity of the punishment).

182. CITY OF LAS VEGAS, COLLECTIVE BARGAINING AGREEMENT BETWEEN LAS VEGAS METROPOLITAN POLICE DEPARTMENT AND LAS VEGAS POLICE PROTECTIVE ASSOCIATION 38–39 (2014) (on file with the *Duke Law Journal*) (requiring the purging of disciplinary records after anywhere from three months to five years, depending on the severity of the violation).

183. CITY OF LOUISVILLE, *supra* note 155, at 22 (requiring the purging of so-called "supervisor files" after one year).

184. CITY OF MIAMI, *supra* note 156, at 18 (requiring the purging of personnel files within five years of termination or retirement, unless otherwise required by state law).

185. CITY OF MINNEAPOLIS, *supra* note 157, at 4 (requiring the purging of any records on a disciplinary action that does not result in punishment).

186. CITY OF SEATTLE, *supra* note 160, at 14 (requiring the purging of disciplinary files after the calendar year of the incident, plus three years).

187. DISTRICT OF COLUMBIA, *supra* note 161, at 18 (requiring, at the employee's request, the purging of disciplinary files in cases that are found to be unsubstantiated).

requires the removal of personnel records at some point in the future.[188]

Admittedly, there may be compelling policy reasons to erase records of minor mistakes by police officers after a set length of time. Evidence of prior wrongdoing may lose its probative or predictive value as time passes. For example, the fact that an officer showed up late to work five years ago likely has little to no bearing on his or her fitness as an officer today. Even so, a pattern of more serious civilian complaints over many decades—even if those complaints are rarely if ever sustained—is often demonstrative of a problem requiring management intervention.

Within the law enforcement community, early intervention systems (EIS) have emerged as a so-called "best practice" over the last two decades.[189] These are computerized databases that document "anywhere from five to twenty-five performance indicators" for individual police officers over time.[190] An emerging consensus suggests that all civilian complaints and reported uses of force, regardless of the outcome of any subsequent investigation, should be included in the EIS.[191] Because of the highly unstructured nature of police work, it is often difficult to prove definitively that an officer engaged in misconduct, in part because investigators must typically weigh the officer's word against a civilian's word. While modern technological tools like body cameras may somewhat level the playing field in these investigations, these tools only provide one angle on interactions between civilians and police.[192]

This is why EIS remains a critical tool for identifying problematic police officers. If a department is using an effective EIS, an officer with an unusually large number of civilian complaints relative to his or her peers—even if these complaints are all or mostly not sustained—should trigger additional management scrutiny.[193] The story of Chicago police

188. *See infra* Appendix C (third column entitled "Limits Consideration of Disciplinary History").

189. WALKER, *supra* note 22, at 6.

190. *Id*.

191. *Id*.

192. *See* Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 840 (2015) (discussing the various limitations of body cameras, including the "length, clarity, lighting, distance, angle, scope, steadiness, manner of shooting, [and] quality" of the video).

193. WALKER, *supra* note 22, at 6. Walker notes:

> An EIS includes all citizen complaints and all reported uses of force regardless of the outcome of the department investigation of each incident. The basic principle is that an EIS should capture the most complete picture of an officer's performance. Most

officer Jason Van Dyke demonstrates how historical recordkeeping of civilian complaints, when combined with an effective EIS, could proactively identify dangerous officers before their behavior escalates. As discussed above, civilians had filed twenty complaints against Van Dyke in the years leading up to the Laquan McDonald shooting.[194] None of these complaints resulted in punishment.[195]

This is not particularly surprising, given that records obtained by Professor Craig Futterman revealed that less than 2 percent of the 28,567 civilian complaints against Chicago police officers between 2011 and 2015 resulted in discipline.[196] If Chicago had used a comprehensive EIS to assess officer risk, the city would have noticed that Van Dyke was the subject of more civilian complaints than almost all other Chicago police officers.[197] By mandating the destruction of disciplinary records in officer personnel records, many modern police union contracts make it nearly impossible for police chiefs to identify such troubling patterns in officer behavior.

### *C. Civilian Oversight*

Since the early twentieth century, civil rights advocates have recognized the importance of civilian oversight of police behavior. As early as 1928, the Los Angeles Committee on Constitutional Rights argued that private citizens should examine citizen complaints and help citizens file complaints.[198] The Wickersham Commission Report[199]—one of the first national reports to identify and discuss police misconduct as a widespread problem—recommended that police departments establish civilian agencies to help victims of police

> citizen complaints are not sustained, but it is a revealing indicator of an officer's performance if an officer receives complaints at a much higher rate than peer officers.

*Id.* (emphasis omitted).

194. *See supra* note 10 and accompanying text.

195. *See supra* note 13 and accompanying text.

196. CITIZENS POLICE DATA PROJECT, *supra* note 17.

197. *See supra* note 11 and accompanying text.

198. JACK MCDEVITT, AMY FARRELL & W. CARSTEN ANDRESEN, NE. UNIV. INST. ON RACE & JUSTICE, ENHANCING CITIZEN PARTICIPATION IN THE REVIEW OF COMPLAINTS AND USE OF FORCE IN THE BOSTON POLICE DEPARTMENT 3–4 (2005), http://www.nlg-npap.org/sites/default/files/Northeasternreport12-05.pdf [https://perma.cc/UFE2-ZG92].

199. For a summary of some of the important findings from the Wickersham Commission Report, see Samuel Walker, *Introduction* to RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, PART 1: RECORDS OF THE COMMITTEE ON OFFICIAL LAWLESSNESS, at v–vi (1997), http://www.lexisnexis.com/documents/academic/upa_cis/1965_wickershamcommpt1.pdf [https://perma.cc/EJ8Y-J5T2].

misconduct file complaints.[200] It was not until the last several decades, though, that the number of civilian review boards increased substantially—from thirteen in 1980,[201] to thirty-eight in 1990,[202] to around seventy in 1995.[203]

According to one 2003 estimate, civilian review boards existed in some form in around 80 percent of large American police departments.[204] But even as civilian review boards have grown in importance, police unions have attempted to use the collective bargaining process to block civilian power to oversee police discipline. In total, forty-two municipalities examined in this study have union contracts that limit civilian oversight in some way.[205]

Some contracts, like Miami's collective bargaining agreement, go so far as to dictate the composition of the administrative board tasked with handing out discipline in cases of officer misconduct. Per the Miami agreement, this administrative board consists exclusively of fellow officers—the majority of whom are selected by the officer under investigation.[206] Other contracts, like those in Baltimore,[207]

200. *Id*.

201. *Id*.

202. SAMUEL WALKER & BETSY WRIGHT, POLICE EXEC. RESEARCH FORUM, CITIZEN REVIEW OF THE POLICE, 1994: A NATIONAL SURVEY 1 (1995), https://www.ncjrs.gov/App/publications/abstract.aspx?ID=155242 [https://perma.cc/3LS6-TKDK].

203. *Id*.

204. Debra Livingston, *The Unfulfilled Promise of Civilian Review*, 1 OHIO ST. J. CRIM. L. 653, 653 (2003).

205. *See infra* Appendix B (column labeled "Limits Civilian Oversight").

206. CITY OF MIAMI, *supra* note 156, at 28. The Miami CBA states:

> All sworn bargaining unit members, prior to the final determination of a monetary fine, forfeiture of time and/or suspension in excess of two (2) tours of duty, demotion or dismissal shall, upon written request of the accused, if submitted within ten (10) working days, be afforded a review of the recommended action by a board composed of five (5) members of the Department, two (2) members selected by the Department Head and three (3) members selected by the bargaining unit member from a standing list.

*Id.*

207. CITY OF BALTIMORE, *supra* note 176, at 20, 22 ("Any employee suspended from duty with pay shall be given a suspension hearing as soon as reasonable following the suspension from duty, wherein a determination will be made at that time whether or not the employee shall remain suspended with or without pay and/or be placed on administrative duties. . . . No civilians other than an Administrative Law Judge may serve on a Departmental Hearing Board.").

Cleveland,[208] San Antonio,[209] and San Diego,[210] keep civilians from having the final say in police discipline. Several others, like those in Austin,[211] Columbus,[212] Los Angeles,[213] Seattle,[214] St. Louis,[215] and Washington, D.C.,[216] establish methods for disciplinary determinations that do not seem to leave room for civilian oversight.

Police union opposition to civilian oversight is nothing new. Historians have observed that many of the earliest experiments with civilian review boards were killed off because of "implacable opposition from police unions."[217] In fact, the rise of civilian oversight may be one of the reasons for the rise of police unionization. As police unions "began to resurface in the late 1960s, opposition to civilian

208. CITY OF CLEVELAND, *supra* note 173, at 56. The contract vests discipline power in the chief of police and the director of public safety, who is a former Cleveland chief of police. Discipline power is prohibited for Cleveland's civilian Police Review Board. *See id.* at 93 ("The undersigned parties to this Agreement agree that the Police Review Board cannot require the Chief of Police or the Safety Director to act in violation of the terms of this agreement.").

209. CITY OF SAN ANTONIO, *supra* note 158, at 85 ("Each board shall make independent recommendations . . . . Such recommendations are advisory only and are not binding on the Chief. The Citizen Advisory Action Board may not conduct a separate independent investigation but may recommend to the Chief of Police that further investigations should be undertaken.").

210. *See* CITY OF SAN DIEGO, *supra* note 159, at 53. Although this particular contract does not clearly specify that the chief has the sole authority to impose discipline, it does seemingly prevent policies from being implemented without the union's consent.

211. CITY OF AUSTIN, *supra* note 146, at 43 ("The final decision as to appropriate discipline is within the sole discretion of the Chief of Police . . . . Neither the OPM employees nor individual members of the Panel shall publicly express agreement or disagreement with the final disciplinary decision of the Chief, other than as set forth in the written recommendation.").

212. CITY OF COLUMBUS, *supra* note 149, at 22–23 ("An immediate supervisor's recommendation to impose discipline at a higher level will require review by the member's chain of command, in which case the final decision will be made by the Chief of Police.").

213. CITY OF LOS ANGELES, MEMORANDUM OF UNDERSTANDING BY AND BETWEEN THE CITY OF LOS ANGELES AND THE LOS ANGELES POLICE PROTECTIVE LEAGUE 93 (2011) (on file with the *Duke Law Journal*) (providing that the police chief must make final disciplinary decisions).

214. CITY OF SEATTLE, *supra* note 160, at 70 ("Only the Chief of Police . . . may impose discipline on bargaining unit members.").

215. CITY OF ST. LOUIS, AGREEMENT BETWEEN THE CITY OF ST. LOUIS AND THE ST. LOUIS POLICE OFFICER'S ASSOCIATION/FRATERNAL ORDER OF POLICE LODGE 68, at 19–20 (2014) (on file with the *Duke Law Journal*) (establishing a commission without citizen participation to make final determinations for all disciplinary action).

216. *See* DISTRICT OF COLUMBIA, *supra* note 161, at 10 (giving the chief of police the final say on punishment).

217. David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 572 (2008).

review was one of its chief rallying cries."[218] Ironically, despite police unions' fears, the empirical and anecdotal evidence suggests that civilians may not provide the sort of rigorous oversight of police misconduct that many had hoped.[219]

Admittedly, civilian oversight has not proven to be "the panacea many expected it to be."[220] Despite their limitations, however, civilian review boards and other forms of community participation allow the community to reassert sovereignty over police, which can empower minority communities most subject to police abuse. Such oversight may be important symbolically in building community trust, ensuring transparency, and increasing the number of civilians willing to come forward with complaints against the police.[221] Police unions in several cities have been successful in using the collective bargaining process to block or severely limit this sort of civilian oversight and engagement.

### *D. Investigation of Complaints*

Many police union contracts disqualify certain classes of civilian complaints. Thirty-two contracts limit management's authority to investigate anonymous civilian complaints.[222] Another forty-six

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218. *Id*.; *see* ROBERT M. FOGELSON, BIG-CITY POLICE 284–86 (1977); STEPHEN C. HALPERN, POLICE-ASSOCIATION AND DEPARTMENT LEADERS: THE POLITICS OF CO-OPTATION 87 (1974); JEROME H. SKOLNICK, THE POLITICS OF PROTEST 278–81 (Simon & Schuster 1969).

219. *See, e.g.*, DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 138 (1994) (suggesting that civilians may be less likely to second-guess officers than fellow officers). It is also worth noting that a Bureau of Justice Statistics study of approximately eight hundred police departments found that departments that use civilian review boards receive twice as many complaints against frontline officers, but sustain only around half as many complaints. Sklansky, *supra* note 217, at 571–75. "The end result [is] that the number of sustained complaints in the two groups, adjusting for the number of officers employed, appear[s] to be roughly equal." *Id*. at 573.

This is only one of several critiques of civilian review boards. Other scholars have suggested that civilian review boards, once constituted, are often dominated by police officers. This is because a number of civilian review boards are not entirely populated by civilians. They are often a mix of police and civilians. *See, e.g.*, Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 547 (2015); Gregory D. Russell, *The Political Ecology of Police Reform*, 20 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 567, 567–76 (1997).

220. Livingston, *supra* note 204, at 653 (quoting Samuel Walker, *Achieving Police Accountability*, *in* RESEARCH BRIEF 1998, at 2 (Ctr. on Crime, Cmtys., & Culture, Occasional Paper Series No. 3, 1998)).

221. Sklansky, *supra* note 217, at 573 ("They may be important symbolically. They may be important for transparency, and for building public confidence. If nothing else, the availability of citizen review seems to make people much more willing to come forward with complaints against the police, and that alone is significant.").

222. *See infra* Appendix B.

disqualify complaints after a set period of time,[223] whether from the initiation of the investigation or from the time of the alleged misconduct. Albuquerque,[224] Anchorage,[225] Austin,[226] Cincinnati,[227] Cleveland,[228] Columbus,[229] El Paso,[230] Glendale,[231] Honolulu,[232] Houston,[233] Jersey City,[234] Lincoln,[235] San Antonio,[236] San Diego,[237] and Seattle[238] are some of the cities that limit the investigation of civilian complaints in one of these two ways. Admittedly, there may be some

223. *See infra* Appendix B.

224. CITY OF ALBUQUERQUE, *supra* note 144, at 32 (limiting the length of internal investigations to ninety days).

225. MUNICIPALITY OF ANCHORAGE, *supra* note 145, at 8 (limiting the length of internal investigations of civilian complaints to forty-five days after initiation).

226. CITY OF AUSTIN, *supra* note 146, at 48 (establishing a 180-day limit on disciplinary actions).

227. CITY OF CINCINNATI, *supra* note 178, at 42 (applying a three-year statute of limitations to disciplinary actions).

228. CITY OF CLEVELAND, *supra* note 173, at 10–11 (preventing the chief of police from punishing officers for any noncriminal complaint filed more than six months after the alleged event and for any charges brought after one year when based on an administrative investigation lacking a citizen's complaint).

229. CITY OF COLUMBUS, *supra* note 149, at 19–21 (stating that a citizen complaint must generally be filed within sixty days of an alleged event in order for management to conduct an investigation, and establishing a ninety-day period for investigations of civilian complaints).

230. CITY OF EL PASO, *supra* note 151, at 57 (stating that disciplinary action in noncriminal matters must be taken within 180 days of an incident, and disciplinary action in criminal matters must take place within two years of the incident, or within sixty days of its discovery, whichever is later).

231. CITY OF GLENDALE, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF GLENDALE AND GLENDALE POLICE OFFICER'S COALITION 5–6 (2014) (on file with the *Duke Law Journal*) (establishing strict time limitations on the investigation of anonymous complaints).

232. STATE OF HAW., *supra* note 180, at 22 (establishing a one-year statute of limitations for investigations of misconduct and disciplinary action).

233. CITY OF HOUSTON, *supra* note 153, at 40–41 (establishing a 180-day statute of limitations on disciplinary action based upon the date that the department learns of alleged wrongdoing).

234. CITY OF JERSEY CITY, AGREEMENT BETWEEN CITY OF JERSEY CITY AND JERSEY CITY POLICE OFFICERS BENEVOLENT ASSOCIATION 64–65 (2013) (on file with the *Duke Law Journal*) (setting a time limit of fifteen to thirty days for disciplinary and criminal charges to be filed).

235. CITY OF LINCOLN, AGREEMENT BETWEEN LINCOLN POLICE UNION AND THE CITY OF LINCOLN, NEBRASKA 19 (2014) (on file with the *Duke Law Journal*) (prohibiting the investigation of complaints that allege misconduct taking place more than forty-five days ago, as well as requiring that the identity of complainants be revealed to officers).

236. CITY OF SAN ANTONIO, *supra* note 158, at 78–79 (establishing a 180-day statute of limitations for internal investigations).

237. CITY OF SAN DIEGO, *supra* note 159, at 82–83 (establishing a one-year statute of limitations for disciplinary action).

238. CITY OF SEATTLE, *supra* note 160, at 10 (establishing a 180-day statute of limitations for internal investigations).

value in avoiding endless disciplinary investigations and discouraging frivolous civilian complaints. However, many of the limitations on the investigation of civilian complaints found in modern union contracts may go too far.

First, bans on anonymous complaints may discourage some individuals from filing complaints against officers, particularly if they have been victims of police brutality and fear retribution. The history of American policing is rife with examples of police departments making it difficult to file complaints against frontline officers, including examples of police threatening those filing complaints.[239] By preventing management from investigating anonymous civilian complaints, these contracts discourage some of the most vulnerable individuals from seeking redress for officer misconduct. For instance, these rules may discourage undocumented individuals from filing complaints against problematic officers, for fear of the legal consequences. This may allow patterns of egregious misconduct against insular minorities to continue without intervention.

Second, clauses in police union contracts that establish statutes of limitations for the investigation of misconduct may frustrate accountability efforts. There is good reason to encourage the swift investigation and adjudication of civilian complaints whenever possible. It might incentivize investigators to act with reasonable diligence, so as to ensure the freshness of witness recollections and the availability of physical evidence. Nevertheless, some particularly egregious incidents of police misconduct may not come to light until years after they occurred. For example, one of the most notorious instances of documented police misconduct in American history is the so-called "midnight crew" led by Chicago Police Commander Jon Burge between 1972 and 1991.[240] Burge and a handful of fellow officers

239. The events surrounding the Rodney King beating provide one example of this problem. After the horrendous incident, one of the passengers present at the incident told Paul King, Rodney King's brother, about what had happened. Paul King went to the Foothill Police Station in Los Angeles to file a formal complaint on his brother's behalf. The sergeant at the Foothill Police Station brought King's brother to an interview room, where he waited for thirty minutes. Then, the sergeant allegedly questioned Paul about whether he had been in any trouble—a question that understandably troubled King's brother, who was there to merely report his brother's mistreatment. CHRISTOPHER COMMISSION REPORT, *supra* note 17, at 9–10.

240. Hal Dardick & John Byrne, *Mayor: Approval of Burge Victims Fund a Step Toward 'Removing a Stain*,*'* CHI. TRIB. (May 6, 2015, 5:40 PM), http://www.chicagotribune.com/ct-city-council-rauner-cupich-met-20150506-story.html [https://perma.cc/867E-6LP3] (describing efforts that Chicago has made to help victims of Burge's torture, which lasted nearly two decades); Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN

tortured over 100 people, mostly black men, in Chicago's impoverished South Side.[241] The officers allegedly used "electric shocks, beatings, smotherings and simulated Russian roulette."[242] It was not until 1993 that Chicago fired Burge—although his firing was not because of his decades of violence.[243] Even as evidence of their misconduct became public, however, Chicago's five-year statute of limitations—known as the "Burge rule"—prevented Chicago from investigating Burge and his fellow officers.[244] In sum, a substantial number of these contracts limit the types of complaints that supervisors can investigate, either through statutes of limitations or bars on the investigation of anonymous complaints, thereby frustrating accountability efforts.

### *E. Arbitration*

Finally, 115 of the union contracts studied in this Article contain language that permits or requires the use of arbitration in adjudicating officer appeals of disciplinary measures. Admittedly, arbitration is a common mechanism for adjudicating disputes in the public labor sector. State laws frequently bar certain classes of public employees, like police officers and firefighters, from striking in cases of labor disputes.[245] Thus, mandatory arbitration provides a release valve in cases of intractable contractual disputes between police unions and management. To be clear, this Article makes no objection to the use of arbitration to settle most contractual disputes. Its use in disciplinary appeals, though, has raised serious concerns among policing scholars.

Policing scholars have previously recognized that using arbitration as a disciplinary tool can frustrate police accountability. For one thing,

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THESE TIMES (June 21, 2016), http://inthesetimes.com/features/police-killings-union-contracts.html [https://perma.cc/D6QT-GBR8] (providing a brief description of the Burge incidents and using the phrase "midnight crew").

241. Dardick & Byrne, *supra* note 240.

242. *Id*.

243. Christina Sterbenz, *A Group of Rogue Cops Known as the 'Midnight Crew' Tortured Dozens of People for Decades—and Now Chicago Is Paying Millions for It*, BUS. INSIDER (May 6, 2015, 3:13 PM), http://www.businessinsider.com/r-chicago-council-approves-reparations-for-police-torture-victims-2015-5 [https://perma.cc/NRM6-CMC8] ("Burge was fired in 1993 (although not directly as a result of the violence) and later convicted of lying about police torture in testimony he gave in civil lawsuits.").

244. Emmanuel, *supra* note 240 ("Flint Taylor, a founding partner of the People's Law Office who represented many Burge victims, blames this on what he calls 'the Burge rule'—unless a police chief signs off, investigations of civilian complaints are subject to a five-year statute of limitations.").

245. SANES & SCHMITT, *supra* note 58, at 8 (showing that only Ohio and Hawaii have not explicitly barred police strikes).

arbitration almost exclusively results in reductions in disciplinary penalties handed down against officers found guilty of professional misconduct.[246] It also allows third parties, often from outside the community, to make final disciplinary decisions that can go against the will of police supervisors or civilian oversight entities.[247]

In this way, arbitration can arguably constitute an antidemocratic limitation on public oversight of law enforcement behavior. Additionally, most states make arbitration decisions binding and limit judicial review of arbitration decisions.[248] Given that the Supreme Court has held that the "refusal of courts to review the merits of an arbitration award is . . . proper," an arbitrator "can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator's opinion."[249]

## V. IMPLICATIONS AND AVENUES FOR REFORM

This Article's findings are consistent with the hypothesis that police union contracts sometimes establish problematic internal disciplinary procedures that serve as barriers to accountability. Collective bargaining advocates have previously argued that the negotiation of disciplinary procedures by public-employee unions should not result in any problematic provisions because "[i]t will rarely be in the union's interest, . . . even where feasible, to negotiate provisions that protect incompetent or abusive employees."[250]

However, it appears that expansive readings of state labor laws by employee-relations boards and courts have opened the door for police

246. *See, e.g.*, CITY OF BURBANK, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BURBANK AND THE BURBANK POLICE OFFICERS' ASSOCIATION 57 (2009) (on file with the *Duke Law Journal*) (limiting arbitrators' ability to increase punishment, but providing no such limitation on their ability to decrease punishment); David Armstrong, *Second Chance for Bad Cops*, BOS. GLOBE, May 21, 2000, at A1 (providing an example of an agency that limits police officers' accountability).

247. *See, e.g.*, Jane Prendergast & Robert Anglen, *10 Fired Officers Returned to Force: City Lost All Cases Taken to Arbitration*, CIN. ENQUIRER, Jan. 18, 2011, at A1 (describing how the City of Cincinnati lost a series of these appeals during arbitration, resulting in the city being forced to reduce punishment or reinstate officers whom the city had felt deserved harsher punishments).

248. Stoughton, *supra* note 45, at 2210.

249. *Id*. (first quoting Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960); then quoting WILL AITCHISON, THE RIGHTS OF LAW ENFORCEMENT OFFICERS 98 (6th ed. 2009)).

250. Hodges, *supra* note 70, at 147. Further, Professor Ann Hodges predicted that "union proposals for disciplinary standards and procedures will not be inimical to the merit principle." *Id*. at 146.

unions to negotiate the inclusion of a range of questionable procedures that may "protect incompetent or abusive employees."[251] Excessively delaying interrogations of officers after alleged misconduct allows officers to coordinate stories in a way that deflects responsibility for wrongful behavior. The destruction of disciplinary records makes it more difficult for supervisors to identify officers engaged in a pattern of misconduct. The disqualification of entire classes of civilian complaints prevents supervisors from even investigating potentially abusive behavior. Limitations on civilian oversight and arbitration clauses rob the public of the opportunity to monitor police behavior. This Part discusses the implications of these findings for the broader literature on police regulation and offers some normative recommendations for reforming police labor law.

### *A. Implications for Police-Reform Efforts*

The findings from this study suggest that internal police department procedures may limit the effectiveness of existing police-reform efforts. For most of American history, policymakers have relied on an array of external legal mechanisms to discourage police wrongdoing. The Supreme Court has barred the admission of some evidence obtained by police officers in violation of the Constitution via the exclusionary rule.[252] Federal law empowers victims of police misconduct to bring civil suits under 42 U.S.C. § 1983 against police officers, and in some cases police departments.[253] Under 18 U.S.C. § 242, federal prosecutors can hold a police officer criminally liable for willfully depriving a person of civil rights.[254] And state prosecutors can bring criminal charges against police officers, like any other person, in the event their conduct violates state criminal statutes. In a previous work, I have described this array of external legal mechanisms as "cost-raising misconduct regulations" because they do not force local police departments to enact specific policies to combat police misconduct, but

251. *Id.* at 147.

252. *See supra* note 40.

253. 42 U.S.C. § 1983 (2012) (establishing a statutory right for private litigants to bring civil suits against state agents who violate their "rights, privileges, or immunities").

254. 18 U.S.C. § 242 (2012) (making it a federal crime for a police officer to violate a person's constitutional rights under color of law while acting willfully and placing heavy criminal penalties on such behavior that leads to bodily injury); U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES 143 (1981), http://hdl.handle.net/2027/uc1.32106015219253 [https://perma.cc/9TLE-4V4V].

instead, they merely raise the cost of officer misconduct by exacting monetary, evidentiary, or criminal penalties.[255]

In theory, as these external legal mechanisms increase the cost borne by police departments in cases of officer misconduct, police supervisors should rationally respond by improving officer training and designing internal procedures to ferret out officer wrongdoing. Yet in many of the nation's largest cities, supervisors cannot always respond to external legal pressure by implementing rigorous disciplinary procedures because of collective bargaining agreements, civil service laws, and LEOBRs. Scholars have long lamented the apparent ineffectiveness of external legal mechanisms in bringing about reform in local police practices.[256] A growing consensus in the late twentieth century emerged that these external, cost-raising mechanisms were sometimes ineffective at transforming the organizational culture or practices of police departments.[257] In the past, participants in this conversation have not fully recognized the ways that police labor and employment law may contribute to questionable internal disciplinary measures. Even when faced with the sting of evidentiary exclusion or the heavy financial burden of civil suits, police union contracts can make it challenging for police chiefs to hold officers accountable for wrongdoing.

It is also important to recognize the limitations of this Article's findings. It remains unclear whether, and to what extent, the collective bargaining process contributes to the lax disciplinary procedures identified in this Article. Even without the negotiation of internal procedures via the collective bargaining process, communities may have nevertheless enacted similar procedures through alternative processes. This Article does not show a causal relationship between the use of collective bargaining and the implementation of questionable disciplinary procedures. Nevertheless, this Article's findings are consistent with the hypothesis that police labor law can frustrate accountability efforts, thereby limiting the effectiveness of traditional, cost-raising forms of police regulation. More research is necessary to

255. Rushin, *Federal Enforcement*, *supra* note 43, at 3196.

256. On the limitations of these existing mechanisms, *see supra* notes 40–42 and accompanying text.

257. *See generally* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–25 (2004) (describing the organizational roots of police misconduct).

understand the relationship between collective bargaining and internal disciplinary procedures.

Police union contracts can also thwart federal efforts to reform local police departments via structural reform litigation. In 1994, Congress authorized the U.S. attorney general to seek equitable relief against local and state police departments engaging in a pattern or practice of unconstitutional misconduct under § 14141 of the Violent Crime Control and Law Enforcement Act.[258] Effectively, this statute gives the DOJ the power to compel cities, under threat of litigation, to invest in costly reform measures aimed at curbing officer wrongdoing.[259] The DOJ has used § 14141 to investigate and reform dozens of police departments.[260] The DOJ has been careful to state in consent decrees and memorandums of understanding—like the one in Pittsburgh in 1997—that "[n]othing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police."[261] Were the DOJ to attempt to overturn any language in Pittsburgh's collective bargaining agreement, the Fraternal Order of Police may have had standing to challenge the federal consent decree, which could have led to a broader challenge to the constitutionality of the DOJ's recommended reforms. So instead, the DOJ has opted to work around police union contracts. As the former chief of the Special Litigation Section of the Civil Rights Division explained, this means that police union contracts narrow the field of reforms that the DOJ can request in § 14141 cases.[262]

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258. 42 U.S.C. § 14141 (2012) ("It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution . . . ."). Under § 14141, relief can be sought "[w]henever the Attorney General has reasonable cause to believe" that there is a pattern or practice of misconduct by "obtain[ing] appropriate equitable and declaratory relief to eliminate the pattern or practice" in a civil action. *Id.*

259. *See generally* Rushin, *Federal Enforcement*, *supra* note 43, at 1367–77 (providing a detailed look at the DOJ's use of § 14141, based on semistructured interviews with stakeholders involved in the process).

260. Rushin, *Using Data*, *supra* note 122, at 157 (stating that the DOJ investigated about fifty-five police departments and reached settlements with twenty-two of these agencies between 1994 and 2012).

261. Consent Decree at 4, United States v. City of Pittsburgh, No. 97-cv-00354 (W.D. Pa. Feb. 26, 1997), http://www.clearinghouse.net/chDocs/public/PN-PA-0003-0002.pdf [https://perma.cc/W65H-DSV4].

262. Jonathan M. Smith, *Police Unions Must Not Block Reform*, N.Y. TIMES (May 29, 2015), http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html [https://perma.cc/TM8G-G8R9] (stating that "[i]n big cities, where police unions have political clout, rigid union contracts also restricted the ability of police chiefs and civilian oversight bodies to tackle

In at least seven of these § 14141 cases—Albuquerque, Los Angeles, Newark, Pittsburgh, Portland, Seattle, and the Virgin Islands—existing collective bargaining provisions presented a roadblock to federal reform efforts.[263] In Pittsburgh, the union contract has prevented investigators from considering all complaints because of a clause that establishes a ninety-day statute of limitations on civilian-complaint investigations.[264] In Portland, a union contract provision that prevents investigators from talking to officers for forty-eight hours after a use-of-force incident has hampered federal efforts to reform internal investigations.[265] And in Newark, the Fraternal Order of Police has tried to block the creation of a civilian oversight entity that could review complaints, impose disciplinary actions, and recommend policies to improve policing, arguing that such a move would violate its collective bargaining agreement.[266]

When Congress passed § 14141, numerous policing scholars hailed the measure as one of the most important regulations of officer misconduct in American history, claiming that it could potentially transform the organizational culture in American police departments.[267] Until recently, though, little scholarship has recognized how state labor laws can frustrate the enforcement of § 14141. In sum, the evidence from this Article suggests that police union contracts may pose an underappreciated barrier to police reform.

### *B. Reforming Police Labor Laws*

Police officers need reasonable procedural safeguards during disciplinary investigations. At the same time, these procedural protections should not go so far as to shield offending officers from accountability. Unfortunately, in many of the nation's largest cities, it appears that the balance may have tipped too heavily in favor of

misconduct" and "[a]s a result, an officer involved in a shooting often cannot be interviewed at the scene; internal affairs investigators have to wait days to get a statement").

263. Emmanuel, *supra* note 240 (citing these cities as cases where DOJ reform efforts were stalled or delayed because of collective bargaining provisions, and stating that, "[i]n these cities, police contract protections appear to have weakened or stalled efforts to improve the handling of police misconduct, to create or extend civilian oversight, or to establish early-warning systems for problem cops").

264. *Id*.

265. *Id*.

266. *Id*.

267. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 798–99 (2006); *see also* Armacost, *supra* note 257, at 457 (stating that § 14141 is "perhaps the most promising legal mechanism" for reducing police misconduct).

protecting police officers while handcuffing internal investigations. In many localities across the country, police officers receive more procedural protections than other government employees during disciplinary investigations.[268] If, as hypothesized, the structure of the collective bargaining process contributes to the development of these questionable disciplinary procedures, policymakers ought to rethink the structure of the collective bargaining process in American police departments. To address this hypothesized problem, this Article suggests a few ways that states could amend labor laws to increase transparency and community participation in the development of police disciplinary procedures.

First, states could amend their labor laws to require municipalities to make collective bargaining sessions over police disciplinary procedures open to the public. In so doing, states could require municipalities to make drafts of police disciplinary procedures available to the public before ratification. Or, perhaps more radically, states could democratize the development of police disciplinary measures by requiring that they be developed outside of the collective bargaining process in a manner that incorporates input from the public and relevant interest groups.

This public process could take many different forms. Communities could elect civilians to a commission tasked with the creation of police disciplinary procedures, with recommendations from police management and union leaders. Communities could establish notice-and-comment procedures, similar to those employed by many administrative agencies, to promulgate disciplinary policies. Conversely, states could require communities to establish police disciplinary procedures in the same manner that they establish municipal ordinances—presumably through a public hearing and vote by local elected officials. Any of these approaches would provide the public with a greater opportunity to shape police disciplinary measures than currently exists in many localities, while still permitting police unions to negotiate collectively on a wide range of topics, including salaries, benefits, retirement, vacation time, holidays, promotion standards, and more.

Increased transparency and public participation may result in more balanced police disciplinary procedures that do not afford

268. *See, e.g.*, Stern, *supra* note 141 (discussing the special rights that Louisiana "gives law enforcement officers suspected of illegal conduct [that go] far beyond those afforded to regular citizens").

officers an unreasonable advantage during internal investigations. First, these proposals would increase participation by stakeholders whom state labor laws currently exclude from the traditional collective bargaining process—namely, minority groups most at risk of experiencing police misconduct. In most states, collective bargaining happens outside of the public view. Only eight states require municipalities to conduct bargaining sessions related to police disciplinary policies in public.[269] Only four states require municipalities to make drafts of police disciplinary procedures public before ratifying collective bargaining agreements.[270]

The collective bargaining process generally excludes individuals most at risk of experiencing police misconduct. During these negotiations, a typical bargaining team for the municipality may include a chief negotiator, the budget or finance director, legal counsel, a representative from human resources, the police chief or some other high-ranking supervisor from the police department, and middle management from the police department like sergeants, lieutenants, and captains.[271] The police union bargaining team will typically include a union representative, a union negotiator, and in some cases, a handful of rank-and-file officers.[272] Typically missing from the bargaining table is any party likely to prioritize the interests of minority groups most at risk of police misconduct. This Article's proposal represents a more collaborative approach to the negotiation of police disciplinary policies that would ensure the participation of more relevant stakeholders.

Second, some of these proposals would force municipalities to consider the merits of police disciplinary procedures on their own, rather than having them become a bargaining chip in a broader budgetary negotiation. As currently structured, most municipalities negotiate with police unions about disciplinary procedures alongside salaries, benefits, vacation time, promotion procedures, and more. Under these conditions, it is not uncommon for the two sides to make

269. These states are Florida, Idaho, Iowa, Kansas, Minnesota, Montana, Oregon, and Texas. Two states—Alaska and Colorado—only provide for such transparency in collective bargaining sessions involving teachers. ABRAHAM, *supra* note 39, at 5–8 (providing links to various state statutes).

270. These states are Florida, Montana, Ohio, and Texas. *Id*.

271. SAM ASHBAUGH, GOV'T FIN. OFFICERS ASS'N, AN ELECTED OFFICIAL'S GUIDE TO NEGOTIATING AND COSTING LABOR CONTRACTS 11–13 (2003), http://www.gfoa.org/sites/default/files/AnElectedOfficialsGuideToNegotiatingAndCostingLaborContracts.pdf [https://perma.cc/9PAL-6TC7].

272. *Id*. at 14.

trade-offs—for example, a police union may accept a smaller than desired raise in officer salaries in exchange for more control over disciplinary procedures.[273]

Even for municipalities that are ideologically opposed to such disciplinary concessions, the temptation can be irresistible if such a concession results in a smaller hit to the municipal budget. Chicago presents a cautionary tale of how municipalities that are strapped for cash have strong incentives to offer concessions on officer accountability in return for lower officer salaries. In the wake of the Laquan McDonald shooting, an investigation by the *Chicago Tribune* found that "[f]rom the moment Chicago's Fraternal Order of Police started negotiating its first contract with City Hall 35 years ago, the union identified an issue that would prove key to its members: ensuring officers had robust protections when they were investigated for misconduct."[274]

By contrast, cash-strapped Chicago officials have been primarily concerned with holding "tight on the bottom line" by avoiding significant increases in salaries and benefits.[275] When it became apparent during negotiations that Chicago—a city that was facing a significant budget crunch—could not meet union salary demands, the Fraternal Order of Police instead demanded that Chicago "pony up" by making concessions on disciplinary procedures.[276] And once Chicago agreed to these lenient disciplinary procedures, it found it difficult to revert back.[277]

The proposals in this Article could help remedy this problem. By forcing municipalities and police unions to negotiate disciplinary procedures in transparent hearings, the public may be put on notice if cities are using lax disciplinary procedures as a bargaining chip to secure lower officer salaries. This, in turn, may discourage such trade-

273. *Id*. at 66 (advising government officials to avoid the temptation to trade management control of employees in exchange for economic concessions); John Chase & David Heinzmann, *Cops Traded Away Pay for Protections in Police Contracts*, CHI. TRIB. (May 20, 2016, 8:36 AM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html [https://perma.cc/3H2D-DH24].

274. Chase & Heinzmann, *supra* note 273.

275. *Id*.

276. *Id*. (quoting former Fraternal Order of Police President John Dineen, who said candidly that "[t]he city didn't have a lot of money but they wanted to keep the police happy, so they'd tell us what we'd get" and "[i]t was always working conditions versus money").

277. *Id*. (discussing in part the efforts by the city to establish a shorter waiting period before interviewing police officers after officer-involved shootings and describing how these efforts were ultimately overturned by an arbitrator ruling in 2011).

offs, thereby forcing the municipalities and police unions to negotiate the content of disciplinary procedures as a standalone issue, with the benefit of public input.

Third, and relatedly, transparency is likely to reduce regulatory capture and corruption.[278] Scholars have documented that police unions are a powerful political constituency.[279] Police union support can be pivotal in local and state elections.[280] Thus, there is legitimate concern that the collective bargaining process in police departments "amount[s] to a division of spoils" rather than a thoughtful compromise.[281] By opening up the negotiation process to the public, relevant stakeholders should, theoretically, be able to monitor the actions of municipal officials during the negotiation of police union contracts and prevent the kind of troubling disciplinary trade-offs that have happened in major cities like Chicago.

### *C. Limitations on Reform*

Nevertheless, police union leaders and other critics may object to increasing transparency and public participation in the development of police disciplinary procedures for several reasons. To begin with, some point out that this Article's proposal treats police officers differently than other public employees. State labor laws allow virtually all other groups of public employees to bargain about disciplinary procedures without the additional burden of a public, participatory process as proposed in this Article. Why should police officers be any different?

This Article argues that, because of the power wielded by frontline officers and the high social cost of officer misconduct,[282] the public

278. *See generally* Mehmet Bac, *Corruption, Connections and Transparency: Does a Better Screen Imply a Better Scene?*, 107 PUB. CHOICE 87 (2001) (arguing that a higher level of transparency increases the probability of corruption detection); Catharina Lindstedt & Daniel Naurin, *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 INT'L POL. SCI. REV. 301 (2010) (arguing that while transparency is an important tool for reducing corruption in government institutions, it is most effective when there is a strong education system, an independent press, and free and fair elections).

279. *See, e.g.*, Douthat, *supra* note 123 (noting that even among conservative Republicans who generally oppose public-employee unionization in other contexts, police unions have maintained strong public support; in fact, police unions have been "insulated from any real pressure to reform").

280. *Id.*

281. *Id.*

282. *See generally, e.g.*, VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS (2011) (describing the social costs of negative police interactions with communities of color in Oakland, California).

ought to have greater input in the development of police disciplinary procedures. Unlike other public employees, police officers generally carry firearms, make investigatory stops, conduct arrests, and use lethal force when needed. Additionally, municipalities necessarily give frontline police officers significantly more discretion than other public employees.[283] Officers encounter "people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed."[284]

While discretion is a necessary part of policing, it is inevitable that some officers will abuse such discretion. The "supervision of subordinates with broad discretion and responsibilities" is especially tough, meaning that superiors cannot meaningfully "hold officers accountable for everything all the time."[285] Some misconduct is an unavoidable part of having a police force.[286] Given their discretion and

283. Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (explaining the necessity of discretion in police work and defining discretion as "the power to consider all circumstances and then determine whether any legal action is to be taken" and "if so taken, of what kind and degree, and to what conclusion").

The academic literature has long observed that, as frontline workers, police officers need discretion to complete their jobs. In the past, it has observed that there are two different types of discretion in modern police work. First, there is the discretion officers must exercise when they decide which laws to enforce most aggressively. Second, there is the discretion officers must exercise in how they enforce those laws. *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (observing how police, as street-level bureaucrats, have the ability to exercise influence over public policy); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE (2003) (analyzing how street-level bureaucrats like police officers have to deal with competing tensions of law abidance and cultural abidance); Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 POLICE ADMIN. REV. 140 (1963) (arguing that police officers must make decisions on which laws to enforce rigidly, and which laws to enforce less aggressively, thereby shaping the meaning of the law).

If police did not have the ability to exercise discretion, "the criminal law would be ordered but intolerable." Breitel, *supra*, at 427. This has been well understood going back to the President's Commission on Law Enforcement and Administration of Justice, which recognized the importance of discretion. The authors of that report noted that police "are charged with performing [their jobs] where all eyes are upon them and where the going is always roughest, on the street." PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf [https://perma.cc/UUB9-4QYB].

284. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN OF JUSTICE, *supra* note 283, at 91.

285. LIPSKY, *supra* note 283, at 164.

286. In the last century, the academic literature has recognized countless examples of how police discretion is invariably tied to some misconduct. One of the first national recognitions of widespread misconduct among police officers came in 1931, when the National Commission on Law Observance and Enforcement, appointed by President Herbert Hoover, released the

legal authority to use force, misconduct by police officers can have far more serious—and deadly—consequences than misconduct by other public employees. A single "bad cop . . . can leave his victim dead or permanently damaged, and under the right circumstances one cop's bad call—or a group of cops' habitual [bad behavior]—can be the spark that leaves a city like Baltimore in flames."[287] Thus, there is a compelling public policy need for the public to have greater input in the development of police disciplinary procedures.

Second, critics may argue that a transparent and public negotiation about disciplinary procedures could reduce efficiency and result in fewer genuine, good-faith discussions about the merits of different disciplinary regimes. Public participation may result in each side appealing to the "lowest common denominator" and pandering to constituents during public hearings, rather than engaging in frank discussions about the complex array of issues at stake.[288] Public negotiations may also be less likely to result in amicable compromises, as negotiators may be less willing to make trade-offs on particularly contentious issues if facing immediate public backlash.[289]

Admittedly, closed-door labor negotiations can offer some real advantages. However, the risk of such closed-door negotiations is that the resulting compromise will not adequately reflect community values.[290] This risk is heightened in the context of police disciplinary procedures in most states, where those individuals who are most at risk

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Wickersham Commission Report. Since the *Report on Lawlessness in Law Enforcement*, "no fewer than six national commissions [have] examined various dimensions" of police misconduct in the United States. Michael S. Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 LAW & SOC. INQUIRY 171, 172 (2008). These reports, along with other academic research, have found certain categories of misconduct to be common across different policing agencies: racial profiling, excessive use of force, unlawful searches and seizures, failures to cooperate with investigations involving fellow officers, dishonesty at trial, and the planting of evidence. Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59, CATH. U. L. REV. 373, 380–81 (2010).

287. Douthat, *supra* note 123.

288. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1349–50 (2011) (acknowledging that transparency can create "a decision-making environment in which the lowest common denominator dimensions of widespread public involvement would cause bad arguments to drive out good ones").

289. *See* David Stasavage, *Does Transparency Make a Difference? The Example of the European Council of Ministers*, *in* CHRISTOPHER HOOD & DAVID HEALD, TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 165, 169 (2006) (stating that "secretive environments help to produce compromises in bargaining").

290. *See* Schauer, *supra* note 288, at 1348–50 (describing the democratic value of transparency in government decisionmaking).

from officer wrongdoing have little say in the current collective bargaining process. A genuine and frank discussion of police disciplinary procedures ought to include the members of the public most at risk of falling victim to police brutality.

Third, some may worry that a public process, particularly at a time when police are under significant national scrutiny,[291] could swing the pendulum in the opposite direction; that is, it may result in virtually no procedural protections for officers facing disciplinary investigations. While potentially problematic, this result seems highly unlikely. For one, police officers are still typically protected by civil service laws that establish basic procedures for hiring, promotion, and in some cases disciplinary procedures.[292] Police officers themselves remain one of the most powerful political constituencies in the United States.[293]

In fact, police officers are such a powerful political constituency that civil rights advocates may worry that even a transparent and public process will not correct the underlying problem. Even with more transparency and public participation, police unions may still be able to lobby local political leaders for excessive procedural protections during disciplinary investigations. For evidence of this objection, we need look no further than LEOBRs, which state legislatures passed after public debate and hearings. If transparency and public participation did not prevent the passage of LEOBRs in sixteen states, why would it prevent municipalities from passing similarly protective measures after a public debate?

No doubt, increasing transparency and public participation in the development of police disciplinary procedures will not cure all problems. Many municipalities will still opt for overly protective procedures that have the effect of limiting police accountability and oversight. Nevertheless, there is still good reason to believe that the addition of public participation and transparency will result in more balanced disciplinary procedures. Only 32 percent of states have passed LEOBRs through their state legislatures, while it appears that a higher portion of large municipalities that engage in collective

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291. *See generally* HEATHER MAC DONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016) (arguing that the current political environment has put unreasonable pressure on police officers, making them less aggressive and contributing to an uptick in crime).

292. *See supra* Part I.B.

293. *See generally* Rushin, *Using Data*, *supra* note 122, at 135–54 (discussing the political power of police groups as compared to the victims of police misconduct and arguing that these political barriers make bottom-up, organic police reform challenging).

bargaining with their police forces have restricted internal investigations in some potentially problematic way.[294] In other words, police officers have been more successful in obtaining unreasonably burdensome procedural protections through the collective bargaining process than through more public processes.

Fourth, some may claim that frontline officers' inability to negotiate disciplinary procedures through the traditional collective bargaining process may result in reduced morale and other forms of pushback.[295] Admittedly, one of the benefits of collective bargaining for disciplinary procedures is that it may promote fairness, reduce arbitrary discipline, and improve employee morale.[296] In other policing contexts, there is evidence that external attempts to overhaul disciplinary procedures without support from police unions resulted in opposition, decreases in enforcement, and ultimately de-policing.[297] From a procedural justice perspective,[298] it may be advantageous to give frontline police officers or their union representatives a voice in the development of disciplinary procedures.

But none of the proposals in this Article would prevent police unions or frontline officers from having a seat at the table in the development of police disciplinary procedures. Instead, this Article merely proposes opening up the development of police disciplinary procedures to the public—either through increasing transparency and public participation in the collective bargaining process or through

294. For a description and evaluation of LEOBRS from fifteen states, see *supra* Part I.C and *infra* Appendix C.

295. *See, e.g.*, Fisk & Richardson, *supra* note 47 (manuscript at 28, 52–53) (explaining how officers who are excluded from the process of establishing internal disciplinary policies may feel "compelled to oppose new policies for fear that the policy will be implemented punitively or unfairly as a way to discipline rank and file who are unpopular with management," and further explaining how "failing to give [frontline officers] any voice" in designing internal policies may fuel resentment because it communicates to them "just how unimportant their views" are and "just how low their status" is within the department).

296. Hodges, *supra* note 70, at 98–99 ("Protection from arbitrary or unjust discipline is a primary motivation for employee unionization."); Charles C. Killingsworth, *Grievance Adjudication in Public Employment*, 13 ARB. J. 3, 15 (1958) (stating that impartial grievance procedures are important for employee morale).

297. *See generally, e.g.*, Rushin & Edwards, *supra* note 82 (demonstrating empirically how federal intervention in police departments is associated with a temporary uptick in crime rates, likely from officers pulling back on street policing).

298. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283 (2003) ("Legal authorities gain when they receive deference and cooperation from the public. Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public.").

democratizing the development of disciplinary procedures. In either scenario, police unions would still play an important role, either as a party during contract negotiations or as a powerful political constituency during a legislative process.

This proposal merely provides other stakeholders with a more direct role in collaboratively developing disciplinary procedures. While transparency and public participation will not prevent all problematic provisions in police union contracts, sunlight has proven time and time again to be the "best of disinfectants."[299]

## CONCLUSION

Few cases better illustrate the complex relationship between police misconduct investigations and labor law than the tragic death of Alton Sterling in Baton Rouge. On July 5, 2016, multiple bystanders recorded the encounter between Sterling and two Baton Rouge police officers.[300] These videos appeared to show the officers shooting Sterling six times in the chest and back from point-blank range.[301] In the aftermath of this horrific event, the public was left with more questions than answers. Was Sterling armed? Did the officers need to use deadly force? And would the disciplinary procedures allow justice to be served?

Labor law protections may make it difficult to answer these questions. Under Louisiana's LEOBR and Baton Rouge's police union contract, officers do not have to answer any questions after a use-of-force incident for thirty days,[302] and internal investigators must complete any subsequent investigation within sixty days.[303] Even if such an investigation results in disciplinary action, all references to

299. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (1914).

300. Richard Fausset, Richard Pérez-Peña & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html [https://perma.cc/4BZC-3EGV].

301. Steph Solis, *Protests Break Out After Baton Rouge Police Fatally Shoot Man*, USA TODAY (July 6, 2016, 11:35 AM), http://www.usatoday.com/story/news/nation/2016/07/05/baton-rouge-alton-sterling-police-shooting/86738368/ [https://perma.cc/36DW-2D47].

302. LA. STAT. ANN. § 40:2531 (2014) (stating that a police officer "shall be granted up to thirty days to secure such representation, during which time all questioning shall be suspended").

303. *Id.* (stating that "each investigation of a police employee or law enforcement officer which is conducted under the provisions of this Chapter shall be completed within sixty days").

Sterling's death will eventually be erased from the officers' personnel records in as few as eighteen months.[304]

As this Article demonstrates, Baton Rouge is hardly alone. Across America's largest cities, many police officers receive excessive procedural protections during internal disciplinary investigations, effectively immunizing them from the consequences of misconduct. And so communities of color have taken to the streets to express their outrage. Those victimized most by police misconduct have used Sterling's death, and the deaths of so many others, to remind the nation that their lives matter.

Going forward, more research is needed on the relationship between state labor law and internal police disciplinary procedures. Future studies could compare the content of internal disciplinary procedures created through the collective bargaining process with those created through alternative processes. Alternatively, future studies could compare the content of police union contracts with collective bargaining agreements in other fields. These methodologies could shed light on whether the unique structure of collective bargaining plays any role in the creation of weak disciplinary procedures in American police departments.

But even in the absence of this sort of definitive evidence, there is still reason to believe that the public should have more say in the development of police accountability mechanisms. For too long, the law has excluded the public from the development of these procedures. It is time to remove this process from the shadows and make the police more accountable to the communities they serve.

304. CITY OF BATON ROUGE, AGREEMENT BETWEEN THE CITY OF BATON ROUGE AND BATON ROUGE UNION OF POLICE LOCAL 237, at 13 (2015) (on file with the *Duke Law Journal*) (establishing a system for purging disciplinary records after anywhere from eighteen months to five years, depending on the outcome of the investigation and the severity of the punishment).

## APPENDIX A: PROFILE OF MUNICIPALITIES STUDIED[305]

| Name of Agency | Sworn Officers |
|---|---|
| Abilene | 170 |
| Akron | 412 |
| Albuquerque | 864 |
| Anaheim | 374 |
| Anchorage | 374 |
| Ann Arbor | 117 |
| Aurora | 657 |
| Austin | 1,709 |
| Bakersfield | 370 |
| Baltimore | 2,779 |
| Baton Rouge | 662 |
| Beaumont | 257 |
| Bellevue | 160 |
| Berkeley | 168 |
| Billings | 141 |
| Boise | 259 |
| Boston | 2,151 |
| Boulder | 174 |
| Bridgeport | 389 |
| Brownsville | 245 |
| Buffalo | 737 |

| Name of Agency | Sworn Officers |
|---|---|
| Lexington | 540 |
| Lincoln | 320 |
| Little Rock | 557 |
| Long Beach | 786 |
| Los Angeles | 9,907 |
| Louisville | 1,252 |
| Madison | 462 |
| Manchester | 223 |
| McAllen | 266 |
| Memphis | 2,233 |
| Mesquite | 213 |
| Mesa | 812 |
| Miami | 1,148 |
| Milwaukee | 1,890 |
| Minneapolis | 836 |
| Miramar | 194 |
| Modesto | 207 |
| Naperville | 160 |
| Nashville | 1,389 |
| New Haven | 458 |
| New York City | 34,581 |

305. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, tbl. 78: FULL-TIME LAW ENFORCEMENT EMPLOYEES BY CITY (2014).

| Name of Agency | Sworn Officers |
|---|---|
| Burbank | 146 |
| Carlsbad | 110 |
| Cedar Rapids | 206 |
| Chandler | 315 |
| Chicago | 12,034 |
| Chula Vista | 212 |
| Cincinnati | 961 |
| Clearwater | 230 |
| Cleveland | 1,476 |
| Columbus | 1,852 |
| Concord | 151 |
| Coral Springs | 200 |
| Corpus Christi | 449 |
| Costa Mesa | 113 |
| Dallas | 3,543 |
| Daly City | 111 |
| Davenport | 160 |
| Davie | 171 |
| Dayton | 361 |
| Denton | 158 |
| Denver | 1,430 |
| Des Moines | 354 |
| Detroit | 2,318 |
| District of Columbia | 3,935 |

| Name of Agency | Sworn Officers |
|---|---|
| Newark | 1,014 |
| Norman | 171 |
| North Las Vegas | 262 |
| Oakland | 715 |
| Oklahoma City | 1,041 |
| Omaha | 793 |
| Ontario | 228 |
| Orange | 150 |
| Orlando | 707 |
| Oxnard | 241 |
| Paterson | 398 |
| Pembroke Pines | 231 |
| Peoria, AZ | 180 |
| Peoria, IL | 209 |
| Philadelphia | 6,410 |
| Phoenix | 2,805 |
| Pittsburgh | 913 |
| Pomona | 157 |
| Port St. Lucie | 217 |
| Portland | 935 |
| Pueblo | 191 |
| Reno | 300 |
| Renton | 112 |
| Rialto | 100 |

| Name of Agency | Sworn Officers |
|---|---|
| Downey | 108 |
| Duluth | 144 |
| El Monte | 114 |
| El Paso | 1,069 |
| Elgin | 173 |
| Elk Grove | 126 |
| Escondido | 153 |
| Eugene | 180 |
| Evansville | 281 |
| Fairfield | 112 |
| Fontana | 183 |
| Fremont | 181 |
| Fresno | 708 |
| Ft. Collins | 196 |
| Ft. Lauderdale | 501 |
| Ft. Wayne | 375 |
| Ft. Worth | 1,536 |
| Fullerton | 137 |
| Gainesville | 297 |
| Garden Grove | 152 |
| Glendale | 386 |
| Grand Rapids | 283 |
| Green Bay | 190 |
| Gresham | 120 |

| Name of Agency | Sworn Officers |
|---|---|
| Richmond, CA | 180 |
| Riverside | 364 |
| Rochester | 713 |
| Rockford | 280 |
| Roseville | 119 |
| Sacramento | 623 |
| Salem | 181 |
| Salinas | 135 |
| Salt Lake City | 428 |
| San Antonio | 2,388 |
| San Diego | 1,876 |
| San Francisco | 2,137 |
| San Jose | 966 |
| San Leando | 136 |
| San Mateo | 140 |
| Santa Ana | 264 |
| Santa Clara | 141 |
| Santa Rosa | 166 |
| Seattle | 1,323 |
| Sioux City | 244 |
| Spokane | 295 |
| Springfield, MO | 302 |
| St. Louis | 1,384 |
| St. Paul | 627 |

| Name of Agency | Sworn Officers |
|---|---|
| Hartford | 420 |
| Hayward | 175 |
| Henderson | 329 |
| Hialeah | 300 |
| Hillsboro | 130 |
| Hollywood | 311 |
| Honolulu | 2,093 |
| Houston | 5,252 |
| Huntington Beach | 207 |
| Indianapolis | 1,536 |
| Inglewood | 162 |
| Irvine | 200 |
| Jacksonville | 1,576 |
| Jersey City | 790 |
| Joliet | 257 |
| Kansas City | 1,398 |
| Kent | 136 |
| Lansing | 192 |
| Laredo | 442 |
| Las Vegas | 2,485 |

| Name of Agency | Sworn Officers |
|---|---|
| St. Petersburg | 531 |
| Stamford | 278 |
| Sterling Heights | 144 |
| Stockton | 371 |
| Sunnyvale | 205 |
| Tacoma | 326 |
| Tampa | 952 |
| Tempe | 349 |
| Toledo | 615 |
| Topeka | 287 |
| Torrance | 210 |
| Tucson | 934 |
| Tulsa | 765 |
| Vallejo | 101 |
| Visalia | 139 |
| Waco | 248 |
| Waterbury | 271 |
| West Palm Beach | 274 |
| Wichita | 598 |
| Worchester | 440 |
| **TOTAL** | **170,625** |

## APPENDIX B: CONTENT OF COLLECTIVE BARGAINING AGREEMENTS

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Abilene | ■ | ■ | ■ | | | | |
| Akron | | | ■ | | ■ | | ■ |
| Albuquerque | ■ | | ■ | ■ | | ■ | |
| Anaheim | | | | | | | ■ |
| Anchorage | ■ | ■ | ■ | ■ | | | ■ |
| Ann Arbor | ■ | ■ | | ■ | ■ | ■ | ■ |
| Aurora | | | | | | | |
| Austin | ■ | ■ | ■ | ■ | | ■ | ■ |
| Bakersfield | | | | | | ■ | |
| Baltimore | | | ■ | | | ■ | |
| Baton Rouge | | | ■ | | | | |
| Beaumont | | | ■ | ■ | | | ■ |
| Bellevue | | | | ■ | | | ■ |
| Berkeley | | | | ■ | | | ■ |
| Billings | | ■ | | | ■ | | ■ |
| Boise | | | | | | | ■ |
| Boston | | | | | | | ■ |
| Boulder | | ■ | | ■ | | | ■ |
| Bridgeport | | | ■ | | ■ | | ■ |
| Brownsville | ■ | | ■ | | ■ | | ■ |
| Buffalo | | | | ■ | ■ | | |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Burbank | | | | | | | ■ |
| Carlsbad | | | ■ | | | | ■ |
| Cedar Rapids | | | | | ■ | | ■ |
| Chandler | ■ | ■ | ■ | | | | |
| Chicago | ■ | | ■ | | ■ | | ■ |
| Chula Vista | | | | | | | |
| Cincinnati | | | ■ | ■ | | | ■ |
| Clearwater | | | | | | | ■ |
| Cleveland | | | ■ | ■ | | ■ | ■ |
| Columbus | ■ | | ■ | ■ | ■ | ■ | ■ |
| Concord | | | | | | ■ | ■ |
| Coral Springs | | | | | | | ■ |
| Corpus Christi | ■ | ■ | | | ■ | | ■ |
| Costa Mesa | | | | | | | ■ |
| Dallas | | | | | | | |
| Daly City | | | | | | | |
| Davenport | | | | | | | ■ |
| Davie | | | | | | | ■ |
| Dayton | ■ | | ■ | ■ | | | ■ |
| Denton | | | | ■ | | | |
| Denver | | | | | | | |
| Des Moines | | | | | | | |
| Detroit | ■ | | ■ | | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Downey | | | | | | | |
| Duluth | | | ■ | | | | ■ |
| El Monte | | | | | | | |
| El Paso | ■ | | | ■ | | ■ | ■ |
| Elgin | | | ■ | | | | ■ |
| Elk Grove | | | ■ | | | | ■ |
| Escondido | | | | | | | |
| Eugene | ■ | | ■ | ■ | | | ■ |
| Evansville | ■ | ■ | ■ | | ■ | ■ | |
| Everett | ■ | | | | | | ■ |
| Fairfield | | | | | | ■ | ■ |
| Fontana | | | | | | | |
| Fremont | | | | | | | |
| Fresno | | | | | | | |
| Ft. Collins | | | | | | | |
| Ft. Lauderdale | | ■ | | | ■ | | ■ |
| Ft. Wayne | ■ | ■ | | | ■ | | |
| Ft. Worth | ■ | | | | | ■ | |
| Fullerton | | | | | | | ■ |
| Gainesville | | | ■ | ■ | ■ | | ■ |
| Garden Grove | | | | | | | |
| Glendale | | | ■ | ■ | ■ | | |
| Grand Rapids | | | ■ | | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Green Bay | | ■ | ■ | | | | ■ |
| Gresham | | | ■ | | | | ■ |
| Hartford | | | | | | | ■ |
| Hayward | | | | | | | ■ |
| Henderson | | | ■ | | | | ■ |
| Hialeah | | ■ | ■ | ■ | ■ | | ■ |
| Hillsboro | ■ | ■ | ■ | ■ | | | ■ |
| Hollywood | | | | | | | ■ |
| Honolulu | | | ■ | ■ | | ■ | ■ |
| Houston | ■ | | | ■ | | ■ | |
| Huntington Beach | | | | | | | ■ |
| Indianapolis | | | ■ | ■ | | | |
| Inglewood | | | | | | | ■ |
| Irvine | | | ■ | | | | |
| Jacksonville | ■ | ■ | ■ | | | | ■ |
| Jersey City | | | ■ | ■ | | | ■ |
| Joliet | ■ | ■ | ■ | ■ | ■ | | ■ |
| Kansas City | ■ | ■ | | | ■ | ■ | |
| Kent | ■ | | ■ | | ■ | | ■ |
| Lansing | | | ■ | | ■ | | ■ |
| Laredo | ■ | ■ | ■ | | | | ■ |
| Las Vegas | ■ | ■ | ■ | | | | ■ |
| Lexington | | | ■ | ■ | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Lincoln | ■ | | ■ | ■ | ■ | ■ | |
| Little Rock | | | | | ■ | | |
| Long Beach | | | | | | | ■ |
| Los Angeles | ■ | | | | | ■ | |
| Louisville | ■ | | ■ | ■ | | ■ | |
| Madison | | | | | | | |
| Manchester | | | | | | ■ | ■ |
| McAllen | ■ | | ■ | | | | |
| Memphis | | ■ | ■ | | | | ■ |
| Mesa | | | ■ | | | | |
| Mesquite | | | | | | | |
| Miami | ■ | ■ | ■ | | | ■ | ■ |
| Milwaukee | | | | | | | ■ |
| Minneapolis | ■ | | ■ | | | ■ | |
| Miramar | | | | | | | ■ |
| Modesto | | | | | | | ■ |
| Naperville | | | ■ | | | | ■ |
| Nashville | | | | | | | |
| New Haven | | ■ | ■ | | | ■ | ■ |
| New York | | | ■ | | | | |
| Newark | | | | | | ■ | |
| Norman | ■ | | | | | | ■ |
| North Las Vegas | ■ | | | | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Oakland | | | | | | | ■ |
| Oklahoma City | | | | | | ■ | ■ |
| Omaha | ■ | | ■ | ■ | | | ■ |
| Ontario | | | ■ | | | | ■ |
| Orange, CA | | | | | | | ■ |
| Orlando | | ■ | ■ | | | ■ | ■ |
| Oxnard | | | | | | | ■ |
| Paterson | | | | | ■ | | ■ |
| Pembroke Pines | | ■ | | | ■ | | ■ |
| Peoria, AZ | | | ■ | ■ | | | ■ |
| Peoria, IL | | | ■ | | | ■ | ■ |
| Philadelphia | | | ■ | | | | |
| Phoenix | | ■ | ■ | | | | |
| Pittsburgh | | | ■ | | | ■ | ■ |
| Pomona | | | ■ | | | | |
| Port St. Lucie | | | | | | | ■ |
| Portland | ■ | ■ | ■ | | ■ | | ■ |
| Pueblo | ■ | | ■ | | | | ■ |
| Reno | | | ■ | | | ■ | ■ |
| Renton | ■ | | ■ | ■ | | ■ | ■ |
| Rialto | | | | | | | ■ |
| Richmond, CA | | | | | | | ■ |
| Riverside | | | | | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Rochester | ■ | | | ■ | | ■ | ■ |
| Rockford | ■ | | ■ | ■ | ■ | | ■ |
| Roseville | | | ■ | ■ | | | |
| Sacramento | ■ | | ■ | | | | ■ |
| Salem | ■ | ■ | ■ | ■ | ■ | | ■ |
| Salinas | | | | | | | |
| Salt Lake City | | | | ■ | | | ■ |
| San Antonio | ■ | ■ | ■ | ■ | | ■ | |
| San Diego | ■ | | ■ | ■ | | | |
| San Francisco | ■ | ■ | | | | ■ | |
| San Jose | | | | | | ■ | ■ |
| San Leandro | | | | | | | |
| San Mateo | | | ■ | | | | |
| Santa Ana | | | | | | | |
| Santa Clara | | | | | | | |
| Santa Rosa | | | | | | | ■ |
| Seattle | ■ | | ■ | ■ | | ■ | |
| Sioux City | | | ■ | | | | |
| Spokane | | | ■ | ■ | | ■ | ■ |
| Springfield, MO | | | | | | | ■ |
| St. Louis | | | | | | ■ | |
| St. Paul | | | ■ | | | ■ | ■ |
| St. Petersburg | | ■ | | ■ | | | ■ |

| City | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Stamford | ■ | | | | | | ■ |
| Sterling Heights | | | ■ | | | | ■ |
| Stockton | | | | | | | ■ |
| Sunnyvale | | | | | | | ■ |
| Tacoma | ■ | | ■ | ■ | ■ | ■ | ■ |
| Tampa | ■ | ■ | | ■ | ■ | | ■ |
| Tempe | ■ | | ■ | | | | |
| Toledo | | | ■ | | ■ | | ■ |
| Topeka | | ■ | ■ | | | | ■ |
| Torrance | | | | | | | |
| Tucson | | | | ■ | | ■ | |
| Tulsa | | | ■ | | | | ■ |
| Vallejo | | | ■ | | | | ■ |
| Visalia | | | | | | | |
| Waco | | | | | | | |
| Washington, D.C. | | ■ | ■ | ■ | | ■ | ■ |
| Waterbury | | | ■ | | | | ■ |
| West Palm Beach | | | | | ■ | ■ | ■ |
| Wichita | | | ■ | | | | |
| Worchester | | | ■ | ■ | ■ | | ■ |

APPENDIX C: CONTENT OF GENERALLY APPLICABLE LAW ENFORCEMENT OFFICERS' BILLS OF RIGHTS

| State | Delays Interview | Provides Access to Evidence Before Interview | Limits Consideration of Disciplinary History | Limits Length of Investigation or Establishes Statute of Limitations | Limits Anonymous Complaints | Limits Civilian Oversight | Provides for Arbitration |
|---|---|---|---|---|---|---|---|
| Arizona | | ■ | | ■ | | | |
| California | | | | | | | |
| Delaware | | | | | | ■ | |
| Florida | | ■ | | ■ | | ■ | |
| Illinois | | | | | ■ | | |
| Iowa | ■ | ■ | | | | | |
| Kentucky | ■ | | | ■ | | | |
| Louisiana | ■ | | ■ | | | | |
| Maryland | ■ | | ■ | ■ | ■ | | |
| Minnesota | | | | | | ■ | |
| Nevada | ■ | | | | | | |
| New Mexico | ■ | | | | ■ | | |
| Rhode Island | | | | ■ | ■ | | |
| Virginia | ■ | | | | | | |
| West Virginia | | | | | | | |
| Wisconsin | | | | | | | |

## APPENDIX D: METHODOLOGICAL DISCUSSION

This project would not have been possible without the work done by previous researchers—particularly the excellent ongoing work by Campaign Zero. Prior examinations of police union contracts and Law Enforcement Officer Bills of Rights (LEOBRs) only received brief discussion in this Article's literature review. I offer this Methodological Appendix to acknowledge these important studies and more thoroughly explain the Article's methodology.

### I. CODING SCHEME

In the methodology section of this Article, I described how I "conducted a preliminary examination of the dataset, surveyed the existing literature, and consulted media reports" in settling on my coding approach. I offered this short explanation with little follow-up. I write now to elaborate on my approach. In coding the Article's dataset of 178 contracts, I ultimately adopted on a coding methodology that overlaps with that used by the volunteers at Campaign Zero at various points in their examination of eighty-one large city union contracts over the last two years.[306] The coding methodology also overlaps with the coding categories considered by the *Guardian* in their evaluation of dozens of union contracts leaked from the Fraternal Order of Police (FOP) server.[307] This coding methodology overlaps with that used by Kevin M. Keenan and Professor Samuel Walker, who analyzed how LEOBRs similarly frustrate accountability efforts.[308] And it somewhat resembles a coding methodology used by *Reuters* in an examination of eighty-two police union contracts.[309] This study also benefitted from earlier work by Professor Walker, identifying how specific union contracts and LEOBRs served as barriers to internal discipline in American police departments. These important studies provided a baseline upon which this study builds. My project would not have been possible without their important work. Nevertheless, in a

306. CHECK THE POLICE, *supra* note 116.

307. Joseph, *supra* note 124.

308. Keenan & Walker, *supra* note 79.

309. Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:16 PM), http://www.reuters.com/investigates/special-report/usa-police-unions [https://perma.cc/5US2-7V9E].

handful of cases, I purposefully deviated from each study in defining my coding scheme.

### *A. Prior Research*

The first, and most important recent study is an ongoing project spearheaded by DeRay McKesson and Samuel Sinyangwe with the group Campaign Zero.[310] As of August 7, 2017, Campaign Zero had coded a dataset of eighty-one union contracts and fifteen LEOBRs according to six variables: (1) whether the contract "[d]isqualif[ies] misconduct complaints that are submitted too many days after an incident occurs or if an investigation takes too long to complete," (2) whether the contract "[p]revent[s] police officers from being interrogated immediately after being involved in an incident or otherwise restrict[s] how, when, or where they can be interrogated," (3) whether the contract "[g]iv[es] officers access to information that civilians do not get prior to being interrogated," (4) whether the contract "[r]equir[es] cities to pay costs related to police misconduct including by giving officers paid leave while under investigation, paying legal fees, and/or the cost of settlements," (5) whether the contract "[p]revent[s] information on past misconduct investigations from being recorded or retained in an officer's personnel file," and (6) whether the contract "[l]imit[s] disciplinary consequences for officers or limit[s] the capacity of civilian oversight structures and/or the media to hold police accountable."[311]

Campaign Zero's coding methodology has evolved over time. Their earlier work looked somewhat more narrowly at a smaller number of cities and considered fewer coding categories, namely when a contract (1) "prevent[s] police officers from being interrogated immediately after being involved in an incident," (2) "prevent[s] information on past misconduct [investigations] from being recorded or retained in an officer's personnel file," (3) "disqualif[ies] misconduct complaints submitted 180+ days after an incident or that take over 1 year to investigate," or (4) "limit[s]

310. CHECK THE POLICE, *supra* note 116.

311. *Id*.

civilian oversight structures from being given the authority to discipline officers for misconduct."[312]

Similarly, George Joseph and the *Guardian* studied police union contracts collected from a hack of the FOP. His analysis went to print in February of 2016, and it found that many contracts "included provisions barring pubic access to records of past civilian complaints, departmental investigations, and disciplinary actions."[313] Others attempted to "slow down misconduct investigations," "enable the destruction of complaints and disciplinary records after a negotiated period of time," and delayed interrogations.[314] It also noted at least one contract that required city officials to redirect all complaints against police officers to the police department for investigation, making it challenging for a person to complain about police conduct with any sort of anonymity.[315]

In 2005, Kevin M. Keenan and Professor Samuel Walker coded the content of fourteen LEOBRs, examining in particular how language in these statutes thwarted legitimate police accountability efforts.[316] Keenan and Walker's coding, which included around fifty variables, took note of several factors that particularly frustrate accountability efforts, including LEOBR language that: (1) provides officers with notice of investigations and waiting periods that delay interrogations,[317] (2) prevents civilians from making disciplinary decisions,[318] (3) gives officers access to arbitration during disciplinary appeals,[319] (4) establishes a statute of limitations for internal disciplinary action,[320] (5) limits the retention of disciplinary

312. CHECK THE POLICE, https://web.archive.org/web/20160209120722/ http://www.checkthepolice.org/#project [https://perma.cc/ZFX4-7XZ6] (archived from Feb. 9, 2016) [hereinafter CHECK THE POLICE archived].

313. Joseph, *supra* note 124.

314. *Id*.

315. *Id*.

316. Keenan & Walker, *supra* note 79.

317. *Id*. at 212–14.

318. *Id*. at 239 ("Kentucky, Maryland, and Rhode Island restrict the involvement of civilians in investigating police misconduct.").

319. *Id*. at 233 (stating that "arbitrators have a natural tendency to 'split the difference' and give something to each side—a practice that results in systematic mitigation of punishment" and discussing which laws establish such potentially problematic procedures).

320. *Id*. at 236–37.

histories in personnel files,[321] (6) limits the ability of civilians to file complaints anonymously,[322] (7) sets forth excessive limitations on time, place, manner and other technical interview procedures,[323] and (8) fails to provide adequate exceptions to procedural rules for emergency situations.[324] It is worth noting that Keenan and Walker considered additional factors, many of which they concluded did not inhibit accountability efforts in the same way as the factors highlighted above.

In January of 2017, Reade Levinson at *Reuters* published an examination of eighty-two police union contracts from mostly large American cities, as well as state LEOBRs.[325] This analysis looked at whether contracts (1) erased disciplinary records of officers accused of misconduct, (2) gave officers access to investigative information when they are under investigation for misconduct, (3) disqualified complaints from being investigated because of either a time limit or because of a requirement that the complainant sign a sworn affidavit, (4) allowed officers to forfeit vacation days in lieu of suspension, (5) permitted officers to refuse to testify to a civilian board, or (6) required officer consent before publicly releasing portions of officer personnel files.[326]

Finally, Professor Walker has written a number of evaluations of police union contracts and LEOBRs over the last several years. In a 2015 manuscript published on his website, Professor Walker argued that waiting periods that delay officer interrogations after alleged misconduct are unsupported by existing scientific evidence.[327] Earlier that same year, Professor Walker conducted a detailed analysis of the ways that the Baltimore police union

321. *Id*. at 240 (stating that "[l]imitations on the retention of citizen complaints and related information pose a barrier" to accountability).

322. *Id*. at 239 (explaining how "[i]n Maryland, complaints alleging police brutality must be duly sworn and filed by the complainant, a family member, or a witness within ninety days of the incident," and later arguing that "[n]o LEOBR[] explicitly establish[es] a right of civilians to make complaints confidentially or anonymously.").

323. *Id*. at 241.

324. *Id*.

325. Levinson, *supra* note 309.

326. *Id*. This study came out in print close in time to the date of my Article's publication and minimally influenced my coding decisions. But because it beat my Article to print, this study deserves mention as an important additional contribution to this field.

327. SAMUEL WALKER, POLICE UNION CONTRACT "WAITING PERIODS" FOR MISCONDUCT INVESTIGATIONS NOT SUPPORTED BY SCIENTIFIC EVIDENCE (July 1, 2015), http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf [https://perma.cc/6BNA-QGS4].

contract and the Maryland LEOBR combined to thwart officer accountability.[328] In that manuscript, he argued that these labor provisions impaired accountability by providing (1) "[d]elays in [i]nvestigating [o]fficer [m]isconduct," (2) limiting civilian oversight by ensuring that officers can "be interrogated only by another sworn officer," (3) regulating the retention of officer personnel records by "[e]xpunging [p]erformance [r]ecords," and limiting discipline from officers being placed on "'[d]o [n]ot [c]all' [l]ists," and (4) limiting the public transparency of officer investigations.[329]

### *B. Choice of Variables for Study*

After reviewing these previous studies and conducting an initial examination of the dataset, I eventually settled on a coding scheme. Admittedly, this coding scheme incorporates some personal judgments about the relative problems posed by language in collective bargaining agreements. But it also tries to ensure some level of consistency with the coding categories identified by previous studies in this field. In the end, I believe that this coding scheme is consistent with existing studies. It reasonably distinguishes between factually distinct categories of contractual terms that can thwart accountability efforts. And I believe this scheme is written narrowly, so as to avoid establishing variable definitions that unduly capture too many ambiguous clauses. The discussion below describes the definition for each variable.

#### 1. *Variables Related to Officer Interviews and Interrogations.*

Most of the studies listed above took issue with efforts by police union contracts and LEOBRs to give officers an unfair advantage during interrogations or interviews. I ultimately settled on two variables to signify the most common objections raised in the literature. First, all of the previous examinations of police union contracts or LEOBRs mentioned above took issue with language that delays interrogations of officers accused of misconduct. As Keenan and Walker argued, "[d]elays in the investigation of police misconduct are intolerable. There is a widespread impression that

328. SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICERS'S BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY (May 2015), http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf [https://perma.cc/HQJ7-W9RG].

329. *Id*. at 2–7.

delays in investigations allow officers time to collude to create a consistent, exculpatory story."[330] Campaign Zero appears to agree with this sentiment, as they included this variable in their earlier coding and appear to include it in their more recent coding as well.[331]

Nevertheless, it is important to recognize that, in cases where an officer is accused of criminal behavior, the officer has a constitutional right to secure a lawyer before the interrogation may begin.[332] This raises a tricky question: how long can investigators delay interviews of officers after an incident without impairing accountability? As Keenan and Walker observed back in 2005, there is "no literature or scholarship adequately exploring or elaborating this issue."[333]

During my initial evaluation of the dataset, I noted that a number of contracts provided officers with the opportunity to delay the interrogation for a "reasonable" period of time, often until an officer could secure representation. Others provided officers with a set waiting time before which investigators could initiate an interview (for example, twenty-four hours, or until investigators have satisfied specific procedural and investigative hurdles, like the interviewing of other witnesses). While "reasonable" waiting periods to allow officers to secure representation could be abused, in my estimation, waiting periods that designate set lengths of time are more inflexible and therefore even more troublesome.[334] Thus, I define the variable "Delays Interrogations of Officers Suspected of Misconduct" somewhat narrowly so as to only include provisions that delay officer interviews for some designated length of time.

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330. Keenan & Walker, *supra* note 79, at 212. Walker expressed similar disagreement with waiting periods in his previous writing. *See* Walker, *supra* note 328, at 2.

331. CHECK THE POLICE, *supra* note 116; CHECK THE POLICE archived, *supra* note 312.

332. *See generally* Garrity v. New Jersey, 385 U.S. 493 (1967) (preventing states from using compelled statements made by police officers during disciplinary investigations in future criminal proceedings).

333. Keenan & Walker, *supra* note 79, at 213.

334. This viewpoint is reinforced by Keenan and Walker's conclusion that an acceptable delay provision may give officers a "reasonable period prior to a formal interrogation" in order to secure representation, if needed. *Id.* at 214. A reasonable period of time may be between six and twenty-four hours, but it should be able to be waived by the chief of police under some circumstances. *Id.* In addition, departments should have the ability to "sequester" officers suspected of misconduct during this delay period. *Id.* Keenan and Walker also observe how departments sometimes interpret waiting periods that last a set length of time as the de facto minimum waiting period for conducting all investigatory activity. *Id*. This, in my estimation, suggests that it may be fair to distinguish between contracts that establish a "reasonable" waiting period and those that establish a waiting period for a set length of time.

Second, at least two of the prior studies raised questions about provisions in union contracts and LEOBRs that provide officers with access to information about an investigation before initiating a disciplinary interview. Campaign Zero most prominently recognized this in their more recent coding of police union contracts, which examines whether the contract "giv[es] officers access to information that civilians do not get prior to being interrogated."[335] The *Reuters* study somewhat similarly defined this variable as whether or not the contract gives officers access to "all investigative materials."[336] The definition used by the *Reuters* study seems overly restrictive in my judgment, while the coding definition used by Campaign Zero seems to strike a sensible balance. The *Reuters* definition potentially fails to capture a number of clauses in police union contracts that provide officers with access to only some, but not all, incriminating evidence an investigator may have against them before interrogations. Thus, I ultimately chose to define this variable similarly to Campaign Zero, as whether the contract "provides officers with access to evidence before interviews or interrogations about alleged wrongdoing." In applying this coding, I defined evidence to include something more substantial than a summary or appraisal of basic facts about an allegation of misconduct.

It is worth noting that I chose not to include a number of interrogation-related variables that other researchers considered in one way or another. I believe these generally do not present meaningful barriers to police accountability. For example, Campaign Zero takes issue with contracts that regulate "how, when, and where [officers] can be interrogated."[337] Indeed, my initial review of the dataset revealed many cases where union contracts prevented officers from being subject to abusive or threatening comments,[338] unreasonably long interrogations,[339] and

335. CHECK THE POLICE, *supra* note 116.

336. Levinson, *supra* note 309.

337. CHECK THE POLICE, *supra* note 116.

338. *See, e.g.,* CITY OF BELLEVUE, AGREEMENT BETWEEN THE CITY OF BELLEVUE AND THE BELLEVUE POLICE OFFICERS GUILD 4 (2011) (on file with the *Duke Law Journal*) (stating that employees should not experience any offensive language or "abusive questioning").

339. *See, e.g.,* CITY OF PORTLAND, LABOR AGREEMENT BETWEEN THE PORTLAND POLICE ASSOCIATION AND THE CITY OF PORTLAND 36 (2013) (on file with the *Duke Law Journal*) ("Interviews shall not be overly long.").

inducements.[340] Some also provided officers with access to transcripts or recordings of interrogations,[341] or required that interrogations happen at reasonable times and locations.[342] On this point, I tend to side with Keenan and Walker. They have argued that "[l]imitations on time, place, and duration of interrogations are reasonable, respect the officer as an individual and as an employee, aid in the search for the truth, and pose no barrier to accountability."[343] I also adopt Professor Kate Levine's view that such accommodations for officers during interrogations should serve as models for how the criminal justice system ought to treat all suspects.[344] Humane limitations on interrogations, whether in the context of the public or police officers, do less to limit accountability and more to avoid "intimidation and fatigue that might lead to false confessions or long-term hostility between the officer and his supervisors."[345] These humane limitations on interrogation are factually distinguishable from defined waiting periods, or provisions that provide officers with access to evidence before questioning.

2. *Variables Related to the Investigation and Adjudication of Complaints*. I considered four variables related to the investigation and adjudication of complaints. First, I included a variable related to civilian oversight of investigations and adjudications of complaints against officers. Campaign Zero, Keenan and Walker, and the Guardian each raised some concern about how LEOBRs and union contracts can limit meaningful civilian involvement in the oversight of law enforcement misconduct. Campaign Zero's latest coding views this issue more expansively as a problem of limitations on "disciplinary consequences for officers or limit[ations on] the

340. *See, e.g.,* CITY OF SAN ANTONIO, AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, TEXAS AND THE SAN ANTONIO POLICE OFFICERS' ASSOCIATION 81 (2009) (on file with the *Duke Law Journal*) (barring the use of "inducements" during interrogations of police officers).

341. *See, e.g.,* CITY OF SALEM, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF SALEM AND THE SALEM POLICE EMPLOYEES' UNION 42 (2014) (on file with the *Duke Law Journal*) (providing officers with the ability to have interrogations recorded, and have access to that recording).

342. *See, e.g.,* CITY OF TAMPA, AGREEMENT BETWEEN CITY OF TAMPA AND POLICE BENEVOLENT ASSOCIATION, INC. 78 (2010) (on file with the *Duke Law Journal*) (providing that interrogations of officers should be conducted at a "reasonable hour, preferably at a time when the employee is on duty").

343. Keenan & Walker, *supra* note 79, at 217–18.

344. Levine, *supra* note 79, at 1236–41.

345. Keenan & Walker, *supra* note 79, at 218.

capacity of civilian oversight structures and/or the media to hold police accountable."[346] Keenan and Walker found that multiple LEOBRs "restrict[ed] the involvement of civilians in investigating misconduct,"[347] and still others established hearing boards filled entirely by fellow police officers—leaving no room for civilians.[348] As they argued, such clauses are unreasonably "dismissive of the public interest in police accountability."[349] And the Guardian concluded that many contracts left out civilians from the adjudication of complaints against officers, by ensuring that "most of the investigations into police are led by officers' supervisors within the department."[350]

I defined my variable somewhat more narrowly than the current coding used by Campaign Zero, and more in line with the definition used by Keenan and Walker and the *Guardian*. While civilian oversight is certainly important, it is also necessary to cabin the definition of civilian oversight so as to avoid creating a category that groups together too many different policies. There is widespread agreement in the policing literature that civilian involvement in the intake and adjudication of civilian complaints is important for accountability. There is more ambiguity, though, about whether the public ought to have access to officers' personnel files, officers' personal information, or details about ongoing internal investigations. These raise more complicated privacy issues.

In my judgment, the exclusion of civilians from the decisionmaking process during disciplinary decisions is also distinguishable from the use of arbitration, which I chose to code separately as discussed in more depth below.[351] Given these

346. Campaign Zero's earlier coding approach included a similar variable, defined as language that "limit[s] civilian oversight structures from being given the authority to discipline officers for misconduct." CHECK THE POLICE archived, *supra* note 312.

347. Keenan & Walker, *supra* note 79, at 239.

348. *Id*. at 225–26.

349. *Id*. at 226 (saying that these procedures "effectively bar[] civilian participation in the discipline oversight process.").

350. Joseph, *supra* note 124.

351. For example, I would argue that arbitration is even more antidemocratic than vesting the authority to make disciplinary decisions in the hands of a police chief. A police chief is generally answerable to an elected mayor and city council, providing some layer of accountability. By contrast, an arbitrator may not even be a resident of the community, and his or her decision is often deemed final and unreviewable thereafter. Arbitration also generally happens after an officer has exhausted alternative appeals of his or her disciplinary penalty. This provides good reason to code these two variables separately, as they raise separate policy concerns.

concerns, I focused my analysis in this area somewhat narrowly on whether a contract "Limits Civilian Oversight," defined as whether the "contract prohibits civilian groups from acquiring authority to investigate, discipline, or terminate police officers for alleged wrongdoing."

Second, I coded contracts based on whether they "Permit or Require Arbitration." While this sort of a variable receives less explicit attention in the current Campaign Zero coding,[352] Walker and Keenan expressed concern in their study about how arbitration may unjustifiably reduce disciplinary penalties against police.[353] This is consistent with evidence and hypotheses from previous research. For example, prior work by Mark Iris indicated that mandatory arbitration contributed in disciplinary action in Chicago and Houston being cut roughly in half for officers on appeal.[354] Professor Seth Stoughton has similarly written on how collective bargaining may contribute to lengthy procedures for adjudicating disciplinary appeals, including arbitration clauses that may frustrate accountability efforts.[355] This suggests that arbitration is a potentially important category for consideration as a standalone variable. Thus, I included in my scheme a variable that tests whether the contract "permits or requires arbitration of disputes related to penalties or termination."

Third, at least two of the studies described above object to limitations on anonymous civilian complaints.[356] Keenan and Walker argued that policies that prevent any anonymous complaints may not "address or deal with the potential for officers to intimidate

352. Campaign Zero did not appear to include a coding category for this variable in their initial scheme. Their current category, which considers whether a contract limits "**disciplinary consequences** for officers or limit[s] the capacity of civilian oversight structures and/or the media to hold police accountable[,]" appears to be constructed broadly enough to include arbitration. CHECK THE POLICE, *supra* note 116.

353. Keenan & Walker, *supra* note 79, at 233 ("Some observers . . . believe that arbitrators have a natural tendency to 'split the difference' and give something to each side—a practice that results in systematic mitigation of punishment.").

354. Iris, *supra* note 113; Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132 (2002).

355. Stoughton, *supra* note 45, at 2210 (describing how an arbitration decision may be improper, but unreviewable because of court precedent).

356. While Campaign Zero does not appear to have coding language that would capture limitations on anonymous complaints, it has noted elsewhere that such policies are potentially worrisome. CHECK THE POLICE archived, *supra* note 312 (noting in the text of the website that bans on anonymous complaints are an additional concern).

and retaliate against complainants."[357] I share Keenan and Walker's concerns,[358] as discussed in Part IV.D of the Article. Thus, I included a variable that considers whether each contract "prohibits supervisors from interrogating, investigating, or disciplining officers on the basis of anonymous civilian complaints."

Fourth, I included a variable in my analysis that considers whether the union contract "limits the length of investigation or establishes [a] statute of limitations" on the imposition of discipline. This variable mirrors a similar variable used by Campaign Zero, which "[d]isqualif[ies] misconduct complaints that are submitted too many days after an incident occurs or if an investigation takes too long to complete."[359] It mirrors a variable considered by *Reuters*, which identified contracts that disqualified complaints from being investigated because of either a time limit or because of a requirement that the complainant sign a sworn affidavit. This variable also mirrors the analysis conducted by Keenan and Walker on statutes of limitations for officer discipline. They found multiple LEOBRs had such limitations. Based on this, they argued that while "[p]olice departments should not be given an unlimited amount of time to hold a hearing after charges have been filed," officers similarly should not be able to avoid accountability simply because of a backlog of cases.[360]

In fact, "[s]ome activists suspect that delays in [the processing of some civilian complaints] are part of a police department's deliberate strategy" to skirt responsibility for wrongdoing.[361] Statutes of limitations can exacerbate this problem. There is no uniform agreement among policing scholars about the appropriate length of such statute of limitations. Keenan and Walker recommend that investigators might need anywhere between ninety days and three years to complete an investigation or hand down punishment, depending on the severity of the infraction.[362] But these numbers appear to be based more on their independent judgments

357. Keenan & Walker, *supra* note 79, at 240.

358. These authors go as far as arguing explicitly that cities and state should "accept anonymous and oral complaints . . . ." *Id*.

359. Campaign Zero's earlier coding category for this topic focused specifically on whether the contract "disqualif[ies] misconduct complaints submitted 180 days after an incident or that take over 1 year to investigate." CHECK THE POLICE archived, *supra* note 312.

360. Keenan & Walker, *supra* note 79, at 237.

361. *Id*.

362. *Id*.

than on empirical evidence. Given the general lack of consensus on this point, I ultimately included no time limitation on my definition of this variable.

3. *Variable Related to Personnel Records.* Finally, virtually all of the prior projects discussed above showed some concern for labor arrangements that remove records of complaints and disciplinary action from officers' personnel files. Keenan and Walker pointed out that LEOBR limits on the retention of information in officer personnel files could be fatal to one of the most important tools for police accountability: early intervention systems (EIS). These are "data-based management tools containing systematic information of officer performance, including, but not limited to, citizen complaints, officer use-of-force reports, and officer involvement in civil litigation."[363] Police manager then examine this accumulated data to identify officers that may be engaged in repeated or troubling patterns of misconduct. Supervisors then subject these officers to "informal, non-disciplinary intervention designed to correct their performance problems," before they elevate into something more serious.[364] By removing officer performance data from an EIS, union contractual terms and LEOBRs may thwart this critically important misconduct prevention tool. Additionally, the *Guardian* noted how some contracts that they studied "enabled the destruction of complaints and disciplinary records after a negotiated period of time."[365]

I have signified this variable in a manner similar to that used by Campaign Zero and the *Guardian*, as "Limits Consideration of Disciplinary History," which I defined as any contract that "mandates the destruction or purging of disciplinary records from personnel files after a set length of time, or limits the consideration of disciplinary records in future employment actions."

## II. DATASET

The dataset of 178 police union contracts[366] that I examined in this Article overlaps with Campaign Zero's examination of eighty-one

363. *Id*. at 241.

364. *Id*.

365. Joseph, *supra* note 124.

366. It is also worth reiterating that some of the contracts I studied have since lapsed and been replaced with new bargaining agreements. I do not believe this is fatal to my limited, academic endeavor. There is little reason to think that the content of the typical collective

large cities and *Reuters* examination of eighty-two large cities. It is particularly important to recognize the impressive work previously done by Campaign Zero to collect dozens of contemporary contracts and make them available online for public consumption. In doing my analyses, I tried when possible to utilize the most up-to-date contracts available through municipal websites, state websites, and record requests. It is worth noting that the overwhelming majority of municipalities discussed in this Article regularly post their community's most up-to-date collective bargaining agreements on their websites or in state repositories.[367] Finally, it is important to

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bargaining agreements has changed in any systematic way from one year to the next. Given the large number of contracts in the collection of 178 contracts studied that had at least one questionable clause that could impede accountability (around 88 percent), I believe my study has accomplished its primary objective. I have regularly updated the dataset and have added a considerable number of contracts to my database, which contains over 1,000 union contract documents from municipalities, most of which have populations of at least 30,000 residents.

367. *See, e.g.,* City of Gresham, Oregon, Human Res., *Labor Contracts*, CITY OF GRESHAM, https://greshamoregon.gov/HR-Labor-Contracts [https://perma.cc/5N3Z-N4VY]; City of Miami, Dep't of Human Res., *Labor Relations, Collective Bargaining Agreements/Union Contracts*, CITY OF MIAMI, http://www.miamigov.com/employeerel/pages/labor/union_contracts.aspasp [https://perma.cc/FBQ7-A9N3]; City of Minneapolis, Human Res. Dep't, *Labor Agreements*, CITY OF MINNEAPOLIS, http://www.minneapolismn.gov/hr/laboragreements [https://perma.cc/48J9-DLJF]; City of Peoria, Human Resources, *Labor* Contracts, CITY OF PEORIA, http://www.peoriagov.org/human-resources [https://perma.cc/P2AB-W46M]; City of San Diego, Human Res., *Employee Organization Agreements*, https://www.sandiego.gov/humanresources/laborrelations/agreements [https://perma.cc/X7V3-6MCM]; City of San Jose, Office of the City Manager, *Labor Relations Information*, CITY OF SAN JOSE, http://www.sanjoseca.gov/index.aspx?NID=505 [https://perma.cc/H5VY-QZXZ]; Municipality of Anchorage, Emp. Relations, *Collective Bargaining Agreements*, MUNICIPALITY OF ANCHORAGE, https://www.muni.org/Departments/employee_relations/Pages/CBA09.aspx [https://perma.cc/C4QV-8V82]; City of St. Petersburg, Human Res.., *Labor Relations Division: Union Agreements*, CITY OF ST. PETERSBURG, http://www.stpete.org/city_departments/human_resources/labor_relations_division.php [https://perma.cc/X4Z2-BVKM]. Among the cities studied in this Article, the following municipalities make updated copies of their contracts freely and publicly accessible through either local or state websites: New York, Los Angeles, Chicago, Houston, Phoenix, San Antonio, San Diego, San Jose, Jacksonville, San Francisco, Austin, Columbus, Detroit, Baltimore, Boston, Seattle, Washington D.C., Denver, Louisville, Milwaukee, Portland, Tucson, Fresno, Sacramento, Long Beach, Omaha, Miami, Cleveland, Tulsa, Oakland, Minneapolis, Anaheim, Tampa, Aurora, Santa Ana, Corpus Christi, Cincinnati, Anchorage, Stockton, Toledo, St. Paul, Newark, Buffalo, Lincoln, Henderson, Jersey City, St. Petersburg, Chula Vista, Orlando, Laredo, Madison, Glendale, Reno, North Las Vegas, Fremont, Irvine, Rochester, Des Moines, Modesto, Akron, Tacoma, Oxnard, Fontana, Little Rock, Huntington Beach, Grand Rapids, Salt Lake City, Worcester, Garden Grove, Santa Rosa, Fort Lauderdale, Port St. Lucie, Ontario, Tempe, Eugene, Salem, Peoria (AZ), Peoria (IL), Sioux City, Sioux Falls, Elk Grove, Rockford, Salinas, Pomona, Joliet, Paterson, Torrance, Bridgeport, Hayward, Escondido, Dayton, Orange, Fullerton, New Haven, Topeka, Cedar Rapids, Elizabeth, Hartford, Visalia, Gainesville, Bellevue, Concord, Coral Springs, Roseville, Evansville, Santa Clara, Springfield, Vallejo, Lansing, Ann Arbor, El Monte, Berkeley, Downey, Norman, Waterbury, Costa Mesa,

acknowledge other groups that have also made a number of police union contracts available online, including Labor Relations Information Systems,[368] the Better Government Association,[369] and the Combined Law Enforcement Associations of Texas.[370] Finally, I owe a debt of gratitude to the research assistants who assisted me with background research, data collection, coding, and open record requests.

## III. DATA PRESENTATION

Previous studies have adopted different methods for presenting their data on the content of police union contract and LEOBRs. When analyzing only fourteen LEOBRs, Walker and Keenan utilized charts that placed the jurisdiction on the horizontal axis and the coding category on the vertical axis.[371] They likely made this choice, in part, because they needed to represent around fifty different coding variables.[372] They signified the presence of most variables with a "Y" (signifying the variable was present in that jurisdiction) or a blank rectangle (signifying that the variable was not present in that jurisdiction).[373] While this sort of data presentation is helpful, it would be impractical to recreate such an approach for the dataset of 178 contracts studied in this Article.

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Manchester, Elgin, Clearwater, Gresham, Carlsbad, Fairfield, Billings, Richmond (CA), Burbank, Everett, Palm Bay, Daly City, Davenport, Rialto, Kent, Davie, Hillsboro, Renton, Sunnyvale, Duluth, San Leandro, and San Mateo. Additionally, Nevada, Ohio, New York, and New Jersey are just a few of the states that have established state repositories for local union contracts. *See, e.g.,* State of Nevada, Local Gov't Emp.-Mgmt. Relations Bd., *Collective Bargaining Agreements*, STATE OF NEVADA, http://emrb.nv.gov/Resources/Collective_Bargaining_Agreements/ [https://perma.cc/E2XX-UQWC]; State of New Jersey, Pub. Emp't Relations Comm'n, *Public Sector Contracts*, STATE OF NEW JERSEY http://www.perc.state.nj.us/publicsectorcontracts.nsf [https://perma.cc/TC2G-85NN]; State of Ohio, State Emp't Relations Bd., *Collective Bargaining Agreements*, STATE OF OHIO, http://www.serb.state.oh.us/sections/research/WEB_CONTRACTS/WebContracts.htm [https://perma.cc/Z6HY-472Y].

368. *LRIS Public Safety Contract Library*, LAB. REL. INFO. SYS., https://www.lris.com/contracts/index.php [https://perma.cc/7ZVE-8SVR].

369. *Collective Bargaining Database*, BETTER GOV'T ASS'N, http://www.bettergov.org/collective-bargaining-database (focusing specifically on contracts for public agencies in the Chicago region).

370. *Contracts*, COMBINED L. ENFORCEMENT ASS'NS TEX. (CLEAT), https://www.cleat.org/contracts [https://perma.cc/3B89-4U9E].

371. Keenan & Walker, *supra* note 79, at 245 app.A.

372. *Id*.

373. *Id*.

By contrast, the *Guardian* provided a mere written summary describing the frequency of problematic provisions in their analysis of dozens of contracts obtained from the FOP server.[374] They generally did not identify how they coded individual jurisdictions. This may have been because of the nature of the data, as a hacker had allegedly acquired the information unlawfully.

In my judgment, Campaign Zero presented coded data from a large collection of police union contracts and LEOBRs in a more useful format than any of the previous studies. Since Campaign Zero has now studied eighty-one contracts using a coding scheme that has varied from anywhere between four and six variables, they organized the cities on the vertical axis and the coding variable on the horizontal axis. They then indicated whether a variable was present by shading in a box (or previously placing an image) underneath each variable, across from the name of the city with such contractual terms. This approach to data presentation is nearly identical to that used by the Urban Institute in their coding of state laws on body-worn cameras,[375] and that used by Upturn and the Leadership Conference on Civil and Human Rights in their coding of municipal policies on body-worn cameras.[376] It also resembles that used by the Brennan Center in their coding of municipal body-worn camera policies.[377]

Given that this Article examined a relatively large dataset (178 contracts) and a small number of variables (seven), I opted to present the data in a manner consistent with the efforts by Campaign Zero, the Urban Institute, Upturn, the Leadership Conference on Civil and Human Rights, and the Brennan Center—that is, with the variables on the horizontal axis, and the police departments' names on the vertical axis. I believe that this graphical format is superior to the line graphs used by *Reuters* or the written summaries used by the *Guardian*, which fail to inform the reader about the relative frequency of questionable clauses in individual municipalities. I owe

374. Joseph, *supra* note 124.

375. *Police Body-Worn Camera Legislation Tracker*, URBAN INST., https://apps-staging.urban.org/features/body-camera-update [https://perma.cc/QX2H-MTJQ].

376. UPTURN & LEADERSHIP CONF. CIV. & HUM. RTS., POLICE BODY WORN CAMERAS: A POLICY SCORECARD, https://www.bwcscorecard.org.

377. *Police Body Camera Policies: Privacy and the First Amendment Protections*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections [https://perma.cc/W2J5-VYHT].

a debt of gratitude to prior researchers for providing such a useful model for presenting this sort of a dataset.

Nevertheless, it is also important to recognize the limitations of this format. This coding methodology can lead to imprecise or misleading graphical representations. I chose to code each contract based on whether or not it fit within the parameters of the variable definitions described in Figure 1. I made 1,246 coding decisions. Of these 1,246 coding decisions, I identified around 5 percent of these decisions as borderline cases. That is, in around 5 percent of all these coding decisions, it was not immediately obvious whether the terms of a union contract clearly fit within the stated definitions for a variable.

For example, the Honolulu contract provides officers with a copy of a complaint before an interview.[378] Does that qualify as "provid[ing] officers with access to evidence" before an interrogation? The contract in San Francisco gives an officer access to incriminating evidence seventy-two hours before possibly undergoing an investigatory hearing interview.[379] Does that qualify as "provid[ing] officers with access to evidence before interviews or interrogations," and does it qualify as delaying an interview? The Pittsburgh contract permits anonymous complaints, but requires such complaints to have additional corroboration.[380] Does this qualify as "prohibiting supervisors from interrogating, investigating, or disciplining officers" based on an anonymous complaint? While the contract in San Diego purges disciplinary files after a set length of time, it allows supervisors to consider some prior disciplinary sanctions in future employment actions if the sanctions "show patterns of specific similar police misconduct."[381] Do these contractual terms qualify as limiting the consideration of disciplinary history? And what if a contract, like that in St.

378. STATE OF HAWAII, *supra* note 180, at 21.

379. CITY AND COUNTY OF SAN FRANCISCO, MEMORANDUM OF UNDERSTANDING BETWEEN CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO POLICE OFFICERS' ASSOCIATION, AT 13-14 (2007) (on file with the *Duke Law Journal*).

380. CITY OF PITTSBURGH, WORKING AGREEMENT BETWEEN THE CITY OF PITTSBURGH AND THE FRATERNAL ORDER OF POLICE FORT PITT LODGE NO. 1, AT 126 (2010) (on file with the *Duke Law Journal*).

381. CITY OF SAN DIEGO, *supra* note 159, at 54.

Petersburg,[382] Tampa,[383] or Joliet[384] explicitly reference or incorporate a state LEOBR or a local ordinance related to officer disciplinary investigations? Should such references or incorporations count for the purpose of this study?

Coding these borderline cases proved challenging. The binary representations used in Figure 2, Appendix B, and Appendix C do not fully represent the ambiguity involved in a handful of coding decisions. In about half of these borderline cases, I ultimately coded the variable as present. Nevertheless, there is certainly room for reasonable disagreement in some of the borderline coding decisions reached in this Article. Different coding techniques may have resulted in variations in a small number of coding decisions. Nevertheless, I do not believe that this limitation undermines the central argument of this paper—that a substantial number of these contracts contain internal disciplinary procedures that thwart accountability efforts.

## IV. CLOSING THOUGHTS

It may be helpful to conclude this methodological appendix with a brief note on the limits of this project. This Article aimed to contribute to an academic literature on the complex tension between collective bargaining and accountability efforts in American police departments. It hoped to provide useful background on the history of police labor laws, explore how many police union contracts impede reasonable accountability efforts, and ultimately offer normative recommendations for reforming state-level collective bargaining statutes. While this Article cannot claim to prove that the collective bargaining process *causes* lax internal disciplinary procedures, it bolsters the emerging hypothesis that the legal procedure used to negotiate police union contracts can be susceptible to a form of regulatory capture. This should inspire more research by future legal scholars into the relationship between the collective bargaining process and lax disciplinary procedures in American police departments.

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382. CITY OF ST. PETERSBURG, AGREEMENT BETWEEN CITY OF ST. PETERSBURG AND SUN COAST POLICE BENEVOLENT FOR POLICE OFFICERS AND TECHNICIANS, at 2 (2016).

383. CITY OF TAMPA, AGREEMENT BETWEEN CITY OF TAMPA AND TAMPA POLICE BENEVOLENT ASSOCIATION, INC., at 81 (2016).

384. CITY OF JOLIET, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF JOLIET AND ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, at 31 (2012).

Nevertheless, the empirical component of this project will soon be out-of-date. Most police unions negotiate new collective bargaining agreements every few years. Many of the contracts used in this Article have already lapsed or will lapse in the near future. Those interested in the constantly changing world of police union contracts in large American cities should consult advocacy resources like Campaign Zero, which continues to do important work on the frontlines of this issue, as well as other police policy issues. You can access their important work on police union contracts and learn how to become involved in their efforts at http://www.checkthepolice.org.

Article

ROUGH DRAFT

167 UNIVERSITY OF PENNSYLVANIA LAW REVIEW __ (forthcoming 2018)

# Police Disciplinary Appeals

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This Article argues that police disciplinary appeals serve as an underappreciated barrier to officer accountability and organizational reform.

Scholars and experts generally agree that rigorous enforcement of internal regulations within a police department promotes constitutional policing by deterring future misconduct and removing unfit officers from the streets. In recent years, though, a troubling pattern has emerged. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers that have engaged in serious misconduct. But little legal research has comprehensively examined the appeals process available to officers facing disciplinary sanctions.

By drawing on a dataset of 656 police union contracts, this Article empirically analyzes the disciplinary appeals process utilized in many of the largest American police departments. It shows that the vast majority of these departments give police officers the ability to appeal disciplinary sanctions through multiple levels of appellate review. At the end of this process, the majority of departments allow officers to appeal disciplinary sanctions to an arbitrator selected, in part, by the local police union or the aggrieved officer. Most jurisdictions give these arbitrators expansive authority to reconsider all factual and legal decisions related to the disciplinary matter. And police departments frequently ban members of the public from watching or participating in these appellate hearings. While each of these appellate procedures may be individually defensible, they combine in many police departments to create a formidable barrier to officer accountability.

This Article concludes by arguing that the law should vest appellate authority in police disciplinary cases in democratically accountable actors. It also offers additional substantive steps that municipalities could

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take to ensure officers have adequate procedural protections from arbitrary punishment, while recognizing the important community interest in police accountability.

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## INTRODUCTION

In August of 2015, Officer Matthew Belver of the San Antonio Police Department (SAPD) reported to the scene of an apparent shooting in the city's South Side neighborhood.[1] While collecting evidence,

[1] Kimbriell Kelly, Wesley Lowery, & Steven Rich, *Fired/Rehired: Polie Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST. (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired (describing the San Antonio incident, along with a number of other similar incidents where police officers were eventually rehired through the appeals process after termination); *see also* Mark D. Wilson, *Video: SAPD Officer Suspended After Challenging Arrestee to Fight, Removing Handcuffs*, SAN ANTONIO EXPRESS (June 10, 2016), http://www.mysanantonio.com/news/local/crime/article/VIDEO-SAPD-officer-agreed-to-fight-man-during-7973241.php (stating that the event took place in the South Side neighborhood of San Antonio, at 5 a.m. in the 3100 block of Cahmita Street).

Officer Belver encountered 48-year-old neighborhood resident Elroy Leal, who pointed out several bullet casings that Officer Belver had missed during his inspection of the crime scene.[2] The situation quickly escalated.[3] Moments later, Officer Belver placed Mr. Leal under arrest.[4]

At this point, a dash camera captured video and audio of a disturbing series of events, as Mr. Leal sat handcuffed in the back of Officer Belver's squad car.[5] Throughout the seventeen minutes of video released by the SAPD, Officer Belver verbally berated Mr. Leal,[6] describing him as a "trashy human being,"[7] mocking his intelligence,[8] and labeling him as "disrespectful" for failing to refer to Belver as "officer."[9] When Mr. Leal asked why he was under arrest, Officer Belver replied that he would "think of something."[10] But perhaps most disturbing of all, as Mr. Leal sat handcuffed in the back of the squad car, Officer Belver challenged Mr. Leal to a fistfight for the chance to be released.[11]

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[2] According to Mr. Leal, Officer Belver became upset after he said: "Hey cop, can I walk through here? Hey, some investigation you guys did." Michael Barajas, *San Antonio Cop Arrests, Berates and Threatens to Fight Man for Being "Disrespectful,"* SAN ANTONIO CURRENT (Jun 9, 2016), https://www.sacurrent.com/the-daily/archives/2016/06/09/san-antonio-cop-arrests-berates-and-threatens-to-fight-man-for-being-disrespectful.

[3] The facts on how the situation escalated remain somewhat unclear. But the statements made by Officer Belver (and recorded by the dash camera video after the arrest) give us some idea. Officer Belver at one point told Mr. Leal, "Who doesn't make mistakes? Everyone makes mistakes at their job … You did not call me officer. You never called me officer until I said listen, shut the fuck up and get in the case. … The way you addressed me was incredibly disrespectful. … I would never talk to anybody like that. That's why you're going to jail and I'm not. And you had the chance to run, to fight, whatever, but you didn't. Because not only are you stupid, you're a coward." *Id*.

[4] Tim Gerber, *City Releases Video of SAPD Officer Agreeing to Fight Suspect, Removing His Handcuffs*, ABC KSAT 12 NEWS (June 7, 2016), https://www.ksat.com/news/defenders/city-releases-video-of-sapd-officer-agreeing-to-fight-suspect-removing-his-handcuffs ("Belver had arrested Leal last August for interfering with the duties of a public servant at the scene of a shooting.").

[5] *Id*. (providing a link to a YouTube video of the dash camera footage).

[6] In addition to the comments discussed elsewhere in this summary, Officer Belver also called Mr. Leal a "sorry human being." Barajas, *supra* note 2.

[7] *Id*.

[8] When Mr. Leal said he would like to invoke his Fifth Amendment rights, Belver responded that, "You wouldn't even know what the Fifth Amendment is. … You don't know anything about history. I doubt you even have a high school diploma." *Id*.

[9] *Id*.

[10] Wilson, *supra* note 1 (quoting Officer Belver from the video evidence as responding to Mr. Leal's question by saying, "I'll think of something. How about public intoxication, pedestrian in a roadway? Whatever else I can think of.").

[11] Officer Belver actually went to the back of the squad car and took off Mr. Leal's handcuffs, seemingly in hopes of engaging in a fistfight. Officer Belver

The dash camera video understandably shocked police supervisors and officials in the district attorney's office.[12] Soon thereafter, the SAPD moved to fire Officer Belver.[13] But before the SAPD could finalize the firing, Texas law provides officers with the right to appeal disciplinary decisions to a "qualified, neutral arbitrator."[14] The law gives this arbitrator, selected in part by the officer under investigation, the power to re-review the factual and legal justification for disciplinary actions taken against an officer.[15] And a decision handed down by such an arbitrator is final and binding, effectively overruling any decisions made by a police chief, mayor, city council, or civilian review board.[16]

Officer Belver himself was no stranger to the disciplinary appeals process. Six years earlier, Officer Belver stood accused of number of serious incidents of misconduct, including a suspiciously similar allegation that he challenged a different man to a fistfight after a drunk

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promised that he would "beat [Mr. Leal's] ass." Kelly, Lowery, & Rich, *supra* note 1.

[12] *Id*. (describing how in December of 2015, Bexar County prosecutors uncovered the video as they were reviewing the video from the arrest, and also describing how San Antonio eventually made the video public after facing community pressure).

[13] *Officer to be Fired for Challenging Man to Fight*, NBC 6 KRISTV (Jun 11, 2016), http://www.kristv.com/story/32199436/officer-to-be-fired-for-challenging-arrested-man-to-fight (noting that the SAPD gave Officer Belver an indefinite suspension for violating departmental policies).

[14] Texas law treats communities differently based on whether they have populations of 1.5 million or more residents. In practice, this means that Houston, as the one municipality with a population over 1.5 million residents, is treated differently than the rest of the state. Disciplinary suspensions in communities like San Antonio, which has slightly less than 1.5 million residents, are governed by Tx. Local Govt. § 143.052. That section describes an "indefinite suspension" like that given to Officer Belver as "equivalent to dismissal from the department." Tx. Local Govt. § 143.053 deals with appeals of disciplinary suspensions for communities with a population under 1.5 million, providing officers with the ability to appeal suspensions to the civil service commission. But under Tx. Local Govt. § 143.057, police officers have the option to waive the right to appeal to the civil service commission, and instead appeal to an "independent third party hearing examiner" defined as a "qualified neutral arbitrator."

[15] Under Tx. Local Govt. § 143.057(d), the officer and the police supervisor may each alternately strike names of potential arbitrators from a panel of seven arbitrators provided by the American Arbitration Association or the Federal Mediation and Conciliation Service. The law appears to provide no explicit limitation on the arbitrator's authority to re-evaluate the factual and legal grounding for a supervisor's disciplinary decision.

[16] Tx. Local Govt. § 143.057(c) ("The hearing examiner's decision is final and binding on all parties. If the … police officer decides to appear to an independent third party hearing examiner, the person automatically waives all rights to appeal to a district court….").

driving arrest.[17] In that case, the SAPD also attempted to fire Officer Belver, only to have an arbitrator on appeal reduce his termination to a mere 30-day suspension.[18]

But this time seemed different. The entire exchange between Mr. Leal and Officer Belver was caught on video, leaving no doubt about the facts in this case. And since this was the second time that Officer Belver had apparently challenged a suspect in custody to a fight, it raised even more serious concerns about his temperament and judgment. To the surprise of many, though, an arbitrator *again* ordered the SAPD to rehire Officer Belver.[19]

Stories like this should worry police reform advocates. Scholars and experts generally agree that, in order to promote the protection of constitutional rights, police supervisors must consistently investigate and respond to officer misconduct. Theoretically, rigorous enforcement of departmental regulations deters future misconduct and removes unfit officers from the streets.[20] But in recent years, various media outlets

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[17] The victim, Carlos Flores, in the earlier case claimed that Officer Belver promised to let him go if he could "kick his [a--]." Additionally, "[b]y the time Flores reached the police detention center, he had a bruised left eye, injuries to his back and neck, and a large bruise across his face, an internal investigation would later determine." In addition, the SAPD found that Officer Belver assaulted a different man after entering the man's home without a warrant. After the department was forced to rehire Belver, it made him sign a "last chance agreement" that premised his future employment on no future misconduct and limited his ability to patrol the streets alone. Kelly, Lowery, & Rich, *supra* note 1.

[18] *Id*.

[19] More specifically, the arbitrator also found that, under the terms of the San Antonio police union contract, supervisors could not consider his past misconduct in their decision to terminate him, since it had taken place over 180 days earlier. This, according to the police union and the arbitrator, made the "last chance agreement" effectively null and void. As a result, the arbitrator concluded that the city could only consider the immediate circumstances of the behavior in question, making termination an unreasonably harsh punishment. *Id*; *see also* Tim Gerber, *SAPD Officer Appeals Termination, Wins Job Back Through Arbitration*, ABC KSAT 12 NEWS (April 27, 2017), https://www.ksat.com/news/defenders/sapd-officer-appeals-termination-wins-job-back-through-arbitration (further elaborating on the rehiring and providing a link to the decision handed down by the arbitrator).

[20] As Judge Thelton Henderson of the U.S. District Court for the Northern District of California observed, "[j]ust like any failure to impose appropriate discipline by the chief or city administrator, any reversal of appropriate discipline [during the appeals process] undermines the very objectives" of the reform program. Matthew Artz, *Judge Orders Investigation into Oakland's Police Arbitration Losses*, SAN JOSE MERCURY NEWS (Aug. 14, 2014), http://www.mercurynews.com/2014/08/14/judge-orders-investigation-into-oaklands-police-arbitration-losses. These comments case after reports emerged that the police union was successful in reducing or overturning punishment against officers in twelve of the previous fifteen cases.

have observed a troubling pattern. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers that have committed egregious acts of misconduct.[21] The story from San Antonio is hardly unique.

The media has documented similar stories in police departments across the country. For example, in 2007 an Oakland police officer shot and killed an unarmed 20-year-old man.[22] Only a few months later, the same officer "killed *another* unarmed man, shooting him three times in the back as he ran away."[23] Oakland paid a $650,000 settlement to the family of the deceased man and fired the officer.[24] But during the disciplinary appeals process, an arbitrator ordered Oakland to reinstate the officer and awarded him back pay.[25] Similarly, an arbitrator overruled a decision by the police department in Sarasota, Florida to fire an officer who misled investigators after being caught on camera repeatedly and excessively beating a suspect without justification.[26] And in Washington, D.C., police officials fired an officer after his criminal conviction for sexually abusing a teenager in his squad car, only to have an arbitrator order him rehired on appeal.[27]

In each of these cases, and hundreds of others like them across the country,[28] police disciplinary appeals have forced communities to

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[21] Kelly, Lowery, & Rich, *supra* note 1 (showing that in a survey of large American police departments, approximately 23 percent of officers won their jobs back through appeals after being terminated for misconduct).

[22] Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Streets*, ATLANTIC (Dec. 2, 2014), https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258.

[23] *Id*; *see also* Sean Maher, *Early Report Shows Oakland Police Shot Man in Back*, EAST BAY TIMES (July 28, 2008), http://www.eastbaytimes.com/2008/07/28/early-report-shows-oakland-police-shot-man-in-back.

[24] Henry K. Lee, *Fatal Shooting to Cost Oakland $650,000*, S.F. GATE (July 8, 2009), http://www.sfgate.com/bayarea/article/Fatal-police-shooting-to-cost-Oakland-650-000-3224969.php.

[25] Henry K. Lee, *Oakland Must Rehire Cop Who Shot Suspect in Back*, S.F. GATE (March 5, 2011), http://www.sfgate.com/crime/article/Oakland-must-rehire-cop-who-shot-suspect-in-back-2528215.php; *see also*, Sean Maher, *Oakland Police Officer to be Reinstated*, MERCURY NEWS (Mar. 6, 2011), http://www.mercurynews.com/2011/03/06/oakland-police-officer-to-be-reinstated.

[26] Friedersdorf, *supra* note 22 (noting further that, "[a]fter the incident, the officer told investigators that he "should have killed him.").

[27] Kelly, Lowery, & Rich, *supra* note 1.

[28] For example, in Portland, Oregon, an arbitrator ordered the rehiring of a police officer that had allegedly unjustifiably killed an unarmed 25-year-old. Evan Bailey, Jr., *Portland Must Rehire Cop Fired After Killing Unarmed Man in 2010, Court Rules*, THE OREGONIAN (Dec. 31, 2015), http://www.oregonlive.com/portland/index.ssf/2015/12/portland_must_rehire_cop_fired.html (explaining that the Oregon Court of Appeals ultimately reaffirmed an

rehire police officers deemed unfit for duty by their supervisors. But to date, there have been few comprehensive, academic studies analyzing the disciplinary appeals procedures that contribute to these problematic outcomes.

This is in part because police disciplinary appeals vary from one jurisdiction to another.[29] These procedures are often articulated not just in state statutes or municipal codes, but also in department-specific police union contracts. Given that there are thousands of decentralized police departments in the United States,[30] each with their own municipal codes and union contracts,[31] the content of police disciplinary appeals has largely escaped scholarly inquiry.

To fill this gap in the literature, this Article analyzes disciplinary appeals procedures across a large number of American police departments. To do this, it draws on a dataset of 656 police union contracts collected between 2014 and 2017 via open record requests, searches of municipal websites and state repositories, and web searches.[32]

This dataset provides a detailed account of the disciplinary appeals process available to a large number of American police officers working at the state and local level.[33] The vast majority of these police departments give officers the ability to appeal disciplinary sanctions through multiple levels of appellate review.[34] At the end of this complex process, the majority of departments permit officers to appeal

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arbitrator and state board's order to reinstate the officer). And in New London, Connecticut, an arbitrator ordered the rehiring of a police officer who shot and paralyzed an unarmed man. *Connecticut Town Rehires Officer Who Shot Unarmed Man,* NEW HAVEN REGISTER, (Mar. 18, 2014), http://www.nhregister.com/connecticut/article/Connecticut-town-rehires-officer-who-shot-unarmed-11367888.php. In 2008, the Pittsburgh Bureau of Police fired an officer for "accidentally shooting a 20-year-old man he was trying to pistol whip" at his wife's birthday party, only to have an arbitrator order the Bureau to rehire him. Friedersdorf, *supra* note 22.

[29] *See* Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1258-66 (showing in app. A and B how appellate procedures for arbitration differ from one jurisdiction to the next).

[30] BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (Bureau of Justice Statistics, Bulletin No. 233982, 2011), http://www.bjs .gov/content/pub/pdf/csllea08.pdf (estimating that there are around 17,985 police and law enforcement agencies in the United States).

[31] The majority of police officers are part of labor unions that collectively negotiate their own contracts with their local police department. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf (about two-thirds of police officers are part of labor unions).

[32] *See infra* Part III (describing in more detail the methodology for this project).

[33] *See infra* Part III.

[34] *See infra* Part IV (a).

disciplinary sanctions to an arbitrator selected in part by the local police union.[35] And in virtually all of these cases, police departments give arbitrators expansive authority to re-litigate the factual and legal grounds for disciplinary action.[36] While each of these appellate procedures may be individually defensible, they may combine in a large number of police departments to create a formidable barrier to democratic police accountability.

This hypothesis has several important implications for the literature on police accountability. First, these findings demonstrate that, in most American police departments, police supervisors, city councils, mayors, and civilian review boards are not the true adjudicators of internal discipline. The final authority on disciplinary actions generally rests with outside arbitrators.[37] This suggests that the average American police officer faces even less democratic accountability than many scholars have previously assumed.

Second, police disciplinary appeals may be a greater barrier to officer accountability than researchers have previously recognized. The complexity and formidability of the disciplinary appeals process may explain the inability of traditional external legal mechanisms to promote reform in American police departments.[38] In many documented cases, supervisors have been forced to rehire officers that have engaged in criminal offenses, violence, and other behaviors that raise serious questions about their fitness to serve in any law enforcement capacity.[39] Sometimes, the offenses committed by rehired officers raise serious enough concerns about an officers' proclivity towards dishonesty that prosecutors are required to place the officer on a *Brady* list[40] and reassign them so as to avoid impairing future criminal prosecutions. This suggests that supervisors may be limited in their ability to bring about important personnel changes that could remedy patterns of misconduct within a police department.

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[35] *See infra* Part IV (b).

[36] *See infra* Part IV (c).

[37] *See, e.g.,* Udi Ofer, *Getting it Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033 (2016) (providing an excellent and detailed summary of civilian review models across a large number of American cities, but spending somewhat less time considering how disciplinary appeals may make civilian review more symbolic than substantive).

[38] *See infra* Part IV (f) (describing the implications of these findings for the effectiveness of the exclusionary rule, civil litigation, criminal prosecution, civilian review boards, and structural reform litigation as regulatory mechanisms).

[39] Kelly, Lowery, & Rich, *supra* note 1 (providing numerous, detailed examples); Friedersdorf, *supra* note 22 (similarly providing numerous, detailed examples).

[40] *See, e.g.,* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (describing the requirements imparted by *Brady* and how they interact with records of officer misconduct).

Based on these findings, this Article concludes by arguing that states and localities should increase democratic accountability in police disciplinary appeals. To be clear, police officers deserve procedural protections to avoid arbitrary punishment. But in many police departments across the country, disciplinary procedures seem as if they are designed to insulate officers from basic, democratic accountability. Principally, this Article argues that states and municipalities should replace arbitrators with democratically accountable actors.[41] A number of police departments already do this, by providing officers with an opportunity to appeal discipline levied by a police supervisor to civilian review boards, city councils, mayors, or city managers.[42]

Nevertheless, many police officers and union leaders may understandably argue that appellate procedures are designed to provide a check on the discretionary authority of democratic actors.[43] A city council member, mayor, civilian review board, or city manager may not be sufficiently detached from police department supervisors so as to make an impartial decision on an internal disciplinary matter. By contrast, police unions may argue that arbitrators are truly neutral and disinterested parties, and thus well situated to adjudicate disciplinary appeals.

Thus, if communities continue using arbitration in cases of disciplinary appeals, this Article proposes a couple steps that communities could take to ensure neutrality and democratic accountability. For example, communities could follow the lead of cities like Grand Rapids, Michigan[44] and Fullerton, California[45] in giving

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[41] *See infra* Part V (a).

[42] For example, in Murrieta, California, officers have the ability to appeal punishment handed down by the police chief to the City Manager. The City Manager must then hold a hearing, where he or she determines whether the punishment is supported by evidence. While employees can challenge the City Manager's decision to advisory arbitration, this arbitrator's decision is not binding on the city. *See* CITY OF MURRIETA, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MURRIETA AND THE MURRIETA POLICE OFFICERS ASSOCIATION, at 5-10 (2007) (on file with author). Other cities allow for officers to appeal disciplinary decisions to an arbitrator, but they make these arbitrator's decisions advisory. In such cases they often give power to the City Manager, or a similar actor, to determine the final disposition. *See, e.g.,* CITY OF OXNARD, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OXNARD AND OXNARD PEACE OFFICERS' ASSOCIATION, at 21-23 (2016) (on file with author).

[43] Ofer, *supra* note 37, at 1050 ("Police officers who are accused of wrongdoing must be fully protected from false accusations and must enjoy the full range of due process protections in all stages of the investigatory and disciplinary process, including … the right to appeal the substantiation or the discipline.").

[44] For example, Grand Rapids, Michigan's contract states that an arbitrator "shall be limited to determine the facts only and shall have no authority to modify the discipline imposed if the facts support the violation." This effectively means that the arbitrator can review the factual sufficiency of the allegations against an

arbitrators narrower standards of review, or limiting their ability to reduce punishment if the evidence supports the alleged violation. Such a move would provide more deference to disciplinary decisions made by democratically accountable representatives of the community, while still empowering arbitrators to provide relief in cases of truly arbitrary or capricious punishment.

This Article proceeds in five parts. Part I provides background information on how the source of internal disciplinary procedures, including appellate procedures, in American police departments. It focuses specifically on police union contracts, civil service laws, and law enforcement officer bills of rights as the primary sources of these appellate procedures. Part II reviews the limited empirical existing literature on police disciplinary appeals. Part III lays out the methodology used in this study, and Part IV presents the results of this study. Finally, Part V offers some normative recommendations for increasing democratic accountability and transparency in police disciplinary appeals.

## I.
## THE INTERNAL DISCIPLINARY PROCESS IN AMERICAN POLICE DEPARTMENTS

Modern policing scholars widely recognize that individual acts of officer misconduct are often symptoms of broader organizational deficiencies within law enforcement agencies.[46] Thus, in order to address police misconduct effectively, the law must not only punish "bad apples,"[47] but also incentivize the nation's nearly 18,000 state and local

officer, but the arbitrator cannot exercise their own personal judgment about the proper amount of punishment. CITY OF GRAND RAPIDS, AGREEMENT BETWEEN CITY OF GRAND RAPIDS AND THE GRAND RAPIDS POLICE OFFICER ASSOCIATION, OFFICE AND SERGEANT UNIT, at 6 (2016) (on file with author).

[45] The Fullerton contract says that an arbitration may not overrule, reverse, or modify a city's decision unless there is a violation of the procedures articulated in the contract, or if the city's punishment is "arbitrary, capricious, discriminatory or otherwise unreasonable." CITY OF FULLERTON, RESOLUTION FOR FULLERTON POLICE OFFICERS' ASSOCIATION, POLICE SAFETY UNIT, at 45 (2015) (on file with author).

[46] Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–25 (2004) (arguing in part that police misconduct is caused by organizational deficiencies).

[47] Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 135 (2016) ("After all, every large organization will have a few bad apples. In the absence of any national statistics on local behavior, it can be difficult for the public, the press, or interest groups to prove that an individual act of police misconduct is connected to a broader problem within a police department.").

police departments[48] to implement rigorous internal oversight and disciplinary procedures.

The law primarily relies on a handful of external, legal mechanisms[49] to do this: the exclusionary rule,[50] criminal prosecution,[51]

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[48] BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (Bureau of Justice Statistics, Bulletin No. 233982, 2011), http://www.bjs .gov/content/pub/pdf/csllea08.pdf (estimating that there are around 17,985 police and law enforcement agencies in the United States).

[49] This list, of course, leaves off other major forms of police regulation like structural reform litigation and state licensing or accreditation, which have received some scholarly discussion—although comparatively less than the exclusionary rule, criminal prosecution, and civil litigation. *See, e.g., generally* Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001) ("Without a mechanism at the state or national level to remove the certificate of law enforcement officials who engage in such misconduct, it is likely that there will be more such instances of repeated misconduct."); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015) [hereinafter Rushin, *Structural Reform Litigation*] (providing an empirical assessment of the use of the DOJ's implementation of 42 U.S.C. § 14141); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014) [hereinafter Rushin, *Federal Enforcement*] (also empirically assessing § 14141 implementation); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2010) (offering normative recommendations for improving the DOJ's use of § 14141 litigation); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (also offering a normative recommendation for improving the DOJ's use of § 14141 litigation); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008) (arguing for a more collaborative approach to § 14141 enforcement).

[50] The exclusionary rule requires state and federal courts to prohibit prosecutors from admitting evidence in criminal trials obtained by police in violation of the constitution. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (expanding the exclusionary rule to cover wrongdoing by state and local police, not just federal law enforcement); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920) (extending the exclusionary rule to address both illegally obtained material and copies of illegally obtained material, establishing the groundwork for the "fruit of the poisonous tree" doctrine); Weeks v. United States, 232 U.S. 383, 398 (1914) (first establishing the exclusionary rule at the federal level, but not applying it to the states), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961). Theoretically, the exclusionary rule deters officer misconduct by removing the incentive for such behavior. Elkins v. United States, 364 U.S. 206, 217 (1960).

There is debate about whether the exclusionary rule contributes to meaningful change in police departments. *See, e.g.*, William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 355 (1991) (arguing that the exclusionary rule increases likelihood police department will develop reforms); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L.

and civil litigation.[52] Each of these mechanisms penalizes individual acts of unlawful behavior by frontline police officers, which in the aggregate, should theoretically force rational police supervisors to enact rigorous internal oversight and disciplinary procedures within their police agencies.[53]

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REV. 1016, 1017 (1987) (finding that the Chicago Police Department underwent some reforms after implementation of exclusionary rule). *But cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 322 (2d ed. 2008) (arguing the exclusionary rule is ineffective at bringing about real change).

[51] Police officers can be subject to criminal prosecution at the state or federal level. At the federal level, under 18 U.S.C. § 242, police officers can be subject to criminal prosecution if their conduct willfully deprives someone of their constitutional rights. At the state level, prosecutors can bring charges against police officers for any criminal law violation, subject to the usual protections afforded to criminal suspects, including criminal defenses like self-defense. Scholars recognize that only a small subset of police misconduct constitute criminal acts, making it an under-inclusive method for addressing the wide range of officer misconduct. *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 842 n.138 (1999) ("[C]riminal law standards define 'the outer limits of what is permissible in society'—not the good police practices that police reformers aspire to institute in a wayward department." (quoting PAUL CHEVIGNY, EDGE OF THE KNIFE 101 (1995)).

[52] Victims of police misconduct can file suit in federal district court, if the officer's conduct violated their constitutional rights. 42 U.S.C. § 1983 (2012). But in order to be successful, individuals must overcome the qualified immunity doctrine. *See* Hope v. Pelzer, 536 U.S. 730 (2002) (further defining clearly established law); Wilson v. Layne, 526 U.S. 603 (1999) (providing a clearer definition of clearly established law); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (limiting civil suit in cases where a public official is protected by qualified immunity). Individuals can also file suit against a police department or municipality, but only if they can show that the officer's conduct was caused by the employer's deliberate indifference in its failure to train or oversee its employer. *See* Canton v. Harris, 489 U.S. 378 (1989) (establishing the deliberate indifference in a failure to train standard for municipal liability); Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 700–01 (1978) (opening up municipal liability in some cases). Some research suggests § 1983 may bring about reform in police departments. *See, e.g.,* CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 95 (2009) (showing that insurance companies pushed reform in police departments in response to the expansion of municipal liability). Nevertheless, indemnification policies in municipalities seem to undermine many of the fundamental assumptions underlying the court's doctrine on § 1983 cases. *See, e.g.,* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (showing the prevalence of indemnification policies across American police departments).

[53] In my previous research, I have described each of these existing responses to police misconduct as "cost-raising" regulations. Rushin, *Structural Reform Litigation*, *supra* note 49, at 1352 ("That is to say, these traditional approaches attempt to dissuade police wrongdoing by raising the potential costs of

But for decades, researchers have lamented the apparent failure of these external mechanisms to usher in the desired organizational reform. Scholars have offered a wide range of explanations for the failure of these mechanisms. Some have argued that, because of the organization of municipal governments, police departments fail to internalize the costs imposed by civil judgments.[54] Others have pointed out that courts have established dozens of exceptions to the exclusionary rule, making it less effective at discouraging officer wrongdoing.[55] And still others have recognized that, for a number of practical and structural reasons, officers are rarely subject to criminal punishment.[56]

But an emerging thread of scholarship has shown that police supervisors face another significant hurdle in responding to officer misconduct: a complex web of labor and employment laws that define the procedural requirements police supervisors must follow when investigating or punishing officers for misconduct.[57] These labor and employment protections come from three primary sources: police union contracts, law enforcement officer bills of rights, and civil service statutes. These three sources also frequently articulate the procedures used by police officers appealing internal disciplinary action. The following subparts will address each in turn, while focusing specifically

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such behavior. They cannot force police departments to adopt proactive reforms aimed at curbing misconduct.").

[54] Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2009) (showing how the organization of municipal governments often means that municipalities do not properly internalize the consequences of police misconduct).

[55] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–27 (1996) (detailing how the Supreme Court has gradually recognized numerous exceptions to the exclusionary rule); *see also* United States v. Leon, 468 U.S. 897, 924–25 (1984) (establishing a good-faith exception to the exclusionary rule); Nix v. Williams, 467 U.S. 431, 449–50 (1984) (establishing the inevitable discovery exception to the exclusionary rule); *Elkins*, 364 U.S. at 208–33 (establishing the silver platter doctrine); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 183 (2012) (explaining how the exclusionary rule only applies to public law enforcement, and not private police agents).

[56] For example, of the thousands of cases of police officers killing civilians from 2005 through 2015, the Washington Post only found evidence that 54 officers were charged for any crimes. Kimberly Kindy, Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (April 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.f4f7d9c08828.

[57] Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (describing labor and employment protections as a sort of "tax" on police reform); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014) (also discussing the incidental impact of labor laws and collective bargaining agreements).

on how these mechanisms establish the disciplinary appeals process in American police departments.

### *A. Police Union Contracts*

Police officers are a relatively "new addition to the labor movement."[58] For much of American history, police officers did not have the legal right to unionize, in part because of the "disastrous Boston Police Department Strike of 1919, in which over a thousand officers—about two-thirds of Boston's police force at the time—made a big for higher pay and better hours by walking off the job or refusing to report for duty," leading to riots, property damage, and numerous deaths. [59] It would be decades after the Boston riots before police began, in earnest, to win the right to unionize and collectively bargain.[60]

Today, the tide has turned dramatically. The majority of police officers are part of police unions,[61] and police unionization has strong supporters on both sides of the political aisle.[62] State statutes on the topic generally permit police officers to bargain collectively on any matter related to wages, hours, and other conditions of employment. Terms like "wages" and "hours" rather straightforwardly give police unions the right to negotiate about anything that affects compensation or benefits,

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[58] Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1203 (2017).

[59] Stoughton, *supra* note 57, at 2206; *see also* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE: 1900–1962 (2004) (chronicling how these events led to court opinions, labor opponents, and policymakers frequently citing the Boston strike "as a cautionary tale of the evils of such [police] unions.").

[60] Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017) ("Unions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s, as rank-and-file officers felt attacked by the civil rights movement's focus on police brutality and racism and by federal court decisions limiting police officers' investigatory and arrest powers.").

[61] There are four states that explicitly bar police unionization under state law: Georgia, North Carolina, South Carolina, and Virginia. Five states have no clear statutory mandate on the topic: Alabama, Colorado, Florida, Mississippi, and Wyoming. The remaining states have either permit or require collective bargaining in police departments. MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POL'Y RES., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 7 (2014), http://cepr.net/documents/state-public-cb- 2014-03.pdf. This means that, according to one estimate, around 66 percent of police officers are employed by departments that engage in collective bargaining. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf.

[62] Rushin, *Police Union Contracts*, *supra* note 58, at 1206 ("…political leaders on both sides of the aisle who once rejected unionization as a threat to public safety have now widely embraced it.").

either directly or indirectly. [63] But terms like "conditions of employment" present some interpretive complexity. If read broadly, this sort of language can become a "catchall phrase into which almost any proposal may fall."[64] To prevent such a broad interpretation, courts and state labor relations board have found that so-called managerial prerogatives are not be subject to collective bargaining as conditions of employment.[65] For all practical purposes, though, most courts have held that disciplinary procedures qualify as conditions of employment rather than managerial prerogatives.[66]

Some research has explored the ways that the collective bargaining process may contribute to internal policies and procedures that thwart police accountability efforts.[67] These studies have found that

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[63] Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Relations*, 84 A.L.R. Fed. 3d Art. 3, at 242 (1978 & Supp. 2015) (showing that courts have generally understood terms like "wages" to permit public employees to bargain about wages or salaries, fringe benefits, health insurance, life insurance, retirement benefits, sick leave, vacation time, and any indirect form of compensation).

[64] Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi, 10 S.W.3d 723, 727 (Tex. App. 1999).

[65] Tussey, supra note 63, at 242–43.

[66] See, e.g., City of Casselberry v. Orange Cty. Police Benevolent Ass'n, 482 So. 2d 336, 340 (Fla. 1986) (concluding that municipalities must bargain collectively on issues of discharge and demotion as needed to provide alternative grievance procedures); City of Reno v. Reno Police Protective Ass'n, 653 P.2d 156, 158 (Nev. 1982) (finding department must negotiate over disciplinary procedures); Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112, 766 N.E.2d 1027, 1031–32 (Ohio Ct. App. 2001) (also holding that the department must bargain collectively over disciplinary procedures); *but c.f.,* Berkeley Police Ass'n v. City of Berkeley, 143 Cal. Rptr. 255, 260 (Cal. Ct. App. 1977) (declining to enjoin the police department from allowing members of the citizens' police review commission to meet and confer with the police union any time a new civil oversight mechanisms was being implemented); Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n, 462 N.E.2d 96, 102 (Mass. 1984) (use of a polygraph was not a condition of employment because of overriding policy interest in officer accountability); State v. State Troopers Fraternal Ass'n, 634 A.2d 478, 493 (N.J. 1993) (limiting the ability of the union to demand bargaining over certain disciplinary procedures).

[67] *See, e.g.,* Fisk & Richardson, *supra* note 60 (providing a summary of how police unions can both thwart and promote accountability, and also providing a summary of many of the ways that police union contracts can impair reasonable accountability efforts); DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie, & Brittany Packnett, *Police Union Contracts and Police Bill of Rights Analysis*, June 29, 2016, https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf (analyzing the content of police union contracts from 81 large American cities, and from 14 law enforcement officer bills of rights to show how some may thwart accountability efforts); Rushin, *Police Union Contracts*, *supra* note 58 (providing an analysis of labor laws that influence police internal

police union contracts frequently include language that impedes officer investigation and oversight by delaying officer interrogations,[68] limiting civilian oversight,[69] expunging records of prior officer misconduct, indemnifying officers accused of misconduct,[70] and more.[71] At least one study has speculated that the structure of the collective bargaining process and the political power of police unions may be contributing to regulatory capture, whereby police unions are able to obtain unreasonably generous protections from disciplinary oversight.[72] In response, some scholars have argued for more transparency in the collective bargaining process,[73] while others support the inclusion of

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disciplinary procedures, analyzing a dataset of 178 police union contracts and 16 law enforcement officer bills of rights, and offering normative recommendations on how to reform the law to diminish the number of barriers to accountability).

[68] *See, e.g.,* CITY OF CHICAGO, AGREEMENT BETWEEN THE CITY OF CHICAGO DEPARTMENT OF POLICE AND THE FRATERNAL ORDER OF POLICE CHICAGO LODGE NO. 7, at 6 (2012) (providing a 48 hour waiting period from the time an officer is informed of a request for an interview, with some exceptions for particular circumstances).

[69] *See, e.g.,* DISTRICT OF COLUMBIA, LABOR AGREEMENT BETWEEN THE GOVERNMENT OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT AND THE FRATERNAL ORDER OF POLICE MPD LABOR COMMITTEE, at 18 (2005) (establishing a protocol for purging disciplinary records over time).

[70] *See, e.g.,* CITY OF BALT., MEMORANDUM OF UNDERSTANDING BETWEEN THE BALTIMORE CITY POLICE DEPARTMENT AND THE BALTIMORE CITY LODGE NO. 3, FRATERNAL ORDER OF POLICE, INC. UNIT I, at 22 (2015) (barring civilian participation on certain disciplinary hearing boards).

[71] *See, e.g.,* Samuel Walker, *The Baltimore Police Union Contract and the Law Enforcement Officers' Bill of Rights: Impediments to Accountability* (May 2015), available at http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf (describing how the law enforcement officer bill of rights in Maryland and the Baltimore police union contract can impede accountability); Samuel Walker, *Police Union Contract "Waiting Periods" for Misconduct Investigations Not Supported by Scientific Evidence* (July 1, 2015), available at http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf (rejecting the need for waiting periods in cases of officer interrogations); Reade Levinson, *Across the U.S., Police Contracts Shield Officers From Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:16 PM GMT), http://www.reuters.com/investigates/special-report/usa-police-unions (conducting an analysis and coding of 82 police union contracts from large American cities).

[72] Rushin, *Police Union Contracts*, *supra* note 58, at 1215-16 (describing why regulatory capture is theoretically plausible in the police union negotiation process).

[73] *Id*. at 1243-51 (calling for improved transparency in the negotiation of police union contracts and considering some of the limitations of such a policy position).

minority unions during negotiations.[74] Overall, the existing literature seems to suggest that police union contracts may make it more difficult to bring about reform in problematic police departments.[75]

But despite the growing scholarship on police unions and collective bargaining, the existing literature has given little attention to the topic of disciplinary appeals. One study observed that police union contracts frequently require the arbitration of disciplinary appeals.[76] Outside of that one brief discussion, disciplinary appeals flowing from union contracts have received virtually no other concerted attention from legal scholars. This is an important oversight because emerging evidence suggests that union contracts may establish particularly cumbersome disciplinary appeals procedures that seem to unfairly advantage officers facing suspensions or terminations.

Take, for example, a recent case in Cleveland, Ohio. There, the city attempted to fire six officers who fired 137 shots in 19.3 seconds at two unarmed civilians inside their car.[77] But the terms of the Cleveland police union contract gave each officer the right to challenge any termination to a third-party arbitrator, who issues a final decision that is binding on all parties.[78] The union contract also gives the arbitrator

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[74] Fisk & Richardson, *supra* note 60, at 777-96 (describing how policymakers could empower new labor organizations to engage in a form of limited minority union bargaining).

[75] Rushin, *Federal Enforcement of Police Reform*, *supra* note 49, at 3196 (using the term "cost-raising" to describe these sorts of regulations).

[76] Rushin, *Police Union Contracts*, *supra* note 58, at 1220, 1238-39 (showing the definition used for arbitration in this study, and showing the results of coding for the presence of arbitration clauses in union contracts).

[77] The incident in question began when an officer observed Russell fail to use his turn signal, and attempted to execute a traffic stop. Russell failed to stop, and instead led officers on a 22 mile chase. At various points, upwards of 62 squad cars were involved in the case, before the chase ended near a local middle school. When one officer opened fire on the vehicle, a number of other officers joined in. Ida Lieszkovszky, *Everything You Need to Know Before the Start of the Trial for Cleveland Police Officer Michael Brelo*, CLEVELAND PLAIN-DEALER (April 6, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/04/everything_you_need_to_know_be.html. In total, the officer fired a total of 137 shots in 19.3 seconds at the vehicle, hitting both Russell and Williams over 20 times each, killing both of them instantly. Later investigations confirmed that both Russell and Williams were apparently unarmed. Evan McDonald, *Six Cleveland Police Officers Fired, Six Suspended for Roles in Deadly Chase and Shooting*, CLEVELAND PLAIN-DEALER (Jan. 26, 2016), http://www.cleveland.com/metro/index.ssf/2016/01/six_cleveland_police_officer_f.html.

[78] Specifically, the union contract states that "[d]iscipline shall fall under the grievance procedures," meaning that officers have the right to challenge disciplinary action through up to four layers of disciplinary review, ultimately culminating in a challenge before a third-party arbitrator, selected "in accordance with the rules of the American Arbitration Association." The decision by the arbitrator is considered "binding on the City, the union, and the members, and

seemingly expansive authority to re-litigate all of the factual and legal determinations made by the city during earlier disciplinary proceedings.[79] In that case, the assigned arbitrator ultimately ordered the city to rehire five of the six officers involved in the deadly shooting, over the fierce objections of city leaders.[80]

But these sort of anecdotal accounts provide only limited insight. They do not tell us whether union contracts across the country frequently offer such protective disciplinary appeals procedures. Given the lack of research on how union contracts affect disciplinary appeals procedures, there appears to be substantial room for future research.

### *B. Law Enforcement Officer Bills of Rights*

In addition to collective bargaining agreements, law enforcement officer bills of rights (LEOBRs) also set strict limits on some types of internal disciplinary action. These are state statutes passed via the legislative process designed to provide a unique level of protection to all officers within a state.[81] For example, Maryland's LEOBR prevents localities from punishing officers for any "brutality" unless someone files a complaint within 90 days.[82] It also allows the removal of civilian complaints from officer personnel files after three years.[83] Louisiana's LEOBR provides officers with up to thirty days to secure counsel before investigators can interview them about alleged misconduct.[84] In Florida, the LEOBR requires investigators to provide an officer under investigation with all evidence related to the investigation before beginning an interrogation, including the name of all complainants, physical evidence, incident reports, GPS locational data, audio evidence, and video recordings.[85] In Illinois, the LEOBR bars the consideration of

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contract provides virtually no guidance on the limits of the arbitrator's authority to re-review all disciplinary findings. CITY OF CLEVELAND, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION NON-CIVILIAN PERSONNEL 42-44 (2013).

[79] *Id*.

[80] Adam Ferrise, *Michael Brelo Stays Fired, Other officers Involved in '137-Shots' Chase Get Jobs Back*, CLEVELAND PLAIN-DEALER (Jun 13, 2017), http://www.cleveland.com/metro/index.ssf/2017/06/michael_brelo_stays_fired_othe.html.

[81] These state statutes emerged in part because of the decision in *Garrity v. New Jersey*, where the U.S. Supreme Court held that the state could not used compelled statements from disciplinary interviews in later criminal prosecutions. Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197, 1220-21 (2016); *see also* Garrity v. New Jersey, 385 U.S. 493 (1967).

[82] MD. CODE, PUBLIC SAFETY § 3-104.

[83] *Id*.

[84] LA. REV. STAT. ANN. § 40.2531.

[85] Fl. Stat. Ann. § 112.532.

anonymous civilian complaints.[86] And in Delaware, the LEOBR bars municipalities from requiring officers to disclose personnel assets as a condition of employment.[87] These only scratch the surface of the protective procedures offered by LEOBRs to police officers facing internal investigations.

There has been a surge of recent scholarship describing the content and policy implications of LEOBRs. Kevin M. Keenan and Samuel Walker conducted the most comprehensive empirical study of LEOBRs to date. They coded the content of fourteen LEOBRs for fifty separate variables.[88] Based on this coding, they concluded that a number of LEOBRs contained unreasonably protective procedures that arguably thwarted reasonable accountability and oversight.[89] Similarly, a study by Aziz Z. Huq and Richard H. McAdams identified twenty existing LEOBRs, which often establish so-called "interrogation buffers" and "delay privileges" that impair officer accountability.[90] Additionally, a number of media outlets have begun to recognize the ways that LEOBRs can tip the scales in favor of the officer during disciplinary cases.[91] Other scholars, like Kate Levine, have argued that some components of LEOBRs—particularly limits on abusive interrogation techniques—ought to serve as a blueprint for how the law could protect the rights of criminal suspects during criminal interrogations.[92]

But, while each of these past studies has made an important contribution to the field, the existing scholarship on LEOBRs spends little time discussing the topic of disciplinary appeals. This may be in part because, as one study found, LEOBRs often do not provide

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[86] 50 Ill. Comp. Stat. Ann. 725/3.8 ("Anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit.").

[87] 11 Del. Code § 9200.

[88] Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B. U. PUB. INT. L.J. 185 (2005).

[89] *Id*.

[90] Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. L. FORUM 213, 222 (identifying Arkansas, Arizona, California, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin as states that have LEOBRs on the books).

[91] *See, e.g.,* Eli Hager, *Blue Shield: Did you Know Police Have Their Own Bill of Rights?*, MARSHALL PROJECT (April 27, 2015), http://www.themarshallproject.com/2015/04/27/blue-shield (also noting that "As man as 11 other states are considering similar legislation, and many of the rest have written essentially the same rights and privileges into their contracts with police unions.").

[92] Levine, *supra* note 81, at 1212.

appellate procedures.[93] Instead, they tend to provide limitations on the investigation and initial adjudication of internal disciplinary matters.

### *C. Civil Service Statutes*

Finally, the majority of states and the District of Columbia have given public employees, including police officers, with additional employment protection via civil service laws. [94] These laws emerged, in part, as an attempt to ensure that government jobs were allocated based on merit, rather than political patronage.[95] While these laws initially focused the hiring and discharge of civil servants, they now cover at least 80 percent of state and local government employees, and their focus has expanded today to include "demotions, transfers, layoffs and recalls, discharges, grievances, pay and benefit determinations, and classification of positions."[96]

Because they often apply equally to all large classes of government employees across an entire state, civil service laws operate as a "floor for police officer employment protections, which police unions can raise through collective bargaining," or law enforcement officer bills of rights.[97] It is also common for civil service statutes to establish minimum procedures for disciplinary appeals in police departments.

Outside of police union contracts, LEOBRs, and civil service statutes, departmental regulations and city ordinances also commonly

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[93] Rushin, *supra* note 29, at 1266 (showing in app. C that no existing LEOBR appears to elaborate procedures for arbitration on appeal).

[94] For some representative examples, *see* ALA. CODE §§ 11-43-180 to 190 (2008) (establishing a civil service system for municipal law enforcement); ARIZ. REV. STAT. §§ 38-1001 to 1007 (1956) (also establishing civil service system for law enforcement officers); ARK. CODE ANN. §§ 14-51-301 to 311 (2013 & Supp. 2015) (civil service system for police and firefighters); COLO. REV. STAT. §§ 31-30-101 to 107 (2016) (civil service system for municipal law enforcement officers); D.C. Code §§ 5-101.01-5.133-21, 5-1302 to 1305 (2001 & Supp. 2016). At least a few states do not appear to have civil service systems that would cover local law enforcement officers.

[95] R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAWS 1-3 (1976). Historians have traced the origins of modern civil service statutes to the assassination of President James Garfield in 1881 by a "disappointed officer seeker" which contributed to the passage of the Pendleton Act two years later. *Id*.

[96] Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95, 101 n.32, 102 (1990).

[97] Rushin, *Police Union Contracts*, *supra* note 58, at 1208.

establish the boundaries of acceptable practices during internal investigations of police officers.[98]

## II.
## EXISTING RESEARCH ON DISCIPLINARY APPEALS

While some studies have shed important light on how union contracts and LEOBRs establish problematic internal disciplinary procedures, there has been little research evaluating the disciplinary appeals process used in American police departments.[99] And the limited existing research on police disciplinary appeals has been outcome oriented. That is to say, the existing research focuses on the *outcomes* of police disciplinary appeals, not the *procedures* that contributed to those outcomes. This small body of literature suggests that police disciplinary appeals frequently result in the reduction of officer punishment.

For example, Mark Iris conducted two separate empirical examinations of the effect of appellate arbitration on disciplinary outcomes in Houston and Chicago.[100] He found that in Houston between 1994 and 1998, and in Chicago between 1990 and 1993, arbitrators regularly reduced or overturned officer suspensions and firings.[101] Similarly, Tyler Adams recently conducted an important, national study of 92 police arbitrator decisions published by the Bloomberg Law's Labor and Employment Law Resource Center between 2011 and 2015.[102] He coded these arbitration decisions to identify common justifications for arbitrators overturning police discipline on appeal.[103] He found that arbitrators often cited inadequate departmental investigations, a lack of proof about the guilt of discharged officers,

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[98] This study does not look at these local ordinances or internal departmental policies. This means that, if anything, this study underrepresents the frequency of use of each of the elements described *infra* Part IV.

[99] For example, some of the existing studies have discussed the internal investigation process, or the initial disciplinary decision-making process. All of these are important subjects for scholarly consideration. But they are distinguishable from the disciplinary appeals process. Once study, though, did code for the presence of arbitration clauses in collective bargaining agreements. *See* Rushin, *supra* note 67, at 1238-39 (showing that 115 of 178 contracts examined as part of that study appeared to permit or require binding arbitration in cases of disciplinary appeals).

[100] Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215 (1998); Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132 (2002).

[101] *Id*.

[102] Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?* 32 A.B.A. J. LAB. & EMP. L. 133 (2016).

[103] *Id*. at 133-34 ("Part III identifies the factors most significant in arbitrators' decisions overturning police discharges and notes the particular importance of officers' good character in decision reversing discharges.").

failure by investigators to adhere to procedural requirements during officer investigations, and mitigating factors in an officer's personnel file to justify appellate relief from disciplinary action.[104]

These findings are roughly consistent with a number of examinations conducted by media outlets. For example, Kimbriell Kelly, Wesley Lowery, and Steven Rich of the *Washington Post* found that, of the 1,876 officers fired for officer misconduct in the nation's largest police departments over the last several years, the disciplinary appeals process reinstated the employment of over 450 of these officers.[105] They found that the disciplinary appeals process forced the Philadelphia Police Department to rehire 62% of officers fired for misconduct during this time period.[106] Similarly, the disciplinary appeals process used by the Denver Police Department resulted in the rehiring of 68% of terminated officers.[107] And in San Antonio, the police department had to rehire an astounding 70% of officers it had fired, because of disciplinary appeals.[108] Similarly, Robert Angien and Dan Horn of the *Cincinnati Enquirer* found that between 1997 and 2001, roughly one in every four officer suspensions or terminations were reversed or reduced on appeal.[109]

Combined, the existing literature presents compelling evidence that the disciplinary appeals process may serve as a barrier to officer accountability. Nevertheless, there appears to be a critical gap in the existing literature. No academic study has comprehensively examined and described the procedural process employed in disciplinary appeals across a substantial cross-section of American police departments. More specifically, the existing literature has not provided a descriptive account of how appeals of discipline work across the nation's 18,000 police departments. How many levels of appeal are available to police officers facing disciplinary sanctions? How many police departments allow arbitrators or comparable third parties to have the final say in

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[104] Based on these findings, Adams challenged the "myth of the untouchable officer." *Id*.

[105] Kelly, Lowery, & Rich, *supra* note 1. I discuss this study in more depth, *infra* Part IV.D.

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] Robert Angien & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to be Reduced*, CINCINNATI ENQUIRER (Oct. 21, 2001), http://enquirer.com/editions/2001/10/21/loc_police_discipline.html. Additionally, reporting out of local news outlets in Philadelphia has also exhibited concern for the ways that disciplinary appeals put problematic officers back on the streets. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILADELPHIA (Feb28, 2013), http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html.

disciplinary appeals? How do communities select the identity of an arbitrator assigned to conduct a disciplinary appeal? And do communities limit the scope of an arbitrator's authority on appeal?

The answers to these questions—that is the procedural process used to adjudicate police disciplinary appeals—likely has a significant effect on the outcome of the appeal. For example, the manner by which police departments select an arbitrator can affect the frequency by which that arbitrator will overturn disciplinary action.[110] Anecdotal evidence suggests that many communities establish a designated list of acceptable arbitrators through union contracts,[111] or employ a system whereby the police union and police supervisors "alternately strike names off [a designed] list; the last name remaining gets the assignment."[112] Such a selection process may contribute to arbitrator decisions that split the difference between supervisor and union demands, since siding too frequently with one side or the other might endanger an arbitrator's selection in future cases through an alternate strike system.[113]

The bottom line is that procedure matters. And there appears to be a descriptive gap in the literature when it comes to the procedures used to adjudicate disciplinary appeals in American police departments.

## III.
## METHODOLOGY

As discussed above, it is challenging to understand fully the range of disciplinary appeals used across the thousands of decentralized American police departments. To begin understanding the kinds of disciplinary appeals procedures offered to police in the United States, this Article relies on an original dataset of police union contracts collected between 2014 and 2017. [114] Consistent with other recent studies

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[110] For example, if police supervisors unilaterally selected an arbitrator, then that arbitrator may feel pressure to approve of any punishments handed down by those supervisors. Conversely, if a police union unilaterally selected an arbitrator, then that arbitrator may feel pressure to overturn or reduce punishment against a union member.

[111] Iris found that Chicago is one of the communities that employ such a permanent panel of designated arbitrators. *See* Iris, *Police Discipline in Houston*, supra note 100, at 146.

[112] Iris identified Houston as a city that employed such an alternate strike system. *See id*.

[113] Interestingly, Iris found that the manner by which communities select arbitrators does not seem to predict the ways in which arbitrators later rule. *Id*. at 146-47 ("That the means through which arbitrators are selected in Houston and Chicago are so different yet produce such similar results."). This Article finds more evidence to bolster this anecdotal finding by Iris, as discussed *supra* Part V.

[114] Because of the long process of collecting and coding these contracts, plus the long editing and publication process, some of these contracts may not longer be active by the time this Article comes out in print. Nevertheless, this

of police policies, this dataset focuses on municipal police departments, rather than sheriff's departments, state highway patrols, or other specialized law enforcement agencies.[115] Public records requests, searches of municipal websites, searches of state repositories, and web searches resulted in the collection of police union contracts from 656 municipal agencies serving communities with over 30,000 residents. A complete list of the departments studied as part of this dataset is available in the Appendix. The dataset covers police officers in 42 states that permit police unionization.[116]

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should not affect the overall claims from this Article. This Article merely claims that a large number of municipalities utilize common disciplinary appeals processes. There is no reason to think that there has been any substantial change over the last several years in disciplinary appeals procedures across a large number of communities. And given the size of the dataset and the overwhelming consistency among jurisdictions, there is no reason to think that this inevitable limitation has skewed the results in any significant way. It is also worth noting that the overwhelming majority of these contracts are available online through public repositories. All contracts analyzed as part of this part of the project are available for download at: https://goo.gl/ZGYjxi.

[115] *See, e.g.,* Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 423-24 (2016) (coding police body camera policies from the largest 100 municipal police departments); Rushin, *supra* note 29, at 1218-1219 (coding police union contracts from municipalities with at least 100,000 residents).

[116] This Article does not code or explore the ways that law enforcement officer bills of rights (LEOBRs) and civil service statutes affect disciplinary appeals. A reporter from the *Marshall Project* identified 14 LEOBRS: California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. *See* Eli Hager, *Blue Shield: Did You Know Police Have Their Own Bill Of Rights?*, MARSHALL PROJECT (Apr. 27, 2015, 12:06 PM), https://www.themarshallproject.org/2015/04/27/blue-shield. In addition, based on analysis by Aziz Huq and Richard McAdams, a handful of other states appear to have statutes on the books that effectively function as LEOBRs, even if they may not be labeled as such. Huq & McAdams, *supra* note 90, at 222. These include Arkansas, Arizona, Iowa, Tennessee, Oregon, and Texas. *See* AR. CODE. ANN § 14-52-303(3); AZ. STAT. § 38-1104(B)(2); IOWA CODE § 80F.1 (2007); OR. REV. STAT. § 236.360; TN. CODE ANN. § 38-8-302; TEX. LOC. GOV'T CODE ANN. § 143.123 (West 1987). In some cases, like in Texas, the more restrictive portions of the LEOBR apply to a particular class of cities based on population, or some other jurisdictional characteristic. Distinguishing between LEOBRs and civil service statutes can be difficult. Some LEOBRs are explicitly articulated separately from civil service statutes. Other times, it can be hard to distinguish between civil service statutes and LEOBRs. Texas is an example of this difficulty. Some have labeled the Texas law as a LEOBR. *See* Huq & McAdams, *supra* note 90, at 222. But this statute is not explicitly labeled as a LEOBR, but instead as a civil service protection. Nevertheless, the portion of the Texas law dealing with cities over 1.5 million residents (which currently only applies to Houston) covers many of the same topics as LEOBRs, including the regulation of officer interrogations and personnel file retention. *See* TX. LOCAL GOVT. § 143.123(f) (providing limitations

This dataset provides a relatively comprehensive understanding of the disciplinary appeals process used in a geographically and demographically diverse cross-section of American police departments. Nevertheless, it is not necessarily generalizable to all police departments, particularly those in small, non-unionized municipalities. While the majority of police officers in the United States are members of unions, there may be reasons to believe that disciplinary appeals procedures differ in unionized and non-unionized agencies. Nevertheless, given the relative ubiquity of police unionization,[117] and given the fact that disciplinary appellate procedures are generally considered appropriate topics for collective bargaining,[118] this dataset provides detailed insight into the disciplinary appellate procedures used across a large segment of unionized police departments.[119]

Before coding the dataset for this Article, I first identified relevant coding variables and definitions. To do this in a manner consistent with prior studies of police policies, I conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability.[120] Through this iterative process, I settled on a five coding variables, which I discuss in more detail in Part IV. Figure 1 summarizes the definitions employed during the coding of the dataset.

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of disciplinary investigations). It is also worth noting that this study does not look at internal departmental policies, state civil service statues, or local city ordinances. This means that, the findings described *infra* Part IV may actually *underrepresent* the frequency of these problematic appellate procedures in communities that choose not to negotiate about appellate procedures during collective bargaining, but nonetheless provide similar protections to those identified in Figure 1 through civil service statutes, municipal ordinances, or internal departmental policies.

[117] BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf (finding that around two-thirds of officers are employed by departments that engage in collective bargaining).

[118] Rushin, *supra* note 29, at 1205-1207.

[119] This dataset, though, does not provide information on the disciplinary appeals procedures in non-unionized departments. In these departments, appellate procedures are generally drawn on municipal ordinances or state civil service statutes.

[120] *See, e.g.,* Fan, *supra* note 115, at 425 (describing the development of the coding book for a similar study of police body camera policies).

Figure 1, Coding Variables and Definitions

| VARIABLE | DEFINITION |
|---|---|
| Appealable to Arbitration or Comparable Procedure | Police officers may appeal disciplinary action to an arbitrator, or a comparable third-party |
| Significant Review Authority | Arbitrator has *de novo* or comparable authority to rehear factual and/or legal determinations made by police supervisors (e.g. police chief), civilian review boards, or city officials |
| Control Over Selection of Arbitrator or Comparable | Police union or police officer has significant authority to select the identity of the arbitrator or third party that will hear the appeal (e.g. striking names from panel or demanding new panels) |
| Arbitrator or Comparable Third Party Makes Final, Binding Decision | The arbitrator or comparable third party has the final say in disciplinary decision, generally disclosing further review or judicial challenges |
| Levels of Appellate Review | The numerical number of levels of appellate review an officer may utilize before a punishment becomes final |

Using the definitions from Figure 1, the dataset underwent two rounds of coding to determine the number of municipalities that fall into each coding category—that is, to determine whether the police union contracts provided for a disciplinary appeal procedure that was consistent with the definition listed in Figure 1. There was substantial agreement in the coding decisions rendered through each of these rounds of coding, suggesting a relatively high level of reliability.[121]

Nevertheless, in a small percentage of cases, these two rounds of coding lead to different decisions as to whether a police union contract satisfied one of the variable definitions listed in Figure 1. In such cases, the union contract underwent a third and final round of coding. Admittedly, in some of these borderline cases, reasonable observers could disagree as to whether a particular municipal policy falls into one of the definitions in Figure 1. Nevertheless, these borderline cases

[121] There was also one single coder used throughout. Thus, there is no reason for concern about the consistency of coding between multiple coders. *See, e.g., id*.

represent less than one percent of the roughly 3350 coding decisions made as part of this study.[122]

Additionally, the goal of this Article is not to analyze the disciplinary appeals procedures of any one police department. Thus, while coding such a large dataset will almost invariably introduce occasional inconsistencies, the methodology used in this Article is designed to provide a comprehensive evaluation of broad trends in disciplinary appeals procedures across a large cross-section of American police departments. A more detailed discussion of the methodology used in this Article is available in Appendix B. As the next Part explains, this coding revealed significant similarity across the disciplinary appeals procedures.

## IV.
## HOW POLICE DISCIPLINARY APPEALS LIMIT ACCOUNTABILITY

The overwhelming majority of police departments in the dataset employ a similar disciplinary appeals process—one that, I argue, may shield officers from reasonable accountability efforts. Figure 2 breaks down the frequency of each variable in the dataset.

Figure 2, Frequency of Police Disciplinary Appellate Procedures in Dataset of Union Contracts

| VARIABLE | FREQUENCY |
|---|---|
| Appealable to Arbitration or Comparable Procedure | 72.7% |
| Significant Review Authority | 70.0% |
| Control Over Selection of Arbitrator or Comparable | 54.3% |
| Arbitrator or Comparable Third Party Makes Final, Binding Decision | 68.8% |

In total, just under half (48.0%) of all union contracts included in this dataset provide officers with *all* of the procedural protections discussed in Figure 2—that is, they give officers the chance to appeal to an arbitrator, they give officers or unions some significant power to select the identity of the arbitrator, they provide this arbitrator with

[122] The dataset used in this Article includes around 656 police union contracts. Coding all of these sources across the 5 variables identified in Figure 1 results in around 3,280 coding decisions.

significant power to override earlier factual or legal decisions, and they make the arbitrator's decision final and binding on the police department. And around 71% of cities provide officer with at least three of these procedural protections on appeal.

The median police department in the dataset offers police officers up to four layers of appellate review in disciplinary cases. Some departments provided officers with as few as one layer of appellate review.[123] Others provided officers with as many as six or seven levels of appellate review.[124] The subparts that follow discuss other common procedures offered to police officers appealing disciplinary action.

### A. *Binding Arbitration*

Approximately 73% of the police departments use a disciplinary appeals process that involves some sort of outside arbitration. This includes the overwhelming majority of the largest American cities, including Austin,[125] Boston,[126] Chicago,[127] Cincinnati,[128] Cleveland,[129]

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[123] *See, e.g.,* CITY OF CHINO, MEMORANDUM OF UNDERSTANDING BETWEEN REPRESENTATIVES OF THE CITY OF CHINO AND THE CHINO POLICE OFFICERS ASSOCIATION, EXHIBIT A, at 3-5 (2015) (on file with author) (describing single layer of disciplinary appeals); CITY OF COLTON, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF COLTON AND THE COLTON POLICE OFFICERS ASSOCIATION 3, 5-10 (2017) (on file with author) (similarly describing how appeals of suspensions in excess of 3 days, disciplinary salary reductions, demotions, and discharges automatically proceed to the final step of the grievance procedures—arbitration; also describing how appeals of minor disciplinary action involve a single layer of appeal to a head of department or designee).

[124] *See, e.g.,* CITY OF EDMOND, AGREEMENT BETWEEN CITY OF EDMOND AND THE FRATERNAL ORDER OF POLICE LOCAL 136, at 10, 15-18 (2016) (on file with author) (providing for six layers of appellate review through the grievance procedure); CITY OF KETTERING, AGREEMENT BETWEEN CITY OF KETTERING, OHIO AND FRATERNAL ORDER OF POLICE, KETTERING LODGE NO. 92, PATROL OFFICERS 13-15 (2015) (on file with author) (allowing seven stages of appeal through the city's grievance procedures).

[125] CITY OF AUSTIN, AGREEMENT BETWEEN THE CITY OF AUSTIN AND THE AUSTIN POLICE ASSOCIATION 48 (2013) (on file with author) (establishing procedures for police to appeal disciplinary action to expedited arbitration).

[126] CITY OF BOSTON, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF BOSTON AND BOSTON POLICE PATROLMEN'S ASSOCIATION, INC. 7-10 (2007) (on file with author) (providing ability of police officers to appeal disciplinary action to binding arbitration at Step 5 of the grievance procedures).

[127] CITY OF CHICAGO, *supra* note 68, at 17, 85-85 (2012) (articulating the standard for binding arbitration on appeal).

[128] CITY OF CINCINNATI, LABOR AGREEMENT BY AND BETWEEN QUEEN CITY LODGE NO. 69 FRATERNAL ORDER OF POLICE AND THE CITY OF CINCINNATI, NON-SUPERVISORS 2, 5 (2016) (on file with author) (allowing officers to proceed directly to final arbitration on appeal in cases of suspensions of more than 5 days without pay, discharge, demotion, or termination).

Columbus,[130] Miami,[131] and Omaha,[132] as well as smaller and mid-sized cities like Billings, Montana, [133] Edison, New Jersey, [134] Flint, Michigan,[135] Green Bay, Wisconsin,[136] and Menlo Park, California.[137]

In most jurisdictions, though, police officers appealing disciplinary action do not immediately proceed to arbitration. Instead, officers generally have the ability to seek relief on appeal at various intermediary levels.[138] For example, the union contract in Midwest City,

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[129] CITY OF CLEVELAND, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION (C.P.P.A.), NON-CIVILIAN PERSONNEL 44 (on file with author) (stating that the arbitration procedures articulated in the grievance procedure shall be "final, conclusive, and binding on the City, the Union, and the members.").

[130] CITY OF COLUMBUS, AGREEMENT BETWEEN CITY OF COLUMBUS AND FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9 41-44 (2014) (on file with author) (also allowing officers to proceed, at step five of the grievance procedure, to arbitration).

[131] CITY OF MIAMI, AGREEMENT BETWEEN CITY OF MIAMI, MIAMI, FLORIDA AND FRATERNAL ORDER OF POLICE, WALTER E. HEADLEY, JR., MIAMI LODGE NO. 20, 13-15 (2015) (2015) (on file with author) (establishing grievance procedures that permit arbitration at step 4).

[132] CITY OF OMAHA, AGREEMENT BETWEEN THE CITY OF OMAHA, NEBRASKA AND THE OMAHA POLICE OFFICERS ASSOCIATION 15-17 (2014) (on file with author) (permitting arbitration on appeal at step 3 of the grievance procedure).

[133] CITY OF BILLINGS, MONTANA, AGREEMENT BETWEEN CITY OF BILLINGS, MONTANA AND MONTANA PUBLIC EMPLOYEES ASSOCIATION, BILLINGS POLICE UNIT 6-9 (2015) (on file with author) (articulating arbitration procedure on appeal).

[134] TOWNSHIP OF EDISON, MEMORANDUM OF UNDERSTANDING BETWEEN THE TOWNSHIP OF EDISON AND POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL NO. 75, INC. 49-51 (2014) (on file with author) (articulating standards for arbitration of grievances).

[135] CITY OF FLINT, AGREEMENT BETWEEN THE CITY OF FLINT AND FLINT POLICE OFFICERS ASSOCIATION 23, 35-39 (2014) (on file with author) (allowing officers to pursue arbitration of disciplinary action).

[136] CITY OF GREEN BAY, AGREEMENT BETWEEN CITY OF GREEN BAY AND GREEN BAY PROFESSIONAL POLICE ASSOCIATION 6-7 (2016) (on file with author) (permitting binding arbitration on appeal).

[137] CITY OF MENLO PARK, MEMORANDUM OF UNDERSTANDING BETWEEN THE MENLO PARK POLICE OFFICERS' ASSOCIATION AND THE CITY OF MENLO PARK 21 (2015) (on file with author) (stating that officers can bring some disciplinary appeals to arbitration).

[138] For example, in Las Cruces, New Mexico, the union contract provides officers with the chance to first bring appeals to their immediate supervisor. *See, e.g.,* THE CITY OF LAS CRUCES, AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND FRATERNAL ORDER OF POLICE, LAS CRUCES POLICE OFFICER'S ASSOCIATION 49-51 (2017) (on file with author) (describing how, at step 1, a grievant must first discuss their objection to disciplinary action with their immediate supervisor, and then with the Chief of Police). If the officer does not receive appellate relief through this initial layer of review, the department then permits an intermediary

Oklahoma provides officers with the chance to first file an appeal with their supervisor.[139] If the employee's grievance remains unresolved after this initial step, they may next file a grievance with the Fraternal Order of Police (FOP) Grievance Committee.[140] Thereafter the FOP Grievance Committee may submit the appeal to the next highest supervisor.[141] Then, the Chief of Police has the ability to respond to the appeal, or the Chief may refer to the matter to the Labor Management Review Board.[142] If the officer fails to get relief on appeal after these initial steps, the appeal goes before the City Manager.[143] And finally, if the grievance remains unresolved after review by the City Manager, the FOP may request binding arbitration.[144] The procedures used in Midwest City, Oklahoma are consistent with those used by a large number of police departments in the dataset. After a lengthy appeals process, most officers have the opportunity to present their appeal to an arbitrator.

In the overwhelming majority of jurisdictions that employ arbitration on appeal, and in 68.8% of all jurisdictions analyzed as part of this study, the decision from this arbitration decision is final and binding on all parties. Nevertheless, some communities like Independence, Missouri[145] and Indio, California[146] do not employ binding arbitration. Instead, these communities make arbitration advisory, or permit additional review of arbitrators' decisions.

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level of review at the level of the Chief of Police, and then the City Manager. *Id*. at 50.

[139] CITY OF MIDWEST CITY, COLLECTIVE BARGAINING AGREEMENT FOR FISCAL YEAR 2017/2018 BETWEEN THE FRATERNAL ORDER OF POLICE LODGE #127 AND THE CITY OF MIDWEST CITY 10-15 (2017) (on file with author) (laying out the city's procedures for disciplinary appeals).

[140] *Id*. at 12.

[141] *Id*.

[142] *Id*. at 13 (describing this procedure and establishing a time limit for action).

[143] *Id*. (If the Grievance of Disciplinary Appeal is still unresolved after receipt of the answer from the Chief of Police, the Grievance or Disciplinary Appeal may be submitted to the City Manager…").

[144] *Id*. ("If the Grievance or Disciplinary Appeal is unresolved after receipt of the answer from the City Manager, the FOP may request that the matter be submitted to impartial arbitration.").

[145] CITY OF INDEPENDENCE, WORKING AGREEMENT BETWEEN CITY OF INDEPENDENCE, MISSOURI POLICE DEPARTMENT & FRATERNAL ORDER OF POLICE LODGE NO. 1, at 22 (2017) (on file with author) (giving the City Manager the ability to "modify a decision of the Grievance Board or an arbitrator" when the "finding of fact and decision based thereon are clearly contrary to the overwhelming weight of the evidence … together with the legitimate inferences…").

[146] CITY OF INDIO, INDIO POLICE OFFICERS' ASSOCIATION COMPREHENSIVE MEMORANDUM OF UNDERSTANDING 44-46 (2015) (on file with author) (establishing advisory arbitration, rather than binding arbitration).

A number of scholars and media outlets have hypothesized that arbitration as an appellate mechanism may contribute to the frequent reversals of or reductions in internal disciplinary sanctions.[147] According to these hypotheses, arbitration is different from other forms of disciplinary appeals, in part because it limits community observation or participation. On this point, a number of jurisdictions in this study, like Colton, California [148] require that all arbitration proceedings are conducted in private without public observation, while other cities like Corpus Christi, Texas,[149] give officers the option to make arbitration proceedings private.

Even so, arbitration by itself may not be problematic as a tool for adjudicating disciplinary appeals. But when combined with some of the features described in the next two sections, arbitration may become a more problematic method of limiting democratic accountability in American police departments.

### B. *Control Over Selection of Arbitrator*

A little over 54% of all departments in the dataset give police officers or the police union significant authority in the selection of the arbitrator that will hear a case on appeal. Major cities including Boston,[150] Chicago,[151] Detroit,[152] El Paso,[153] Fort Worth,[154] Honolulu,[155]

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[147] *See, e.g.,* Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS L. J. 363, 365 (2016) ("And, even assuming the officer is fired for violating the Constitution or for other reasons, in many jurisdictions, the collective bargaining agreements provide for arbitration of the issue, and it is quite common for the officer to be put back on the job, leading to back pay and reinstatement.").

[148] CITY OF COLTON, *supra* note 123, at 7 ("Grievance arbitration hearings shall be private.").

[149] CITY OF CORPUS CHRISTI, AGREEMENT BETWEEN THE CITY OF CORPUS CHRISTI AND THE CORPUS CHRISTI POLICE OFFICERS' ASSOCIATION 20 (2015) (on file with author) ("All hearings shall be public unless requested by the appealing employee that the hearing shall be closed to the public. In any event, the final decision of the arbitrator shall be public, although public announcement may be reasonably delayed upon request of the parties."). It is worth noting that, even in cities that use a City Manager or other city agent to hear appellate cases, some still allow the officer to bar public observation of the proceeding. *See* CITY OF MURRIETA, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MURRIETA AND THE MURRIETA POLICE OFFICERS ASSOCIATION 8 (2007) (on file with author)

[150] CITY OF BOSTON, *supra* note 126, at 9 ("The arbitrator shall be selected in a manner mutually agreed upon by the parties from a rotating panel of not less than three (3) and not more than five (5) arbitrators selected by mutual agreement of the parties.").

[151] CITY OF CHICAGO, *supra* note 68, at 84 (establishing panel of agreeable arbitrators between city and police union).

[152] CITY OF DETROIT, MASTER AGREEMENT BETWEEN CITY OF DETROIT AND THE DETROIT POLICE OFFICERS ASSOCIATION 11-12 (2014) (on file with

Jacksonville, [156] Las Vegas, [157] Memphis, [158] Milwaukee, [159] Minneapolis, [160] and Oakland [161] allow officers or their union representatives to have this sort of control over the identity of an arbitrator, as do smaller and medium-sized cities like Akron, Ohio,[162]

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author) (establishing alternative striking procedure by which the union can remove potential arbitrators).

[153] CITY OF EL PASO, ARTICLES OF AGREEMENT BETWEEN CITY OF EL PASO, TEXAS AND EL PASO MUNICIPAL POLICE OFFICERS' ASSOCIATION 42 (2014) (establishing procedure for union and city to agree on panel of 5 individuals to serve terms as members of the hearing examiner panel).

[154] CITY OF FORT WORTH, MEET AND CONFER LABOR AGREEMENT BETWEEN CITY OF FORT WORTH, TEXAS AND FORT WORTH POLICE OFFICERS ASSOCIATION 23-24 (2017) (on file with author) (giving the union an equal role in selecting the identity of hearing examiners who act in a role equivalent to arbitrators for the appeal of disciplinary actions).

[155] STATE OF HAWAII, AGREEMENT BETWEEN STATE OF HAWAII, CITY AND COUNTY OF HONOLULU AND THE STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS BARGAINING UNIT 12, at 49-50 (2011) (on file with author) (providing for an alternate striking system empowering the union to remove names from panel of potential arbitrators).

[156] CITY OF JACKSONVILLE, AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE, POLICE OFFICERS THROUGH SERGEANTS 21 (2011) (on file with author) (requiring mutual agreement between union and city for the appointment of an arbitrator to a rotating list).

[157] CITY OF LAS VEGAS, COLLECTIVE BARGAINING AGREEMENT BETWEEN LAS VEGAS METROPOLITAN POLICE DEPARTMENT & LAS VEGAS POLICE PROTECTIVE ASSOCIATION 19 (2016) (on file with author) (establishing procedure for union to select two of five potential arbitrators, with two additional arbitrators selected by the city, and one selected by mutual agreement).

[158] CITY OF MEMPHIS, AGREEMENT BETWEEN THE MEMPHIS POLICE ASSOCIATION AND THE CITY OF MEMPHIS, TENNESSEE 20 (2016) (on file with author) (establishing the alternate striking method for selecting an arbitrator, thereby giving union equal power as city).

[159] CITY OF MILWAUKEE, AGREEMENT BETWEEN CITY OF MILWAUKEE AND THE MILWAUKEE POLICE ASSOCIATION, LOCAL #21, I.U.P.A., AFL-CIO 12 (2013) (on file with author) (using alternate striking method for selecting arbitrator).

[160] CITY OF MINNEAPOLIS, LABOR AGREEMENT BETWEEN THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS, at app. H (2017) (on file with author) (establishing alternate striking methodology for selecting arbitrators).

[161] CITY OF OAKLAND, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OAKLAND AND OAKLAND POLICE OFFICERS' ASSOCIATION 36-37 (2015) (on file with author) (also using alternate striking system for selecting arbitrators).

[162] CITY OF AKRON, AGREEMENT BETWEEN THE CITY OF AKRON AND FRATERNAL ORDER OF POLICE LODGE #7, at 8 (2016) (on file with author) (alternatively striking names from a panel of arbitrators).

Boulder, Colorado,[163] Canton, Ohio,[164] Champaign, Illinois,[165] and Fairbanks, Alaska.[166]

Most of these departments fall into two different categories. First, a handful of agencies explicitly stipulate an acceptable panel of arbitrators in their union contract. For example, in Chicago, the Fraternal Order of Police and the City of Chicago have agreed on a panel of five stipulated arbitrators in the appendix to the police union contract.[167] This means that, in cities like Chicago, the identity of the appellate arbitrators is a topic of negotiation during collective bargaining—a topic where the union can exert a significant influence.

Second, another group of agencies establish alternative striking procedures. For instance, in Corpus Christi, the union contract allows officers to appeal "any disciplinary action" to an arbitrator.[168] To select this arbitrator, the Director of Human Resources requests seven arbitrators from the National Academy of Arbitrators, or other "qualified agencies."[169] Thereafter, the police officer facing discipline and the city alternatively strike names from this panel of seven arbitrators until one name remains.[170]

In theory, these procedures for selecting the identity of an arbitrator somewhat mirror the procedures for selecting jurors in the American justice system. The voir dire process provides both the defense and the plaintiff or prosecution with a limited number of preemptory strikes, as well as an unlimited number of strikes for cause.[171] Much like the procedure described above, a court will usually

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[163] CITY OF BOULDER, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF BOULDER AND BOULDER POLICE OFFICERS ASSOCIATION 13 (2016) (on file with author) (alternative strike methodology for selecting arbitrator).

[164] CITY OF CANTON, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CANTON AND CANTON POLICE PATROLMEN'S ASSOCIATION LOCAL 98/I.U.P.A. AFL-CIO 14 (2015) (on file with author) (mutually agreed panel of arbitrator provided in union contract).

[165] CITY OF CHAMPAIGN, AGREEMENT BETWEEN ILLINOIS FOP LABOR COUNCIL AND CITY OF CHAMPAIGN PATROL AND SERGEANT 66 (2015) (on file with author) (alternative striking methodology and confidential proceeding).

[166] CITY OF FAIRBANKS, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF FAIRBANKS AND THE PUBLIC SAFETY EMPLOYEES ASSOCIATION, FAIRBANKS POLICE DEPARTMENT CHAPTER (2011) (on file with author) (alternative striking methodology from pre-agreed list of arbitrators).

[167] CITY OF CHICAGO, *supra* note 68, at 84 (describing in Appendix Q how the city and the police union have agreed on a panel of five arbitrators to be used in expedited arbitrations).

[168] CITY OF CORPUS CHRISTI, *supra* note 149, at 18.

[169] *Id*. at 19.

[170] *Id*.

[171] Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 848-853 (2015) (providing an excellent, preliminary summary of the voir dire process).

impanel the individuals that survive this striking process as the jury.[172] If this procedure is effective at impaneling impartial jurors in the American justice system, why not use a similar procedure to select an arbitrator for an appellate proceeding?

The problem with using such a procedure in internal disciplinary appeals is that it may incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases. Unlike a juror in the American justice system, arbitrators are repeat players.[173] Arbitrators must frequently survive these selection procedures in order to obtain work in the future. An arbitrator that frequently sides with either police management or officers during appellate procedures may be unlikely to survive future selection proceedings.[174] From an accountability perspective, this mindset can be highly problematic if results in arbitrators feeling compelled to frequently reduce the termination of unfit officers to mere suspensions.

### C. *De Novo Review*

The majority of communities—around 70%—vest arbitrators with expansive review authority on appeal. That is, these jurisdictions effectively give arbitrators the power to re-review all relevant issues on appeal. This means that arbitration on appeal provides officers with an opportunity to re-litigate disciplinary matters with little or no deference to decisions made by police supervisors, city officials, or civilian review boards. This sort of extensive review is provided in large American cities like Anchorage,[175] the District of Columbia,[176] and Orlando,[177] as well as

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[172] *Id*.

[173] *See generally* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-104 (1974) (distinguishing between repeat players and one shotters).

[174] *See* Iris, *Police Discipline in Houston*, supra note 100, at 146.

[175] MUNICIPALITY OF ANCHORAGE, COLLECTIVE BARGAINING AGREEMENT BETWEEN ANCHORAGE POLICE DEPARTMENT EMPLOYEES AND MUNICIPALITY OF ANCHORAGE 10-12, 16 (2015) (on file with author) (stating that management may punish officers for just cause, and then giving arbitrator wide latitude to review any apparent violation of the collective bargaining agreement on appeal).

[176] DISTRICT OF COLUMBIA, *supra* note 69, at 11 (stating that employees may appeal adverse action, defined as a fine, suspension, demotion, or termination, to arbitration; further explaining that, during this arbitration, while the arbitrator should rely on the record from the hearing below, the arbitrator may re-review any evidentiary ruling, or other evidence improperly excluded from the earlier proceeding).

[177] CITY OF ORLANDO, AGREEMENT BETWEEN CITY OF ORLANDO AND ORLANDO LODGE #25, FRATERNAL ORDER OF POLICE, INC. 2, 18-21 (2016) (on file with author) (stating that all discharges and punishments must be for just cause, and

smaller communities like Albany, New York,[178] Danville, Illinois,[179] and New Haven, Connecticut.[180]

Thus, even if the internal affairs division of a police department has presented sufficient evidence to convince members of a civilian review board to suspend or terminate an officer for conduct inconsistent with departmental regulations, most jurisdictions provide this officer with an opportunity to circumvent the decision by the civilian review board entirely, and re-litigate the matter anew before an arbitrator. For example, in New Haven, the police union contract permits officers to appeal disciplinary action to an arbitrator, who is tasked with the responsibility of conducting a "de novo hearing" in order to determine "whether said discharge or discipline was for just cause" as required by the contract.[181] The contract further clarifies that an arbitrator is "empowered to receive evidence of alleged misconduct by the employee involved, as well as any defense, denial, or other evidence controverting or concerning such allegation…."[182]

This stands in stark contrast to the limited role of appeals in the American criminal and civil justice system. As Professor Martin B. Louis observed, "[i]n America, appellate courts almost never decide cases de novo."[183] While American appellate courts generally have the authority to re-review legal determinations made at the trial level, appellate courts will typically defer to factual determinations made at the trial level.[184] Thus, the "primary function" of appellate courts is to

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further providing an arbitrator on appeal with the power to provide any remedy necessary using a wide range of evidence).

[178] CITY OF ALBANY, NEW YORK, AGREEMENT BETWEEN THE CITY OF ALBANY, NEW YORK AND THE ALBANY POLICE OFFICERS UNION LOCAL 2841, LAW ENFORCEMENT OFFICERS UNION COUNCIL 82, AFSCME, AFL-CIO, PATROL UNIT, at 11 (2008) (on file with author) (stating that an arbitrator on appeal has the power to re-adjudicate guilt or innocence, and can re-decide this factual question based on a preponderance of evidence standard, with the burden on the employer).

[179] CITY OF DANVILLE, ILLINOIS, AN AGREEMENT BY AND BETWEEN CITY OF DANVILLE, ILLINOIS AND POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, UNIT #11, at 6, 8-9 (2015) (on file with author) (limiting management to only punishing officers for just cause, and giving arbitrator the power on appeal to re-adjudicate whether just cause existed for punishment through the grievance process).

[180] CITY OF NEW HAVEN, AGREEMENT BETWEEN THE CITY OF NEW HAVEN AND THE NEW HAVEN POLICE UNION LOCAL 530, AND COUNCIL 15, AFSCME, AFL-CIO 4 (2011) (on file with author) (providing for de novo review of appeals to determine whether there was just cause for discharge or discipline).

[181] *Id*.

[182] *Id*.

[183] Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986).

[184] Admittedly, "[t]hese nicely compartmentalized separations of law from fact and trial level functions from appellate functions belie more complex

review for legal errors made at the trial level.[185] Factual determinations are not always outside of the review authority of appellate courts. But appellate courts regularly adopt deferential standards when reviewing pure factual determinations made by a trial judge or jury.[186]

This is not to say that appeals of disciplinary actions ought to mirror appeals in our justice system. In adjudicating disciplinary actions, most police departments do not employ procedures as rigorous as the Constitution demands in both civil and criminal trials. And rarely do these disciplinary hearings employ something akin to a civil or criminal jury as a decision-maker. Thus, police officers may argue that de novo review on appeal provides an important check on unfair, arbitrary, or capricious punishments.

Nevertheless, an expansive or de novo standard of review on appeal may insulate officers from democratic accountability. It diminishes the ability of police supervisors, city officials, and civilian review boards to reform police departments. Such an expansive standard of review on appeal means that most officers will be highly incentivized to appeal any disciplinary sanction to arbitration. And given that most jurisdictions make the arbitrator's determination binding on all parties, it is the final word on certain classes of disciplinary action. This effectively means that any earlier disciplinary action taken against a police officer by a city official, police supervisor, or civilian review board is largely symbolic. The real power sits with the arbitrator on appeal.

### D. *Effects of Procedure on Outcomes of Disciplinary Appeals*

Combined, it appears that a large majority of American police departments provide officers with similar procedural protections during disciplinary appeals. When layered on top of one another, these procedural protections may combine to frustrate democratic accountability efforts. Even so, it is important to recognize the limitations of these findings. This Article cannot definitively claim to show that these procedural protections help officers avoid punishment.

Despite this empirical limitation, there is a growing body of evidence to suggest that the disciplinary appeals process described in this Article may frequently impede police accountability. As discussed briefly in Part II, Kelly, Lowery, and Rich at the *Washington Post* have conducted the most comprehensive empirical analysis of the effects of

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distinctions." So-called "ultimate facts," where a trial court applies "historical facts found" at trial to "relevant general legal principles" combine law and fact and do not fit nicely into this dichotomy. *Id*. at 994.

[185] *Id*. at 993.

[186] *Id*. at 995; *see also*, Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 (1944).

disciplinary appeals on officer termination and rehiring practices.[187] Recall that these reporters acquired data on the number of officers rehired on appeal after termination for misconduct across 36 large American law enforcement agencies.[188] They found that 450 of the 1,876 police officers fired by these agencies between 2006 and 2017 were ultimately ordered rehired on appeal, normally by arbitrators.[189] Figure 3 reproduces the data from the *Washington Post* study, showing the number of total officers fired and rehired during this time period.[190]

**Figure 3, Frequency of Disciplinary Appeals Resulting in the Rehiring of Terminated Officers, 2006-2017**

| Department | Total Fired | Total Rehired | Percent Rehired |
|---|---|---|---|
| Atlanta Police Department | 87 | 7 | 8.05% |
| Austin Police Department | 30 | 4 | 13.33% |
| Boston Police Department | 14 | 4 | 28.57% |
| Broward County, FL Sheriff's Office | 64 | 13 | 20.31% |
| Charlotte-Mecklenburg Police Department | 22 | 7 | 31.82% |
| Chicago Police Department | 103 | 10 | 9.71% |
| Columbus Division of Police | 23 | 2 | 8.70% |
| D.C. Metropolitan Police Department | 86 | 39 | 45.35% |
| Dallas Police Department | 120 | 32 | 26.67% |
| Denver Police Department | 31 | 21 | 67.74% |
| Detroit Police Department | 37 | 5 | 13.51% |
| Fort Worth Police Department | 53 | 6 | 11.32% |
| Harris County, TX Sheriff's Office | 143 | 29 | 20.28% |

[187] Kelly, Lowery, & Rich, *supra* note 1.

[188] *Id*.

[189] *Id*.

[190] One immediate question that emerges from an analysis of the *Washington Post* data is whether the type of appellate procedures given to officers predicts the frequency of officers being rehired on appeal. A preliminary examination suggests there is no correlation between these two phenomena. This does not, however, suggest that the types of procedures offered to an officer on appeal have no effect on appellate outcomes.

For one thing, we should not assume that police supervisors, civilian review boards, and other initial adjudicators of police discipline exercise their authority evenly across all jurisdictions. It may be that some police departments routinely seek excessive or unjustifiable punishment against officers in cases of alleged misconduct. In such cases, we would *want* officers to receive frequent relief on appeal. So for example, the fact that 70.45% of terminated police officers in San Antonio are rehired on appeal may be the result of the procedures used on appeal, or it may be because the City of San Antonio has a history of excessively seeking officer terminations when a lesser punishment is more justifiable. There is simply no way to know from the available data.

| Department | Total Fired | Total Rehired | Percent Rehired |
|---|---|---|---|
| Honolulu Police Department | 33 | 19 | 57.58% |
| Houston Police Department | 107 | 24 | 22.43% |
| Jacksonville, FL Sheriff's Office | 64 | 2 | 3.13% |
| Las Vegas Metropolitan Police Department | 59 | 14 | 23.73% |
| Memphis Police Department | 84 | 22 | 26.19% |
| Metropolitan Nashville Police Department | 44 | 14 | 31.82% |
| Miami Police Department | 28 | 8 | 28.57% |
| Miami-Dade Police Department | 101 | 38 | 37.62% |
| Milwaukee Police Department | 57 | 11 | 19.30% |
| Oklahoma City Police Department | 15 | 6 | 40.00% |
| Orange County, CA Sheriff's Department | 43 | 6 | 13.95% |
| Orange County, FL Sheriff's Office | 28 | 0 | 0.00% |
| Palm Beach, FL County Sheriff's Office | 31 | 1 | 3.23% |
| Philadelphia Police Department | 71 | 44 | 61.97% |
| Phoenix Police Department | 37 | 15 | 40.54% |
| Prince George's County, MD Police Department | 58 | 1 | 1.72% |
| Riverside County, CA Sheriff's Department | 109 | 7 | 6.42% |
| Sacramento County, CA Sheriff's Department | 3 | 0 | 0.00% |
| San Antonio Police Department | 44 | 31 | 70.45% |
| San Francisco Police Department | 11 | 0 | 0.00% |
| Santa Clara County, CA Sheriff's Department | 8 | 0 | 0.00% |
| Seattle Police Department | 19 | 4 | 21.05% |
| Suffolk County, NY Police Department | 9 | 4 | 44.44% |

This data provides valuable insight into the outcomes of disciplinary appeals. It suggests that the disciplinary appeals process, as currently constructed, results in the reduction or reversal of disciplinary sanctions in a large number of police departments. Just under a quarter (24%) of all officers terminated for misconduct in large American police departments are eventually rehired because of the disciplinary appeals process. This analysis, though, only focuses on the rehiring of terminated officers. While only around 10% of terminated Chicago police officers were ordered rehired on appeal according to the data obtained by the *Washington Post*, a separate analysis by Jennifer Smith Richards of the *Chicago Tribune* and Jodi S. Cohen of *ProPublica* found that, between 2010 and 2017, the City of Chicago has reduced or reversed sanctions against 85% all police officers during the grievance appeals process.[191] So, if anything, the *Washington Post* data likely *underrepresents* the

[191] Jennifer Smith Richards & Jodi S. Cohen, *Cop Disciplinary System Undercut*, CHI. TRIB., Dec. 14, 2017, at 1.

number of officers that receive some sort of relief during disciplinary appeals.

This, though, raises a difficult normative question. How often *should* we expect police disciplinary decisions to be overturned or reduced on appeal? There is no easy answer to this question. Theoretically, appellate success ought to vary by department. In police departments that are prone to arbitrary, excessive, or unreasonable disciplinary decisions, we may want arbitrators to overturn or reduce disciplinary decisions frequently. As a normative matter, though, it seems independently problematic if the appeals process results in the systematic overturning of just decisions made by democratically accountable actors.

Unfortunately, this Article cannot prove that these procedural protections cause an unreasonable number of police disciplinary cases to be overturned or reduced on appeal. The narrow focus of this Article can only claim to build a descriptive account of the procedural process utilized during disciplinary appeals in a large cross-section of American police departments. In doing so, it shows that American police departments provide officers with a remarkably consistent package of procedural protections during disciplinary appeals. The findings from this study are certainly consistent with the hypothesis that the procedures used during disciplinary appeals may contribute to the high rate of reversals or reductions in punishments. Nevertheless, more research is needed to confirm this hypothesis.[192]

### E. *Implications for Police Reform Efforts*

The findings from this Article have significant implications for the study of police reform. First, these findings suggest that arbitrators wield even more authority in internal disciplinary matters than many policing scholars have previously recognized. In fact, arbitrators are the true adjudicators of internal discipline in the majority of police departments in this Article's dataset—even in agencies that employ civilian review apparatuses designed to the increase public participation in police disciplinary matters. A recent study by Udi Ofer found that twenty-four of the nation's largest fifty police departments use civilian

[192] As a preliminary matter, it may be useful to consider the frequency that litigants receive relief on appeal in the court system. Between 2015 and 2016, only 6.1% of all cases, and 17.2% of criminal cases, before the federal circuit courts resulted in reversals or remands. Thus, is seems safe to say that, despite not being nearly as limited by the exclusionary rule, federal rules of evidence, and other procedural hurdles that can contribute to reversals in the federal system, police officers more frequently receive relief than other litigants in the American justice system.

review boards to oversee certain police disciplinary matters.[193] Commentators like Ofer generally point to civilian review boards as examples of communities empowering the public with meaningful oversight of police conduct.

But the findings from this Article suggest that some civilian review boards—even robust ones with full investigative, subpoena, and disciplinary authority—may be more symbolic in their functional importance. Ofer's study identifies Detroit as a community with one of the nation's most unique and powerful civilian review board, referred to as the Detroit Police Commission, compromised of seven members elected from each police district and four members selected by the Mayor with the approval of the City Council.[194] The Detroit Police Commission has the authority to subpoena information during investigations[195] and it has the ability to discipline officers.[196] Detroit is one of the only large cities in the United States that gives a civilian review board such extensive authority, matched only by Chicago, Milwaukee, Newark, San Francisco, and Washington, D.C.[197] It would seem that Detroit is a model of civilian control over police disciplinary investigations.

And yet, Detroit's union contract establishes an appeals process that allows arbitrators on appeal to overrule decisions made by the

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[193] Udi Ofer, *Getting it Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1041-43 (2016). Ofer also provides an excellent discussion of the history of civilian review boards and makes some important normative recommendations on how communities could improve the structure of civilian review boards to ensure long-term stability and independence. As Ofer explains, Washington, D.C. and New York were two of the earliest adopters of civilian reviews, establishing some sort of civilian oversight boards in 1948 and 1953 respectively. In both cases, though, city officials eventually dismantled these early civilian review boards after "intense lobbying" by police unions. The concept of civilian oversight of police departments would not go mainstream until the 1960s and 1970s, when highly publicized incidents of police brutality, combined with the civil rights movement led to more widespread implementation of civilian oversight structures. *Id*. at 1040-41. Today, there are over 100 civilian review boards across the country. Samuel Walker, *The History of the Citizen oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT AGENCIES 1, 7-8 (Justina Cintron Perino ed., 2006).

[194] Ofer, *supra* note 193, at 1055 (identifying Detroit's characteristics in the appendix).

[195] *Id*. at 1043 ("[T]he only review board that has a leadership structure that is not majority nominated by the mayor and that is empowered with subpoena, disciplinary, and policy review authorities, is Detroit's").

[196] *Id*. ("[S]ome form of disciplinary authority remains relatively rare, with only six civilian review boards having it—Chicago, Washington, D.C., Detroit, Milwaukee, San Francisco, and Newark.").

[197] *Id*. at 1053-1062 (showing that all of these cities have the authority described above).

Detroit Police Commission.[198] The police union has a significant role in selecting the identity of this third-party arbitrator.[199] The arbitrator's decision is final and binding on all parties.[200] And based on the terms of the union contract, it appears that this arbitrator has de novo authority to re-examine whether just cause existed for the punishment.[201] So while the Detroit Police Commission seems to make civilians the primary adjudicators of internal discipline for police officers, this is an illusion. The ultimate power resides with an appellate arbitrator.[202] And Detroit is not unique. This same general pattern holds in other large American cities with seemingly robust civilian review boards, like Chicago[203] and Milwaukee.[204]

Second, if police disciplinary appeals frequently lead to arbitrators overturning termination decisions, this has worrisome downstream effects for police reform efforts, in part because of the U.S.

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[198] CITY OF DETROIT, *supra* note 152, at 11-16, (establishing the right of the department to punish only for just cause; providing details on the disciplinary process; further describing the appellate process, including expedited arbitration for suspensions of more than three days in length).

[199] *Id*. at 11-12 (permitting two methods for selecting an arbitrator: an existing panel of acceptable arbitrators, or a alternative striking system whereby the union gets an say in the identity of the arbitrator as the city management).

[200] *Id*. at 13 (stating that the arbitrator's decision "shall be final and binding on the Association, all bargaining unit members, and on the Department.").

[201] *Id*. at 11-13 (appearing to provide the arbitrator the general authority to determine if any disciplinary action violates the terms of the collective bargaining agreement, which requires just cause, and seemingly giving the arbitrator wide authority to hear evidence from both sides with little deference to any decisions made by the Police Commission).

[202] To further elaborate on this point, this finding may even suggest that, in most American police departments, up-front disciplinary mechanisms like civilian review boards act more akin to internal prosecutors. They can bring charges against police officers for misconduct, but the final authority on disciplinary actions generally rests with third-party arbitrators. If true, this would upend the traditional narrative of police reform articulated by many scholars, which emphasizes the importance of departmental leadership dedicated to constitutional policing. Further, if we hope to promote constitutional policing, police departments need leadership within a police department that rigorously investigates and responds to alleged officer wrongdoing. But this will, in itself, will often be sufficient. Supervisors within a police department must then navigate a complex disciplinary appeals process that is structured to insulate officers from public accountability.

[203] CITY OF CHICAGO, *supra* note 68, at 17-18, 84-85 (laying out the ground rules of arbitrations of appeals of disciplinary suspensions, including a designated panel of arbitrators selected via the collective bargaining process, making the arbitration procedure "final and binding," and seemingly granting the arbitrator wide authority).

[204] CITY OF MILWAUKEE, *supra* note 159, at 7-14 (describing the appellate procedure, which includes "final and binding arbitration" of disciplinary actions, grants the Association significant authority to select the arbitrator, and gives the arbitrator wide, seemingly de novo authority).

Supreme Court holding in *Brady v. Maryland*. There, the Court held that prosecutors must disclose material evidence that is favorable to defense, including anything known to any member of the prosecution team.[205] As Jonathan Abel has described in detail, evidence of prior misconduct by police officers can be critical pieces of *Brady* material.[206] This is particularly true when the evidence of misconduct suggests that the officer has a history of dishonesty,[207] theft,[208] false police reports,[209] or other wrongdoing that calls into question an officer's credibility as a witness. This has forced police departments to develop *Brady* lists—databases of officers that have previously committed acts of misconduct that must be disclosed to defense counsel in criminal cases to avoid violating the *Brady* decision.[210] Officers placed on such *Brady* lists generally "cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand," because if they do, the defense counsel will have access to records of the officer's prior misconduct for impeachment purposes.[211] Abel says that such officers "would be well advised to start looking for a new profession," because they can no longer perform the basic functions of a law enforcement officer.[212]

But the findings from this Article present a different, and especially problematic possibility. Because of the disciplinary appeals process, many police departments may be unable to terminate the employment of these so-called "*Brady* cops."[213] Instead, departments may be forced to utilize limited resources employing a police officer that cannot engage in any policing function that may lead to testimony before a court. To accomplish this, many police departments have shuffled staff and reassigned re-hired officers, so as to minimize their involvement in criminal cases.[214] This can drive up the cost of public safety services, not

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[205] 373 U.S. 83 (1963) (establishing this basic requirement on prosecutors); Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (further clarifying *Brady* to make clear that evidence known to the prosecution team must be disclosed).

[206] Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745-747 (2015) (describing this phenomenon).

[207] Fields v. State, 69 A.3d 1104, 110 (Md. 2013).

[208] United States v. Robinson, 627 F.3d 941, 946 (4th Cir. 2010).

[209] Miller v. City of Ithaca, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012).

[210] Abel, *supra* note 206, at 746.

[211] *Id*.

[212] *Id*.

[213] *Id*.

[214] *See, e.g.,* Pauline Repard, *The Secret List That Police Officers Don't Want You to See*, SAN DIEGO TRIB. (Aug. 23, 2017), http://www.sandiegouniontribune.com/news/public-safety/sd-me-brady-notebook-20170823-story.html (describing the use of *Brady* lists for officers still on the force in San Diego after serious incidents of misconduct); Craig Cheatham, Dan Monk, Joe Rosemeyer, & Brian Niesz, *Can Police Officers Still Serve After They're*

to mention limit the ability of a police chief to bring about real reform within an agency.

Third, this Article's finding bolster the hypothesis the police union contract negotiations may be susceptible to regulatory capture. In the past, I have observed that police union contract negotiations typically happen outside of public view.[215] Police unions are powerful political constituencies.[216] Communities often have little in the way of resources to satisfy union demands for higher salaries and more generous benefits.[217] And virtually all municipalities negotiate salaries, benefits, and disciplinary procedures as part of the same private negotiation.[218] Under these conditions, I have hypothesized that municipal leaders may be incentivized to offer police unions concessions on disciplinary procedures in exchange for lower officer salaries.[219] A number of anecdotal cases suggest that such trade-offs are commonplace.[220] This Article provides further evidence that collective bargaining agreements can serve as a barrier to officer accountability—this time through the elaboration of extensive appellate protections for officers found guilty of misconduct.

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*Caught Being Dishonest?,* WCPO CINCINNATI (Oct. 31, 2017), https://www.wcpo.com/longform/i-team-investigation-can-officers-still-serve-after-theyre-caught-being-dishonest (providing data on the number of officers serving in Cincinnati after apparent dishonesty).

[215] Rushin, *Police Union Contracts*, *supra* note 29, at 1213 ("…there are thousands of decentralized police departments in the United States, and each negotiates its own collective bargaining agreements, largely outside public view.").

[216] *See, e.g.,* Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT (Apr. 28, 2015, 9:42 AM), https://theintercept.com/2015/04/28/baltimore-freddie-gray-prosecute (detailing how police unions effectively blocked various reforms in Maryland); Michael Tracey, *The Pernicious Power of the Police Lobby*, VICE (Dec. 4, 2014, 9:42 AM), http://www.vice.com/read/the-pernicious-power-of-police-unions (describing the political power of police unions).

[217] John Chase & David Heinzmann, *Cops Traded Away Pay for Protections in Police Contracts*, CHI. TRIB. (May 20, 2016, 8:36 AM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop- 20160520-story.html (describing how, in Chicago, the city traded off lower salaries for more generous disciplinary protections).

[218] Rushin, *Police Union Contracts*, *supra* note 29, at 1245 ("As currently structured, most municipalities negotiate with police unions about disciplinary procedures alongside salaries, benefits, vacation time, promotion procedures, and more.").

[219] *Id*. at 1245-46.

[220] *See, e.g.,* Chase & Heinzmann, *supra* note 217.

## V.
## REFORMING POLICE DISCIPLINARY APPEALS

Police need basic procedural protections against arbitrary and capricious punishment. This includes the ability to appeal disciplinary action. At the same time, these appellate procedures should not allow officers to completely circumvent democratic oversight. The disciplinary appellate procedures currently used by a large number of American police departments transfer oversight authority to arbitrators. Virtually all departments give officers multiple layers of appellate review, culminating in binding appellate arbitration. In most cases, the police union has some substantial role in selecting the identity of the arbitrator. And in most of these cases, the arbitrator is given expansive authority to re-litigate all decisions made by police supervisors, city officials, and civilian review boards.

While each of these appellate procedures may be individually defensible, they can combine to create a formidable barrier to democratic accountability in American police departments. With a lack of democratic oversight, it should come no surprise that the media has uncovered so many problematic officers rehired through such disciplinary appeals procedures. This is especially problematic since "democratic deliberation around policing is imperative," as it ensures that officers are accountable to the serve the people.[221]

Thus, this Part considers how the states and localities could reform the disciplinary appeals process in American police departments in a manner that balances officers' need for procedural protections against arbitrary punishment against the communities need for democratic accountability.

### *A. Democratizing Disciplinary Appeals*

As I have argued elsewhere, communities should promote democratic participation and transparency in internal disciplinary matters.[222] One of the most effective ways that communities could accomplish this is by entirely eliminating arbitration of disciplinary appeals. In its place, communities could vest appellate review authority in more democratically accountable actors, like city councils, mayors, city managers, or civilian review boards. A number of communities

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[221] Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837, 1907 (2015). As a general rule, Professor Friedman and Ponomarenko found that democratic accountability is generally lacking, often without sufficient justification in the world of policing. *Id*. at 1843-1845.

[222] Rushin, *Police Union Contracts*, *supra* note 29 (arguing in favor of more public involvement in the development of police union contracts in hopes of preventing regulatory capture).

already do this, like Fountain Valley, California[223] or Lincoln, Nebraska.[224] This may allow internal disciplinary responses by local police departments to reflect community values more accurately.

As an alternative, communities could make appellate arbitrations advisory, or at least provide an opportunity for city leaders to overturn particularly egregious decisions by arbitrators. A large number of cities provide such procedures on appeal. These include Peoria, Arizona,[225] as well as a large number of cities in California, including Buena Park,[226] Burbank,[227] Cathedral City,[228] Costa Mesa,[229] Delano,[230] Fullerton,[231]

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[223] CITY OF FOUNTAIN VALLEY, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF FOUNTAIN VALLEY AND THE FOUNTAIN VALLEY POLICE OFFICERS' ASSOCIATION 36-37 (2014) (on file with author) (providing officers the right to appeal disciplinary action to the police chief and then the city manager; providing a limited option under municipal code for officers to challenge city manager's final decision to city council under certain exceptional circumstances).

[224] CITY OF LINCOLN, NEBRASKA, AGREEMENT BETWEEN LINCOLN POLICE UNION AND THE CITY OF LINCOLN NEBRASKA 16 (2016) (on file with author) (permitting appeal to city's Personnel Board).

[225] CITY OF PEORIA, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF PEORIA AND PEORIA POLICE OFFICER ASSOCIATION, COVERING POLICE OFFICERS UNIT 23-24 (2013) (on file with author) (providing officers with the chance to bring a disciplinary grievance before an arbitrator as the third step in the grievance process, but then allowing the police department to appeal an arbitrator's grievance to the City Manager at Step 4).

[226] CITY OF BUENA PARK, CALIFORNIA, MEMORANDUM OF UNDERSTANDING BETWEEN BUENA PARK, CALIFORNIA AND BUENA PARK POLICE ASSOCIATION 39-41, 57-59 (2016) (on file with author) (stipulating that arbitration on appeal is merely advisory).

[227] CITY OF BURBANK, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BURBANK AND THE BURBANK POLICE OFFICERS' ASSOCIATION 54-61 (2016) (on file with author) (establishing procedures for arbitration of disciplinary appeals, and providing that "The decision of the arbitrator shall be solely advisory in nature.").

[228] CITY OF CATHEDRAL CITY, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF CATHEDRAL CITY AND CATHEDRAL CITY POLICE OFFICER'S ASSOCIATION (CPPOA) 16-20 (2016) (on file with author) (explaining the procedures for hearing officers to consider appeals by officers to disciplinary action, but stating explicitly that the hearing officer's decision is not binding; instead the "City Manager or designee mutually agreeable to the City and the employee shall review the Hearing Officer's recommendation, but shall not be bound thereby").

[229] CITY OF COSTA MESA, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF COSTA MESA AND THE REPRESENTATIVES OF THE COSTA MESA POLICE ASSOCIATION 17-24 (2014) (on file with author) (establishing arbitration procedures, but vesting final decision-making authority with the Chief Executive Officer).

[230] CITY OF DELANO, AGREEMENT BETWEEN CITY OF DELANO AND THE DELANO POLICE OFFICERS ASSOCIATION 6-8 (2017) (on file with author) (authorizing advisory arbitration of disciplinary action).

Indio,[232] Ontario,[233] Oxnard,[234] and Pasadena.[235] Officers may find this option more procedurally just, as it would give them an opportunity to make their case before a third party that is separate from city leadership. And city leaders would maintain the flexibility to depart from decisions made by an arbitrator when it appears to run counter to the public's interest.

Or, if communities still want to use binding appellate arbitration in some disciplinary cases, they could follow the model of Oceanside, California. There, the city's police union contract permits officers to appeal relatively minor disciplinary action to binding arbitration.[236] But the contract makes arbitration decisions merely advisory for serious misconduct resulting in suspensions and terminations.[237] Such a compromise would allow cities to maintain the use of arbitration so as to avoid unfair punishments in some cases, while maintaining the ability of city officials to protect the public interest in police accountability in cases of serious misconduct where the continued employment of the officer could pose a public safety risk.

Each of these options would give the public a greater role in overseeing police disciplinary decisions. And each of these options would give police and city leaders greater latitude to circumvent some of the harmful, downstream effects of disciplinary appeals procedures that currently insulate officers from punishment.

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[231] CITY OF FULLERTON, *supra* note 45, at 44 (placing the authority to review an arbitrator's decision in the hands of the city council).

[232] CITY OF INDIO, COMPREHENSIVE MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF INDIO AND INDIO POLICE OFFICERS' ASSOCIATION (IPOA) 42-46 (2015) (on file with author) (allowing appellate arbitration, but vesting final authority in hands of city manager).

[233] CITY OF ONTARIO, MEMORANDUM OF UNDERSTANDING BETWEEN ONTARIO POLICE OFFICERS ASSOCIATION AND CITY OF ONTARIO 30 (2014) (on file with author) (making arbitration awards subject to review by city council).

[234] CITY OF OXNARD, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OXNARD AND OXNARD PEACE OFFICERS' ASSOCIATION 22 (2016) (on file with author) (permitting advisory arbitration).

[235] CITY OF PASADENA, MEMORANDUM OF UNDERSTANDING BETWEEN PASADENA POLICE OFFICERS ASSOCIATION AND CITY OF PASADENA 41 (2017) (on file with author) (giving the Municipal Employee Relations Officer the authority to accept, modify, or reject hearing decision on appeal).

[236] CITY OF OCEANSIDE, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF OCEANSIDE AND THE OCEANSIDE POLICE OFFICERS' ASSOCIATION 30-35 (2017) (on file with author) (stating that appeals of non-suspensions and non-termination go to binding adjudication by "third party neutral," but in other appeals, decisions by third party neutrals will be "advisory).

[237] *Id*.

### *B. Limiting the Scope of Appellate Review*

Police may understandably object to replacing arbitration with oversight by democratic actors during the disciplinary appeals process. Theoretically, arbitrators are neutral, third parties who should not be indebted to either party during an appellate procedure. This makes an arbitrator a natural choice to settle disputes between police unions and city leadership on appeal. Indeed, this Article does not take issue with the concept of arbitration. As I have already argued, many of the procedures described in this Article are individually defensible. Instead, it is their combination that can create appellate procedures that systematically benefit officers at the expense of the community.

Thus, an alternative way that communities could improve the disciplinary appeals process is by narrowing the scope of an arbitrator's scope of review. As discussed *supra* Part IV.D, most communities allow arbitrators to re-hear cases effectively de novo. This means that they need not defer to any decisions made by civilian review boards, police leaders, or city leadership. But not all cities use this model. Some cities explicitly limit the authority of arbitration on appeal.

For example, Fullerton, California permits advisory arbitration on appeal, but bars an arbitrator from overruling or modifying punishment handed down against an officer unless the arbitrator finds the punishment to be "arbitrary, capricious, discriminatory, or otherwise unreasonable."[238] This standard of review on appeal is far more favorable to city leaders than that used in a majority of the cities in this dataset. Fullerton's standard of review is similar to that used by Bloomington, Illinois, which states that suspensions should "be upheld unless it is arbitrary, unreasonable[,] or unrelated to the needs of the service."[239] Eugene, Oregon similarly limits the authority of the arbitrator to review disciplinary matter de novo by only empowering them to determine whether the city's actions were "reasonably consistent with City and departmental guidelines."[240]

Alternatively, communities could limit arbitrators from altering punishment in cases where the facts support a finding of guilt. This is the case in Grand Rapids, Michigan, where an arbitrator on appeal can overturn a decision made by the city, but cannot reduce punishment in cases where there is evidence to support the allegation of misconduct.[241] Similarly, the policy in Ocala, Florida states that an arbitrator on appeal

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[238] CITY OF FULLERTON, *supra* note 45, at 45.

[239] CITY OF BLOOMINGTON, ILLINOIS, AGREEMENT BETWEEN CITY OF BLOOMINGTON, ILLINOIS AND POLICE BENEVOLENT AND PROTECTIVE ASSOCIATION, Unit No. 21, at 15 (2014) (on file with author).

[240] THE CITY OF EUGENE, CONTRACT BETWEEN THE CITY OF EUGENE AND THE EUGENE POLICE EMPLOYEES' ASSOCIATION 45 (2016) (on file with author).

[241] CITY OF GRAND RAPIDS, *supra* note 44, at 6.

cannot question the city's judgment on the proper amount of punishment, provided that the department has demonstrated "good cause for discipline."[242]

By enacting similar limitations on the scope of review on appeal, state and localities could maintain the use of arbitration while preventing these appellate procedures from entirely displacing the role of police leaders, city leaders, and civilian review boards. This would represent a positive step in promoting democratic accountability in the police disciplinary appeals.

### C. *Possible Drawbacks*

Police officers and unions may object to increasing democratic accountability in disciplinary appeals for several reasons. First, police officers and police unions may argue that the proposals in this Article would give police officers less procedural protections during appeal than some other public servants. Admittedly, other civil servants like fire fighters or teachers may have similar appellate protections from disciplinary action. So why should we treat police differently than other civil servants?

While understandable, this argument ignores the fact that police work is fundamentally different than the work by most public servants. For example, "unlike other public employees, police officers generally carry firearms, make investigatory stops, conduct arrests, and use lethal force when needed."[243] Officers also encounter "people when they are most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed."[244] We necessarily give police officers considerable discretion in carrying out their job. With this discretion, there is a heightened risk that officers will engage in misconduct. And unlike other fields, misconduct by police officers "can leave [a] victim dead or permanently damaged, and under the right circumstances one cop's bad call—or a group of cops' habitual [bad behavior]—can be the spark that leaves a city like Baltimore I flames."[245] Given these realities of modern American policing, it is critical to ensure that police disciplinary procedures reflect not just a

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[242] CITY OF OCALA, FLORIDA, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF OCALA, FLORIDA AND FLORIDA STATE LODGE, FRATERNAL ORDER OF POLICE 15 (2016) (on file with author).

[243] Rushin, *Police Union Contracts*, *supra* note 29, at 1248.

[244] PRESIDENTS COMMISSION ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[245] Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html.

respect for due process, but also a respect for the opinions of the public that the police department serves.

Second, and relatedly, the removal or curtailing of arbitration provisions in police disciplinary appeals may result in significant pushback by frontline officers. Some officers may understandably argue that this would reduce job security and hurt officer morale, making police work less appealing. There is at least some empirical evidence to suggest that efforts to increase oversight and accountability among police officers can result in union opposition, reduced street-level enforcement of the law, and ultimately de-policing.[246] While this is a serious concern, it should not deter communities from establishing a disciplinary appeals process that emphasizes democratic accountability. Virtually any policing regulation can inspire some pushback from frontline officers. Nevertheless, there is reason to believe that such pushback and negative side effects are generally temporary in nature. Take, for example, the pushback from police officers during cases of federal intervention pursuant to 42 U.S.C. § 14141.[247] The Department of Justice (DOJ), mostly under Democratic presidents,[248] has used this statute to force local police departments into negotiated settlements to address patterns of unconstitutional or unlawful misconduct.[249] In many

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[246] *See, e.g.,* Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721 (2017) (finding that the introduction of federal intervention into American police departments to reduce patterns of misconduct was associated with a statistically significant uptick in property crime rates; also noting that this uptick in crime was frontloaded in the years immediately after federal intervention); *but c.f.* Joshua Chanin & Brittany Sheats, *Depolicing as Dissent Shirking: Examining the Effects of Pattern or Practice Misconduct Reform on Police Behavior*, CRIM. JUSTICE REV. 1 (2017) (finding that federal intervention did not result in reductions in arrests across a sample of test agencies).

[247] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as 42 U.S.C. § 14141 (2006)).

[248] Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3232 (2014) (showing in Figure 3 how the use of § 14141 has varied by presidential administration); Joshua M. Chanin, Negotiated Justice? The Legal, Administrative, and Policy Implications of "Pattern or Practice" Police Misconduct Reform 335 (July 6, 2011) (unpublished Ph.D dissertation, American University), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf (describing some structural changes during the President George W. Bush administration that contributed to changes in vigorousness of enforcement of § 14141); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 21 (2009) (attributing the weakness in the enforcement of § 14141 to lack of political commitment, particularly during the administration of President George W. Bush).

[249] *See generally* STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS (2017) (providing a complete historical description of how the DOJ has enforced § 14141 over time, listing the departments subject to DOJ reform since the statute's passage in 1994, and making recommendations for its improvement); Ivana Dukanovic, *Reforming High-Stakes Police Departments:*

of these negotiated settlements, the DOJ has pressured police departments to improve disciplinary oversight of officers.[250] In response, surveys have found that officers frequently complained about how these new disciplinary measures caused them to be less proactive "because of [the] fear of being unfairly disciplined."[251]

Yet, empirical research has found that this sort of pushback and reduction in morale did not have any long-term, statistically significant effect on arrest or crime rates.[252] Additionally, even if the introduction of democratic accountability in disciplinary appeals does have some negative effects on officer morale, this may be a necessary cost to ensure that police departments reflect the values of their constituents. Democratic accountability is an independently important goal in policing, as demonstrated by the widespread support for community policing initiatives, even if it "may sometimes require compromise."[253]

And third, some may argue that the disciplinary appeals process in American police departments is exhaustive and undemocratic out of necessity. For example, Professor Kate Levine's important new work describes the current state of internal discipline in American police departments as "uneven, arbitrary, and entirely discretionary."[254] As evidence for this proposition, Professor Levine compares the way that two different police departments—the Chicago Police Department and the Philadelphia Police Department—reacted to officers claiming to

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*How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911 (2016) (providing in part a summary of existing DOJ work under § 14141 and the mechanisms strengths and weaknesses); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015) (providing a summary of how the DOJ has used § 14141 over time to bring about reform in problematic police departments).

[250] Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 249, at 1378-88 (providing a summary of the various portions of these negotiated settlements, including regulations of use of force, early intervention and risk management systems, overhauls of complaint and investigation procedures, new training procedures, measures to address bias in policing, and programs emphasizing community policing).

[251] *See, e.g,* CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 19 (2009), http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf (finding that 89% of officers believed that "because of fear of being unfairly disciplined, many LAPD officers are not proactive in doing their jobs.").

[252] *See* Rushin & Edwards, *supra* note 246 (finding that, if federal intervention did result in any de-policing effect, it was mostly in terms of property crime rates, and this effect was frontloaded); Chanin & Sheats, *supra* note 246 (finding no effect of federal intervention on arrest rates).

[253] Rushin & Edwards, *supra* note 246, at 776.

[254] Kate Levine, *Discipline and Policing*, at 4 (unpublished manuscript, on file with author).

exercise their free speech rights while on duty.[255] In Chicago, two black officers received reprimands for taking a photograph with a civilian while kneeling in support of Colin Kaepernick's protest against police brutality.[256] But in Philadelphia, a white officer received no such punishment or reprimand for displaying a tattoo of an eagle symbol allegedly used by the Nazi Party along with the word "Fatherland."[257] Professor Levine cites the seemingly inconsistent treatment of these officers across two major American police departments to demonstrate the unpredictability of modern police discipline.

If we accept Professor Levine's claim, then disciplinary appeals serve a critically important role. The appeals process may protect officers from being unfairly punished, particularly when unfair punishment is politically popular or expedient. Officers may worry that increasing public involvement in disciplinary appeals will put officers at risk of being unfairly fired or disciplined, particularly in communities with bias against police officers.[258]

No doubt, police officers deserve adequate procedure protections during internal disciplinary investigations. But none of the recommendations in this Article would strip police of their due process right to appeal disciplinary action. Instead, they would merely alter the current procedures used in some police departments to ensure a heightened level of democratic engagement in this process. Officers would still have the ability to challenge arbitrary and capricious punishments and incorrect applications of internal regulations. Officers would still have the opportunity to bring such appeals before a different

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[255] *Id*. at 3-4 (summarizing these two vignettes and explaining that they "reflect the state of internal discipline in police departments across the country").

[256] Tom Porter, *Chicago Police Officers Disiplined for Taking a Kneww in Solidarity with Colin Kaepernick*, NEWSWEEK (Sep. 26, 2017, 5:25 AM GMT), http://www.newsweek.com/chicago-police-officers-discplined-taking-knee-solidarity-colin-kaepernick-670988. The punishment happened after a civilian posted a picture of the event on Instagram. The Chicago Police Spokesman stated that the department reprimanded the officers for violating the city's policy on political speech while in uniform.

[257] John Kopp, *Photos Surface of Philly Police Officer with Nazi Tattoo*, PHILLY VOICE (Sep. 1, 2016), http://www.phillyvoice.com/photos-surface-philly-police-officer-nazi-tattoo/ (describing the public outrage to the tattoo and showing a picture of the officer "posing with fellow Nazi reenactors"); John Kopp, *Internal Affairs Investigation Clears Philly Police Officer with Apparent Nazi Tattoo*, PHILLY VOICE (January 31, 2017), http://www.phillyvoice.com/internal-affairs-investigation-clears-philly-police-officer-apparent-nazi-tattoo (describing how an Internal Affairs investigation concluded that the officer did not violate any departmental policy by having the tattoo).

[258] *See generally* HEATHER MAC DONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016) (controversially claiming that the current anti-police political environment causes police to reduce aggressiveness, resulting in effects on crime rates).

oversight body than that which levied the original disciplinary decision, ensuring that no officer could face severe punishment without multiple layers of oversight. And a number of police departments across the country already employ many of the recommendations in this Article. At minimum, this demonstrates that these procedures represent a feasible path forward.

## CONCLUSION

Few stories better illustrate the importance of police disciplinary appeals than that of Florida police officer Sergeant German Bosque. An investigation by the *Miami Herald* found that, over his nineteen year career, Sergeant Bosque faced misconduct accusations for allegedly "cracking the head of a handcuffed suspect, beating juveniles, hiding drugs in his police car, stealing from suspects, defying direct orders, and lying and falsifying police reports."[259] At one point, he allegedly called in sick to take a vacation to Cancún.[260] He engaged in a series of police chases that violated departmental policy, killing four civilians in the process.[261] He has been arrested and jailed multiple times.[262] And his employer has attempted to suspend and fire him more than any other officer in the state.[263] Despite all of this, each attempt to fire Sergeant Bosque has failed, thanks in part to the disciplinary appeals process.

All police officers, including Sergeant Bosque, deserve adequate procedural protections during internal disciplinary investigations. This should to include the right to appeal disciplinary action. But these disciplinary appeals procedures should not insulate officers from basic accountability at the expense of the broader community. This is admittedly a tough balance to strike. The findings from this Article, though, suggest that some communities may be failing to strike a reasonable balance between these two competing goals.

Many communities have established appeals procedures that may hamper reform efforts, contribute to officer misconduct, and limit public oversight of police departments. Most agencies permit officers to appeal disciplinary action to binding arbitration. Many agencies allow the police union or the aggrieved officer to have a substantial role in selecting the arbitrator. And agencies often give this arbitrator expansive review authority that offers no deference to decisions made by other disciplinary

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[259] Julie K. Brown, *The South Florida Cop Who Won't Stay Fired*, MIAMI HERALD (Sep. 8, 2014), http://www.miamiherald.com/latest-news/article1940924.html.

[260] *Id*.

[261] *Id*. (describing how he "has engaged in a rash of unauthorized police chases, including one in which four people were killed.").

[262] *Id*.

[263] *Id*. (explaining that they department has attempted to fire him 6 times).

agents, like civilian review boards, police chiefs, or city officials. Each of these procedural protections may be individually defensible. But they may combine to create a formidable barrier to democratic oversight of police officers.

Police departments need not eliminate all of these appellate protections. But curtailing some of them, or transferring additional deference and authority to democratically accountable accounts, would represent an incremental step in ensuring that police officers are accountable to the communities they serve.

## APPENDIX A: AGENCIES STUDIED

| City | State |
|---|---|
| Anchorage | AK |
| Fairbanks | AK |
| Juneau | AK |
| Little Rock | AR |
| Chandler | AZ |
| Glendale | AZ |
| Goodyear | AZ |
| Lake Havasu | AZ |
| Mesa | AZ |
| Peoria | AZ |
| Phoenix | AZ |
| Tempe | AZ |
| Tucson | AZ |
| Alameda | CA |
| Anaheim | CA |
| Antioch | CA |
| Arcadia | CA |
| Azusa | CA |
| Bakersfield | CA |
| Baldwin Park | CA |
| Berkeley | CA |
| Brea | CA |
| Brentwood | CA |
| Buena Park | CA |
| Burbank | CA |
| Carlsbad | CA |
| Cathedral City | CA |
| Ceres | CA |
| Chico | CA |
| Chino | CA |
| Chula Vista | CA |
| Citrus Heights | CA |
| Clovis | CA |
| Colton | CA |
| Concord | CA |
| Corona | CA |
| Costa Mesa | CA |
| Culver City | CA |

| City | State |
|---|---|
| Cypress | CA |
| Daly City | CA |
| Davis | CA |
| Delano | CA |
| Downey | CA |
| El Cajon | CA |
| El Monte | CA |
| Elk Grove | CA |
| Escondido | CA |
| Fairfield | CA |
| Folsom | CA |
| Fontana | CA |
| Fountain Valley | CA |
| Fremont | CA |
| Fresno | CA |
| Fullerton | CA |
| Garden Grove | CA |
| Gardena | CA |
| Gilroy | CA |
| Glendale | CA |
| Glendora | CA |
| Hanford | CA |
| Hawthorne | CA |
| Hayward | CA |
| Hemet | CA |
| Huntington Beach | CA |
| Huntington Park | CA |
| Indio | CA |
| Inglewood | CA |
| Irvine | CA |
| La Habra | CA |
| La Mesa | CA |
| Lincoln | CA |
| Livermore | CA |
| Lodi | CA |
| Long Beach | CA |
| Los Angeles | CA |
| Madera | CA |

| City | State |
|---|---|
| Manhattan Beach | CA |
| Manteca | CA |
| Menlo Park | CA |
| Merced | CA |
| Milpitas | CA |
| Modesto | CA |
| Monterey Park | CA |
| Mountain View | CA |
| Murrieta | CA |
| Napa | CA |
| National City | CA |
| Newport Beach | CA |
| Novato | CA |
| Oakland | CA |
| Oceanside | CA |
| Ontario | CA |
| Orange | CA |
| Oxnard | CA |
| Palm Springs | CA |
| Palo Alto | CA |
| Pasadena | CA |
| Petaluma | CA |
| Pittsburg | CA |
| Placentia | CA |
| Pleasanton | CA |
| Pomona | CA |
| Redding | CA |
| Redlands | CA |
| Redondo Beach | CA |
| Redwood City | CA |
| Rialto | CA |
| Richmond | CA |
| Riverside | CA |
| Rocklin | CA |
| Roseville | CA |
| Sacramento | CA |
| Salinas | CA |
| San Bernadino | CA |
| San Diego | CA |

| City | State |
|---|---|
| San Francisco | CA |
| San Jose | CA |
| San Leandro | CA |
| San Luis Opisbo | CA |
| San Mateo | CA |
| San Rafael | CA |
| San Ramon | CA |
| Santa Ana | CA |
| Santa Barbara | CA |
| Santa Clara | CA |
| Santa Cruz | CA |
| Santa Maria | CA |
| Santa Monica | CA |
| Santa Rosa | CA |
| Simi Valley | CA |
| South Gate | CA |
| South San Francisco | CA |
| Stockton | CA |
| Sunnyvale | CA |
| Torrance | CA |
| Tracy | CA |
| Tulare | CA |
| Turlock | CA |
| Tustin | CA |
| Union City | CA |
| Upland | CA |
| Vacaville | CA |
| Vallejo | CA |
| Ventura | CA |
| Visalia | CA |
| Walnut Creek | CA |
| Watsonville | CA |
| West Covina | CA |
| West Sacramento | CA |
| Westminster | CA |
| Whittier | CA |
| Woodland | CA |
| Yuba City | CA |
| Aurora | CO |

| City | State |
|---|---|
| Boulder | CO |
| Commerce City | CO |
| Denver | CO |
| Fort Collins | CO |
| Greeley | CO |
| Pueblo | CO |
| Thornton | CO |
| Bridgeport | CT |
| Bristol | CT |
| Greenwich | CT |
| Hartford | CT |
| Manchester | CT |
| Meriden | CT |
| Middletown | CT |
| Milford | CT |
| Naugatuck | CT |
| New Haven | CT |
| Norwalk | CT |
| Norwich | CT |
| Stamford | CT |
| Stratford | CT |
| Torrington | CT |
| Waterbury | CT |
| West Hartford | CT |
| District of Columbia | DC |
| Dover | DE |
| Newark | DE |
| Wilmington | DE |
| Aventura | FL |
| Boca Raton | FL |
| Boynton Beach | FL |
| Bradenton | FL |
| Cape Coral | FL |
| Clearwater | FL |
| Coconut Creek | FL |
| Coral Gables | FL |
| Coral Springs | FL |
| Davie | FL |
| Daytona Beach | FL |

| City | State |
|---|---|
| Delray Beach | FL |
| Doral | FL |
| Fort Lauderdale | FL |
| Fort Myers | FL |
| Fort Pierce | FL |
| Gainesville | FL |
| Greenacres | FL |
| Hallandale | FL |
| Hialeah | FL |
| Hollywood | FL |
| Jacksonville | FL |
| Jupiter | FL |
| Kissimmee | FL |
| Lakeland | FL |
| Largo | FL |
| Lauderhill | FL |
| Margate | FL |
| Melbourne | FL |
| Miami | FL |
| Miami Beach | FL |
| Miami Gardens | FL |
| Miramar | FL |
| North Miami | FL |
| North Miami Beach | FL |
| Ocala | FL |
| Ocoee | FL |
| Orlando | FL |
| Ormond Beach | FL |
| Oviedo | FL |
| Palm Bay | FL |
| Palm Beach Gardens | FL |
| Pembroke Pines | FL |
| Pensacola | FL |
| Plantation | FL |
| Port Orange | FL |
| Port St. Lucie | FL |
| Saint Petersburg | FL |
| Sarasota | FL |
| Sunrise | FL |

| City | State |
|---|---|
| Tampa | FL |
| Titusville | FL |
| West Palm Beach | FL |
| Honolulu | HI |
| Ames | IA |
| Ankeny | IA |
| Bettendorf | IA |
| Cedar Rapids | IA |
| Council Bluffs | IA |
| Davenport | IA |
| Des Moines | IA |
| Dubuque | IA |
| Iowa City | IA |
| Sioux City | IA |
| West Des Moines | IA |
| Boise | ID |
| Pocatello | ID |
| Addison | IL |
| Algonquin | IL |
| Arlington Heights | IL |
| Aurora | IL |
| Bartlett | IL |
| Belleville | IL |
| Berwyn | IL |
| Bloomington | IL |
| Bolingbrook | IL |
| Buffalo Grove | IL |
| Calumet City | IL |
| Carol Stream | IL |
| Carpentersville | IL |
| Champaign | IL |
| Chicago | IL |
| Chicago Heights | IL |
| Cicero | IL |
| Crystal Lake | IL |
| Danville | IL |
| Decatur | IL |
| DeKalb | IL |
| Des Plaines | IL |

| City | State |
|---|---|
| Downers Grove | IL |
| Elgin | IL |
| Elk Grove | IL |
| Elmhurst | IL |
| Evanston | IL |
| Galesburg | IL |
| Glendale Heights | IL |
| Glenview | IL |
| Gurnee | IL |
| Hanover Park | IL |
| Hoffman Estates | IL |
| Joliet | IL |
| Lombard | IL |
| Moline | IL |
| Mount Prospect | IL |
| Mundelein | IL |
| Naperville | IL |
| Normal | IL |
| North Chicago | IL |
| Northbrook | IL |
| Oak Lawn | IL |
| Oak Park | IL |
| Orlando Park | IL |
| Oswego | IL |
| Palatine | IL |
| Park Ridge | IL |
| Pekin | IL |
| Peoria | IL |
| Plainfield | IL |
| Rock Island | IL |
| Rockford | IL |
| Romeoville | IL |
| Saint Charles | IL |
| Schaumburg | IL |
| Skokie | IL |
| Springfield | IL |
| Tinley Park | IL |
| Urbana | IL |
| Waukegan | IL |

| City | State |
|---|---|
| Wheaton | IL |
| Wheeling | IL |
| Woodridge | IL |
| Carmel | IN |
| Evansville | IN |
| Fort Wayne | IN |
| Gary | IN |
| Indianapolis | IN |
| Lafeyette | IN |
| Muncie | IN |
| Noblesville | IN |
| South Bend | IN |
| Terre Haute | IN |
| Kansas City | KS |
| Lawrence | KS |
| Topeka | KS |
| Wichita | KS |
| Bowling Green | KY |
| Covington | KY |
| Lexington | KY |
| Louisville | KY |
| Alexandria | LA |
| Baton Rouge | LA |
| Boston | MA |
| Brockton | MA |
| Cambridge | MA |
| Chicopee | MA |
| Fall River | MA |
| Fitchburg | MA |
| Framingham | MA |
| Haverhill | MA |
| Lowell | MA |
| Medford | MA |
| New Bedford | MA |
| Newton | MA |
| Peabody | MA |
| Plymouth | MA |
| Revere | MA |
| Somerville | MA |

| City | State |
|---|---|
| Taunton | MA |
| Waltham | MA |
| Watertown Town | MA |
| Worcester | MA |
| Baltimore | MD |
| Frederick | MD |
| Lewiston | ME |
| Portland | ME |
| Ann Arbor | MI |
| Battle Creek | MI |
| Bay City | MI |
| Dearborn | MI |
| Detroit | MI |
| East Lansing | MI |
| Eastpointe | MI |
| Farmington Hills | MI |
| Flint | MI |
| Grand Rapids | MI |
| Jackson | MI |
| Kalamazoo | MI |
| Lansing | MI |
| Lincoln Park | MI |
| Livonia | MI |
| Madison Heights | MI |
| Midland | MI |
| Novi | MI |
| Portage | MI |
| Roseville | MI |
| Saginaw | MI |
| Southfield | MI |
| Sterling Heights | MI |
| Taylor | MI |
| Troy | MI |
| Warren | MI |
| West Bloomfield | MI |
| Westland | MI |
| Wyoming | MI |
| Blaine | MN |
| Bloomington | MN |

| City | State |
|---|---|
| Coon Rapids | MN |
| Duluth | MN |
| Mankato | MN |
| Minneapolis | MN |
| Moorhead | MN |
| Rochester | MN |
| Saint Cloud | MN |
| Saint Paul | MN |
| Shakopee | MN |
| Woodbury | MN |
| Blue Springs | MO |
| Columbia | MO |
| Independence | MO |
| Kansas City | MO |
| O'fallon | MO |
| Saint Charles | MO |
| Saint Joseph | MO |
| Saint Louis | MO |
| Springfield | MO |
| University City | MO |
| Billings | MT |
| Bozeman | MT |
| Butte | MT |
| Great Falls | MT |
| Helena | MT |
| Missoula | MT |
| Bellevue | NE |
| Grand Island | NE |
| Lincoln | NE |
| Omaha | NE |
| Concord | NH |
| Dover | NH |
| Manchester | NH |
| Nashua | NH |
| Rochester | NH |
| Atlantic City | NJ |
| Brick | NJ |
| Camden | NJ |
| Clifton | NJ |

| City | State |
|---|---|
| East Orange | NJ |
| Edison | NJ |
| Elizabeth | NJ |
| Fair Lawn | NJ |
| Fort Lee | NJ |
| Garfield | NJ |
| Hackensack | NJ |
| Hamilton | NJ |
| Hoboken | NJ |
| Jersey City | NJ |
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| Perth Amboy | NJ |
| Plainfield | NJ |
| Sayreville | NJ |
| Trenton | NJ |
| Union City | NJ |
| Vineland | NJ |
| West New York | NJ |
| Westfield | NJ |
| Woodbridge | NJ |
| Albuquerque | NM |
| Hobbs | NM |
| Las Cruces | NM |
| Rio Rancho | NM |
| Santa Fe | NM |
| Henderson | NV |
| Las Vegas | NV |
| North Las Vegas | NV |
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| New York | NY |
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| Oyster Bay | NY |
| Poughkeepsie (City) | NY |
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| Riverhead | NY |
| Rochester | NY |
| Syracuse | NY |
| Tonawanda | NY |
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| Utica | NY |
| White Plains | NY |
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| Eugene | OR |
| Grants Pass | OR |
| Gresham | OR |
| Hillsboro | OR |
| Keizer | OR |
| Lake Oswego | OR |
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| Oregon City | OR |
| Portland | OR |
| Salem | OR |
| Springfield | OR |
| Tigard | OR |
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| Bethlehem | PA |
| Erie | PA |
| Philadelphia | PA |
| Pittsburgh | PA |
| Reading | PA |
| Scranton | PA |
| Cranston | RI |
| East Providence | RI |
| Pawtucket | RI |
| Warwick | RI |
| Woonsocket | RI |
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| Del Rio | TX |
| Denton | TX |
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| El Paso | TX |
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| Galveston | TX |
| Georgetown | TX |
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| Lufkin | TX |
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| McKinney | TX |
| Mesquite | TX |
| Pharr | TX |
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| San Angelo | TX |
| San Antonio | TX |
| San Marcos | TX |
| Temple | TX |
| Waco | TX |
| Salt Lake City | UT |
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| Kent | WA |
| Lacey | WA |
| Lake Stevens | WA |
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| Lynwood | WA |
| Marysville | WA |
| Puyallup | WA |
| Redmond | WA |
| Renton | WA |
| Richland | WA |
| Seattle | WA |
| Spokane | WA |
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| City | State |
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| Wenatchee | WA |
| Yakima | WA |
| Appleton | WI |
| Brookfield | WI |
| Fond du Lac | WI |
| Green Bay | WI |
| Janesville | WI |
| Kenosha | WI |
| Madison | WI |
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| New Berlin | WI |
| Oshkosh | WI |
| Wausau | WI |
| Wauwatosa | WI |
| West Allis | WI |

## APPENDIX B: METHODOLOGICAL DISCUSSION

In the methodology portion of this Article, I described how I went about collecting the police union contracts for the dataset in this Article.[264] I also outlined how I "conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability."[265] For the purposes of brevity and readability, I provided only a brief discussion of the methodological components of this Article. This methodological discussion is intended to build on the earlier methodology section, and to demonstrate the important influences of prior studies on this study's methodology.

### I. DATASET AND COLLECTION

The dataset for this Article includes 656 police union contracts. I collected these contracts as part of a broader series of projects designed to examine the ways that internal disciplinary procedures influence police accountability. I published the first examination of a portion of this dataset in 2017, when I looked specifically at broad categories of

[264] *See supra* Part III.
[265] *Id*.

contractual terms that may thwart officer accountability in police union contracts for 178 of the largest municipal departments serving communities with around 100,000 residents or more.[266] That study built off other important and similar work done by previous researchers, including Professor Samuel Walker and Kevin M. Keenan, Campaign Zero, *Reuters*, and the *Guardian*.[267] Based on these findings, that Article hypothesized that internal disciplinary procedures represent an underappreciated barrier to police reform, and that collective bargaining negotiations may be subject to something akin to regulatory capture by politically powerful police unions.[268] Ultimately, that Article offered normative recommendations for how to change the negotiation of police union contracts.[269] This Article similarly draws this same original database to examine one specific component of the internal disciplinary process, as established by police union contracts: police disciplinary appeals. Given the narrower focus and smaller number of variables used in this study, I expand my analysis to include departments serving communities with around 30,000 residents or more. This resulted in a total of 656 police union contracts.

### A. *Collection Methodology*

I collected the contracts used in this Article between 2014 and 2017, regularly updating them at various points throughout this time period. When possible, I collected contracts directly from municipal websites, state repositories, and police union websites. Despite assumptions to the contrary, the overwhelming majority of police union contracts are available through this these public locations. Approximately 61% of these contracts come from municipal websites, 18% from state websites, 5% from police association or union websites, and 2% from media reports. Another 3% of these contracts were only available through previous union contract collections by other organizations like Labor Relations Information Systems and Campaign Zero, which make these contracts available online. And I obtained the remaining approximately 11% of contracts through open record requests, as they are not otherwise publicly available. The municipal departments covered in this dataset serve a total population of around 97 million Americans. The median population served by this dataset is around 67,905 residents. Although I believe this is the largest database of police

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[266] Rushin, *supra* note 29, at 1217-18.

[267] *See, e.g.,* Keenan & Walker, *supra* note 88 (conducting extensive coding on a dataset of 14 law enforcement officer bills of rights); Sinyangwe, Elzie, & Packnett, *supra* note 69 (coding 81 union contracts); Levinson, *supra* note 71 (coding 82 union contracts).

[268] Rushin, *supra* note 29, at 1239-40.

[269] *Id*. at 1243-47.

union contracts used in any academic study, it is important to note that I am not the first to collect union contracts. It is worth noting that other groups have also created databases of union contracts.[270]

### B. *Representativeness of Dataset and Generalizability*

There are two potential factors that readers should consider before generalizing from this dataset. First, the dataset focuses only on large and mid-sized police departments. This means that the dataset used in this study is not representative of police departments of all sizes. It also focuses exclusively on municipal police departments, meaning that readers should be cautious in reaching generalizations about the implications of these findings for the appellate procedures available in other types of law enforcement agencies, like federal law enforcement agencies, sheriff's departments, and state highway patrols.

Second, this dataset focuses exclusively on police union contracts rather than other sources of appellate procedures. It does not analyze municipal ordinances, departmental procedures established outside the collective bargaining process, or state laws. Thus, this paper should provide generalizable conclusions about the disciplinary appeals procedures offered in unionized municipal police departments serving large and mid-sized jurisdictions. But readers should be careful in generalizing from this information to smaller and non-unionized departments.

## II. IDENTIFICATION AND DEFINITION OF VARIABLES

The defined the variables in this study in a manner consistent with the limited existing literature on police disciplinary appeals. Here, I write to elaborate both on the definition of each variable and the influence of prior studies on the selection of each variable.

### A. *Variable Definitions*

First, I included a variable to identify when departments offered arbitration for officers appealing disciplinary action. This posed two methodological challenges. Some union contracts permit arbitration for some, but not all, disciplinary appeals. Others permit the use of hearing

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[270] *See, e.g., LRIS Public Safety Contract Library*, LAB. REL. INFO. SYS., https://www.lris.com/contracts/index.php (collecting a large number of union contracts, although many are currently out of date); *Contracts*, COMBINED L. ENFORCEMENT ASS'NS TEX. (CLEAT), https://www.cleat.org/contracts (collecting contracts from Texas, although for a somewhat small number of jurisdictions); McKesson, Sinyangwe, Elzie, & Packnett, *supra* note 69 (collecting contracts for 81 jurisdictions); Levinson, *supra* note 71 (collecting 82 union contracts).

officers or other third parties that are the functional equivalent of arbitrators. Given the large number of researchers have identified that arbitration may serve as a barrier to officer accountability as discussed *supra* Part IV.A. I defined this variable broadly as whether officers can appeal any "disciplinary action to an arbitrator, or a comparable third-party."

Second, I included a variable that examined the selection method for arbitrators. The variable definition used in this study look specifically at whether the contract provides the "[p]olice union or police officer" with significant authority to select the identity of the arbitrator or third party that will hear the appeal." In his prior work in this area, Professor Iris noted

> The selection of which will serve as an arbitrator depends upon the willingness of both parties to a dispute (or in this study, series of disputes) to accept that individual as an arbitrator. Those arbitrators whom labor perceives as strongly pro-management, or vice versa, will over time find themselves not being selected to serve as arbitrators.[271]

In Chicago and in Houston, Iris found that arbitrators frequently split the difference between union and management demands during disciplinary appeals, despite the fact that the two cities used somewhat different selection procedures. Houston used an alternative strike system that permitted both labor and management to strike potential arbitrators from a panel, while Chicago used, in part, a panel of arbitrators stipulated in their union contract that gave them "quasi-permanent status."[272] Iris ultimately found that both selection processes were associated with similar rates of arbitrators overturning disciplinary decisions.[273] Thus, I included in my definition of this variable any selection methodology that allowed officers to have a role in selecting an arbitrator that was equal to or greater than management. This would include both Houston and Chicago from Iris's prior studies. I did not, however, include in this definition union contract provisions that defer to the selection process recommended by national associations or arbitrators or mediators—even if those associations recommend a similar approach. It is important to explicitly clarify that this Article does not take the position that these selection methodologies are, in and of themselves, problematic. Rather, it makes a narrower argument, similar to that made by other previous researchers like Professor Iris, that this sort of a selection methodology may theoretically create unintended incentives to compromise on disciplinary action because police

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[271] Iris, *Police Discipline in Chicago*, *supra* note 100, at 240.
[272] Iris, *Police Discipline in Houston*, *supra* note 100, at 146.
[273] *Id*. at 146-47.

disciplinary arbitrators are repeat players—particularly when this variable is present with other variables considered in this study.

Third, I included a variable to determine whether a police union contract made arbitration decisions binding on the municipality. I coded an arbitration procedure as binding if the contract explicitly said as much, or if it was the final step of an appellate procedure (even if some states may permit limited judicial review of arbitrator's decisions). I also included in this definition circumstances where arbitration was the final step in the appellate process for disciplinary actions. I did not consider whether the state in question permitted labor or management to file judicial challenges to final arbitration decisions. But such situations are relatively rare. Most states make arbitration decisions binding and limit judicial review of arbitration decisions.[274] The Supreme Court has also held that the "refusal of courts to review the merits of an arbitration award is . . . proper," meaning that an arbitrator "can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator's opinion."[275]

Finally, I included a variable to determine the standard of review used by arbitrators on appeal. The vast majority of contracts simply articulated the acceptable conditions under which a police department could discipline an officer (often for "just cause," "legitimate cause," or "good cause"). Most contracts then gave an arbitrator expansive authority to determine whether a police chief, city manager, or civilian review board had such sufficient cause to punish and officer, and to decide whether the punishment was proportional to the alleged offense. I attempted to be as judicious as possible in coding contracts under this variable. If a union contract placed any limit on an arbitrator's authority to re-review factual or legal findings handed down earlier in the disciplinary proceeding, I coded that contract as failing to provide expansive or de novo review authority. Thus, I tried to only capture in this definition those contracts that provide arbitrators with something akin to de novo review authority of disciplinary decisions.

### B. *Limitations of Binary Coding Approach*

The binary nature of the coding used in this study sometimes lends itself to difficult choices. I ultimately coded each variable as either (1) for present or (0) for not present in each contract. Nevertheless, as discussing in the methodology section of this Article, not all contracts had provisions that neatly fit into the coding parameters set by this

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[274] Stoughton, *supra* note 57, at 2210.

[275] *Id*. (first quoting Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960); then quoting WILL AITCHISON, THE RIGHTS OF LAW ENFORCEMENT OFFICERS 98 (6th ed. 2009)).

Article. In these borderline cases, there is certainly room for reasonable disagreement as to the coding decisions I reached. Different coding techniques may have resulted in variations in a small number of coding decisions. Nevertheless, these represented less than one percent of the coding decisions I made in evaluating this dataset, so I do not believe this limitation undermines the central claims of this Article.

New Perspectives in Policing

JUNE 2011

HARVARD Kennedy School
Program in Criminal Justice Policy and Management

NIJ
National Institute of Justice

# Police Discipline: A Case for Change

Darrel W. Stephens

## Executive Session on Policing and Public Safety

This is one in a series of papers that will be published as a result of the Executive Session on Policing and Public Safety.

Harvard's Executive Sessions are a convening of individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue. Members are selected based on their experiences, their reputation for thoughtfulness and their potential for helping to disseminate the work of the Session.

In the early 1980s, an Executive Session on Policing helped resolve many law enforcement issues of the day. It produced a number of papers and concepts that revolutionized policing. Thirty years later, law enforcement has changed and NIJ and Harvard's Kennedy School of Government are again collaborating to help resolve law enforcement issues of the day.

Learn more about the Executive Session on Policing and Public Safety at:

NIJ's website: http://www.nij.gov/topics/law-enforcement/administration/executive-sessions/welcome.htm

Harvard's website: http://www.hks.harvard.edu/criminaljustice/executive_sessions/policing.htm

## Introduction

Police disciplinary procedures have long been a source of frustration for nearly everyone involved in the process and those interested in the outcomes. Police executives are commonly upset by the months — and sometimes years — it takes from an allegation of misconduct through the investigation and resolution. Their frustration is even greater with the frequency with which their decisions are reversed or modified by arbitrators, civil service boards and grievance panels. Police officers and their unions generally feel discipline is arbitrary and fails to meet the fundamental requirements of consistency and fairness. Unless it is a high-profile case or one is directly involved, few in the community are interested in the police disciplinary process. Those interested are mystified by both the time involved in dealing with complaints of misconduct and the various steps in a lengthy, confusing and overly legal process. The one area about the administration of police discipline where there is general agreement: it is a frustrating experience that leaves everyone with a sense that it has fallen well short of the primary purpose of holding officers accountable for their actions and encouraging behavior that falls

within departmental expectations and values. News accounts reinforce the overall dissatisfaction with police discipline:

- **United Kingdom.** Publishing the *Review of Police Disciplinary Arrangements,* Ms. Hazel Blears said: "I am grateful to William Taylor for his thorough review. There is clear agreement… that police disciplinary arrangements need to move away from being lengthy, costly, heavily regulated and punitive" (Taylor, 2005).

- **Newark, N.J.** "The Newark City Council launched an investigation today into the police department's disciplinary procedure after African-American and Hispanic officers complained supervisors were disproportionally punishing them" (Adarlo, 2009).

- **San Francisco, Calif.** "Police Commission President John Keker says he hopes the uproar over the panel's vote not to fire Officer Marc Andaya will spur the city to revamp the 'broken' police disciplinary system" (Zamora, 1997).

  Twelve years later: "Almost six years after San Francisco voters gave civilians unparalleled power over police officers, the city's discipline system is beset by delays of months and sometimes years, officials in charge of it say" (Cote, 2009).

- **Madison, Wis. "**Two lawmakers are proposing a statewide solution to the problem of how to establish a system for disciplining and dismissing law enforcement officers and to end pay for those who are fired" (Forster, 2007).

- **Montgomery County, Md.** "In 2008, one out of nine officers found by the department to have committed a serious offense received the punishment originally recommended by Police Chief J. Thomas Manger, according to Assistant County Attorney Chris Hinrichs" (Suderman, 2009).

- **Cincinnati, Ohio.** "The most severe punishments for police misconduct in Cincinnati are the least likely to stick. Police officers disciplined for major violations — from breaking policies to breaking laws — get their penalties reduced nearly three times more often than officers accused of minor violations" (Anglen and Horn, 2001).

These news accounts, and others from the past few years, clearly reflect widespread concern with the processes used by police to discipline errant officers. The disciplinary process is supposed to help address police misconduct while supporting officers who have exercised their discretion appropriately and within the framework of law and policy. Unfortunately, the approaches police generally use fall well short of achieving their primary purpose and leave the department, employees and the community with concerns. There is significant dissatisfaction with the discipline approach: it is predominately punishment oriented, it takes an excessive amount of time,

Cite this paper as: Stephens, Darrel W., *Police Discipline: A Case for Change,* Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 2011.

many decisions are overturned on appeal, and the entire process leaves one with a sense that there should be a better way to help officers stay within the boundaries of acceptable behavior and learn from the mistakes made in an increasingly difficult and challenging job.

This paper focuses on discipline process issues and purposes within the context of the organizational challenge of managing and modifying officer behaviors. It begins by discussing the task of creating an environment in which officers understand expectations and avoid the formal disciplinary process altogether. It then describes the issues with traditional approaches to discipline and reviews different approaches that some police agencies are trying. These include the Charlotte-Mecklenburg Police Department's discipline philosophy, now used for almost 10 years, and the Education-Based Discipline approach recently implemented by the Los Angeles County Sheriff's Department and others. The paper will also offer a way forward for police to implement more effective approaches to discipline.

## Creating the Right Environment

The best situation for a police department, its employees and the community is to create an environment in which the formal disciplinary process to deal with employee mistakes and misconduct is both the last option and the one least used. Creating that environment requires the department's leadership to pay close attention to several essential elements that play central roles in an effectively managed organization. These areas include:

- **The Hiring Process.** Finding and employing the right people is the foundation for creating an organization that effectively serves the community. Employment standards must be clear. For example: How is prior illegal or prescription drug abuse handled? What is the standard for driving and arrest records? What are the educational requirements? Do candidates have the right personality and character? With clear standards the selection process can identify and screen out candidates that may have difficulty maintaining the conduct and ethical behavior expected of a police officer.

- **Training.** Officers must have the skills and knowledge to effectively do their jobs. High-quality, entry-level, field and in-service training programs are key to ensuring that officers not only understand the department's expectations but have the skill level to meet them. Police departments and their employees must commit to a regimen of lifelong learning.

- **Clear Expectations.** Training is an important aspect of ensuring that officers understand the department's expectations, but more is required. The department's mission, vision, values and ethical standards convey essential messages to employees, as do formalized departmental goals and objectives. The policies and procedures the department has developed to guide decisions provide a framework for acceptable performance. These must not only be written in clear, understandable language but must also be reinforced in daily operations. For example, a pursuit that begins in conflict with the department's policy

but for which no disciplinary proceeding ensues because of a positive outcome sets the stage for confusion and contributes to questions about consistency and fairness in the disciplinary process. Likewise, a policy that prohibits gratuities in an organization where a substantial number of people at all levels routinely accept them sends confusing messages and undermines all efforts at accountability.

- **Effective Supervision.** One of the most important steps in creating a healthy work environment is the frontline supervisor and the level just above. These are also the most challenging jobs in police organizations as these levels have the most direct interaction with frontline employees and the community. These front-line supervisors are largely responsible for translating the department's mission, vision, values, policies, rules and regulations into operational practice. By emphasizing some things and not others, they establish the organizational expectations for officers and shape the culture. Effective supervision is critical to creating an environment in which coaching, not the threat of discipline, helps mold officers into professionals.

- **Performance Standards and Review.** Officers need to know what the work standards are and periodically review with their supervisor how they are doing. This is a difficult process for most police agencies. Setting standards is very challenging given the workload and types of problems officers encounter in different parts of the community and at different times of the day. Some officers are assigned to areas where the only work they are able to do is handle calls for service while others must self-initiate the majority of their work. Whatever the standards and review processes are in the department, it is important that officers understand them and that supervisors are helping to achieve them.

- **Complaint Reception and Investigative Procedures.** The department must have effective complaint reception protocols and investigative procedures. It should not be overly difficult for a citizen to lodge a complaint against a police employee. Like employees, citizens should be informed of the steps that will be taken to follow up on the complaint and should also be informed of the outcome. The investigative process should also have defined time frames for completion, with complainants notified of any delays.

- **Technology.** Police agencies have increasingly turned to technology to help deter misconduct and investigate it when it occurs. Automatic vehicle locators and in-car camera systems have become standard equipment in many police agencies in America. Some agencies are testing head-mounted cameras that record what officers see and hear when they are away from their vehicle handling a call. Although this technology has not been subjected to rigorous evaluation as an investigative aid or deterrent to misconduct, most police agencies believe that it serves that purpose.

- **Code of Silence.** The "code of silence" has been a significant issue for policing for many

years. Creating the right environment to discourage misconduct requires that police executives confront this issue. Even with indications that things may be improving, research suggests the code of silence is alive and well in policing (Rothwell and Baldwin, 2007). The code severely hampers a police department's ability to learn about and investigate misconduct. It also undermines credibility in the eyes of the community.

Paying attention to all of these elements will help department leaders reduce employee mistakes and misconduct and contribute to creating the right environment, even though it will not eliminate the need for effective disciplinary processes that have legitimacy both internally and externally.

Effective disciplinary processes serve a number of important functions in a police agency. They punish, change behavior, signal organizational expectations internally and externally, respond to citizen complaints and serve as an early warning tool about potential problem behaviors and tensions in the community. Ineffective processes do the same things except they have a tendency to punish without an appropriate behavior change, send the wrong signals and frequently leave the public with a sense that its complaints have not been taken seriously. Persistent problems with current disciplinary processes have limited their effectiveness.

## Disciplinary Process Issues

In a nation where citizens have always valued individual liberties and have been reluctant to grant too much authority to government, police officers are given significant powers and are expected to use them judiciously. Citizens also expect that the police will be held accountable for the manner in which they use their authority and that any misconduct will be dealt with appropriately. The disciplinary process plays an important role in holding police officers accountable for their behavior. It also helps sort out situations in which officer misconduct has been alleged but in fact the officer acted appropriately. Obviously, there is a lot at stake for the community, for the officers and for the department. Effective policing depends on a disciplinary process that is capable of serving the interests of all three parties in a fair and equitable manner. In many cases the current disciplinary systems fail to do this, reducing police legitimacy and effectiveness. Some current issues with police disciplinary processes include:

**The disciplinary process is an ongoing source of conflict with employees and unions.** The majority of police officers will not be the subject of an internal affairs investigation or significant disciplinary action during their careers. Yet, because of the potential for complaints or innocent mistakes, they are always concerned about the possibility of being investigated by Internal Affairs. Officers are influenced by the locker room talk about Internal Affairs investigations and general perceptions of not being treated fairly in the process[1] (Curry, 2004).

**The disciplinary process is a source of mistrust and tension for some in the community, particularly in minority communities where many believe too many police decisions are influenced by race.** Although there has been improvement, minority communities report

lower levels of confidence in the police and their honesty and integrity than white communities[2] (Bureau of Justice Statistics, 2009). Obviously, many factors contribute to citizens' views of the police, but one that has substantial influence is a sense that police officers are not always held accountable for their behavior. A 2006 *Seattle Post-Intelligencer* editorial board poll revealed that 66 percent of respondents did not believe that complaints against the police were handled fairly and openly (*Seattle Post-Intelligencer* Editorial Board, 2006).

**The focus of discipline is predominately punishment, not behavior change.** Most police executives would say the purpose of punishment is to deter future misconduct by the officer involved and send a message to others that such behavior will not be tolerated. Alternative courses of action that would lead to behavioral change are seldom part of the sanctions imposed on officers who have had sustained misconduct charges. Punishment for misconduct is appropriate at times, and it may lead to behavioral change, but it also brings resentment and at times contributes to the sense of unfairness that many officers have about how discipline is handled. In an Op/Ed piece, Ted Hunt (2009), the former president of the Los Angeles Police Protective League, noted:

> One of the things that officers often complain about when they are disciplined is the way it was done. "I was not treated with respect," said one officer. It wasn't long until that officer's humiliation turned into anger and then to resentment. An angry, resentful officer is not good for the organization.

**For the most part, the disciplinary process fails to deal adequately with the small group of officers who are the source of a disproportionate share of complaints received and use-of-force situations**. It is common knowledge that a small number of officers account for an inordinate number of complaints and use-of-force situations. The Independent Commission on the Los Angeles Police Department (1991) found 44 officers with extremely high rates of citizen complaints who could have been identified from department records. Journalists have noted departments in which 2 percent of the officers accounted for as much as 50 percent of the complaints (Walker, Alpert and Kennedy, 2000). This realization has resulted in the establishment of early intervention systems to help identify problem officers.

**Inconsistent messages are sent to officers by the department heads handling complaints and misconduct allegations.** A common myth in policing is that aggressive officers working in high-crime areas can expect to receive a higher number of complaints and encounter a greater number of situations where they will have to use force. Supervisors and managers often reinforce this belief in the way they handle complaints and reviews of use-of-force situations from these areas of the community. In police agencies where officers are required to file a report when they use force, supervisors are expected to investigate the circumstances under which force was used. Too often, these are pro forma investigations that focus on whether the degree of force used was within policy, not whether force should have been used. This tends to reinforce officers' behavior and misses

an opportunity to provide coaching on how these encounters might have been handled differently.

**The disciplinary appeal processes often weaken the purpose of discipline.** Police executives' disciplinary decisions are frequently overturned or reduced by review boards and arbitrators, undermining the impact of the discipline. Anglen and Horn (2001) found that in Cincinnati,

> Nearly 37 percent of cases involving more than three days of discipline were reduced, compared to 14 percent of cases with lesser punishments.... Part of the reason is that officers who get the stiffest punishments are more likely to appeal. And when fired officers appeal to an outside arbitrator, they get their jobs back every time.

In both Chicago and Houston, arbitrators reduced the initial sanction imposed by the chief in 50 percent of the cases (Iris, 2002). Are police executives wrong half of the time when they determine sanctions for misconduct or do those hearing the appeal just disagree with the sanction? What is the impact of the frequency with which disciplinary decisions are overturned? Do officers in the organization believe this shows the process works, or are they more likely to believe this shows that the sanctions imposed were harsh and inappropriate? In high-profile cases, what is the impact on community confidence and trust when officers in the department are known to have been involved with misconduct?

**Processes generally take an excessive amount of time to complete.** In large departments, it takes about six months to complete a complaint investigation, reach a finding and determine the disciplinary action if the allegation is sustained. In the most serious cases this time can be increased significantly and, when discipline is appealed, it can take well over a year or longer to completely resolve the matter. An article in the *Atlanta Journal-Constitution* described a police officer who had been on administrative leave for four years for a criminal allegation before he was charged with a felony sexual assault. He was only one of 26 officers who had been placed on administrative leave for a long period of time pending case investigation (Torpy, 2009). The impact of discipline on the officer and the messages to the department and to the community are severely compromised the longer it takes from the time the misconduct occurred to its resolution.

**Processes and outcomes often do not appear to be fair to employees.** Several factors contribute to the impression held by many employees that the disciplinary process is not fair. First, discipline is a personnel matter and in many states and cities personnel issues are confidential.[3] In these locations, departments cannot disclose the discipline or the circumstances that led to the decision. Second, there may be real or perceived variations in the punishment for similar offenses. These variations most often arise when different people are making the decisions. A commander in one part of the department may view the misconduct differently than another, producing different outcomes. Third, the amount of time that has elapsed from the time the misconduct occurred to when the sanctions are imposed sometimes influences employees' opinions about

fairness. For example, an officer suspended a year after the misconduct, but who has performed well in the interim, is likely to resent the imposition of the sanction; in such instances, the officer's colleagues frequently believe that imposition of the sanction is unfair. Finally, there are instances in police agencies where an officer is commended for his or her actions yet is disciplined for the same incident. Officers almost always see this as unfair disciplinary action. "Fair" is a tricky standard to establish in the best of circumstances and almost always requires some careful explanation.

**Processes and outcomes may be influenced by the amount of publicity the alleged misconduct receives.** A high-profile incident of officer misconduct may affect the investigation and the outcome of the discipline process. In some cases the process is expedited while others are slowed down considerably by all the attention. In a case in Portland, Ore., that received extensive news media attention, it took more than three years for the chief to reach a decision in an incident where a Taser was used and the person being arrested died. The chief determined the officer acted within policy but the officer was suspended because he did not send the victim to the hospital soon enough (Bernstein, 2009). In another case three years later, the same officer was placed on administrative leave for shooting a 12-year-old girl with a bean bag shotgun because she was resisting arrest. Union leaders claimed the suspension was more about the visibility of these cases than the behavior of the officer (Pitkin, 2009).

High-profile cases are particularly difficult for police executives and the community. The news media may disseminate information, video or photo images provided by citizens before the departmental hierarchy even knows something has happened. Executives then have to make statements as soon as possible with very limited information, and what they say may change (and often does) as the investigation gets under way and progresses. The community struggles with sorting out what happened as they hear conflicting statements or see segments of videotapes that include only part of the encounter with officers.

**Discipline in some states is very public (e.g., Florida and Texas) but in most, it is a personnel matter protected by privacy laws (e.g., North Carolina).** Debate continues about whether discipline of police officers should be open to public scrutiny. Some believe that open records serve as a deterrent to police officers and other public officials. They also believe the transparency that comes from being open improves confidence and trust in the police. In an article written to help gain access to disciplinary records, communications lawyers Steven Zansberg and Pamela Campos (2004) argue that: "Public access would help assure citizens that their complaints are taken seriously, investigated thoroughly in an unbiased fashion, and that officers who are found to have violated departmental policies are appropriately sanctioned."

Others believe it is unfair to officers to have personnel records completely open to the public — particularly internal affairs records. They believe that being a police officer does not mean they have to give up their right to privacy. They are concerned that unsubstantiated misconduct

allegations could damage their reputations and careers if open to the public. They point out that officers are sometimes the subject of false allegations made by people trying to get back at them simply for doing their job.

Policies on openness are far from settled and vary significantly from state to state. Florida's public records law is among the most open in the nation. It makes Florida one of two states where access to these records is a right protected by the state constitution. Passed in the late 1970s, Florida's law makes most police records open to the public, including personnel records and internal affairs records (after an investigation has concluded).

**The police chief's authority to administer discipline varies widely even though it is a critically important responsibility in the overall operation of the department.** An important aspect of leading and managing a police agency is the authority to ensure that law, policy, procedures and organizational expectations are carried out by employees. Disciplinary authority is an important aspect of that authority but surprisingly, it is limited for many police executives. In a 2006 report to the Board of Supervisors on police disciplinary procedures, a survey of 25 California police departments, including the state's eight largest, revealed that the chief's authority to implement disciplinary sanctions ranged from none at all to officer termination. In most cases, the authority was limited to suspensions of less than 10 days with greater sanctions requiring the city manager's or some type of board approval (Van de Water, 2006).

**The administration of discipline in police departments has taken on the characteristics of a criminal process in the way the investigation is conducted, testimony and evidence are considered and, in many respects, the way sanctions are imposed.** This observation applies to policing within and beyond the United States. The *Review of Police Disciplinary Arrangements Report* (Taylor, 2005) noted the adoption of legal system procedures for handling discipline as an impediment to effective discipline. Following are excerpts from the report:

> The language and environment for handling police discipline should be open and transparent. It should be much less quasi-judicial. Investigations need not be centered on the crime model, the style of hearing should be less adversarial and similarities with a 'military court martial model' avoided (p. 5).

> The language in which the regulations are written and the processes operated is often viewed as inaccessible and the judicial style creates a formality which does not aid understanding, openness and simplicity. This is particularly so for the member of the public who becomes embroiled in the process (p. 19).

The report also encourages that involvement of lawyers in the process be limited except in the appeal stage. The new procedures in the United Kingdom are designed to provide a fair and open way of dealing with misconduct and performance problems, creating an environment in which the

emphasis is on learning and development, both for the employees and for the organization.

The overall impact of the issues described above will vary from one community to another, but all are affected by at least some of these issues. It seems clear that police disciplinary processes are in need of revision, but what is not clear is *what* should be done or *how*.

## Alternative Police Discipline Processes

Recognizing the shortcomings of current approaches to police disciplinary practice, and in an effort to respond to concerns, some police departments have begun to explore alternatives and make changes. Some of the alternative approaches are relatively new, while others have been tried in some places, abandoned and then tried again in other places. Because of the complexity of the processes and the range of influences, most alternate approaches are not complete revisions of the process. Rather, they are designed to address one or more issues that cause major concern for individual departments.

### Discipline Matrix

Although not a new idea, a number of departments have developed matrices that spell out the options for sanctions when there is a sustained violation of the rules of conduct or other policies. These departments believe that in addition to letting employees know in advance, a matrix will help make the sanctions applied both fair and consistent. In late 2003, the Oakland Police Department and the University of Nebraska at Omaha cosponsored a conference on the use of a disciplinary matrix as an effective accountability tool. The matrix was described as follows (Walker, 2004: 2):

> A discipline matrix is a formal schedule for disciplinary actions, specifying both the presumptive action to be taken for each type of misconduct and any adjustment to be made based on an officer's previous disciplinary record.
>
> The primary purpose of a discipline matrix is to achieve consistency in discipline: to eliminate disparities and ensure that officers who have been found to have committed similar forms of misconduct will receive similar discipline.

Conference participants concluded that a matrix has the potential to improve accountability and consistency. They also cautioned that successful implementation is not guaranteed, as many of the precise details of using a matrix to guide disciplinary decisions remain to be worked out (Walker, 2004).

Several police departments are moving forward in an effort to work through the details required to put a discipline matrix in place. Denver's efforts represent one of the most comprehensive revisions of the disciplinary process that includes a matrix.[4] The Denver Manager of Safety appointed an 80-member Disciplinary Advisory Group to review the entire process in an effort to administer discipline in a fair and timely manner. It was a diverse group that represented all of the stakeholders. The members worked for more than three years to understand the process that

was in place and develop a process that included spelling out sanctions in a matrix.

The Washington State Patrol adopted a discipline matrix in January 2002 that contains three different levels of misconduct from minor to major and defines sanctions for each level based on the number of offenses. The resulting process provides an opportunity for officers to "admit their mistake and move on." Officers can choose to acknowledge their mistake and accept the sanction from the matrix without a lengthy investigation and hearing. In 2002, the patrol resolved 43 percent of its complaints without a formal investigation and most were resolved in less than 14 days. The process also facilitated resolution of level 3 (minor) complaints at the first line supervisory level rather than through a full-scale investigation as required by the old system. The first full year of implementation saw a reduction in lengthy investigations, reduced costs, a reduction in citizen complaints and considerable cost savings (Serpas, Olson and Jones, 2003).

More recently, the Tucson Police Department adopted a matrix to guide disciplinary decisions. Union President Jim Parks said, "While no disciplinary system will ever be foolproof, I believe that we at the Tucson Police Department took a step in the right direction" (Parks, 2006). Tucson followed the lead of the Phoenix Police Department, which began using the matrix several years before.[5] Table 1 is an example of a discipline matrix recommended to the Vancouver (Wash.) Police Department (Matrix Consulting Group, 2009). The "Offense Class" represents the seriousness of the offense.

Overall, matrices have become a more commonly used device for improving disciplinary decision-making processes for police agencies, and it seems many officers see this as an improvement.

**Table 1. Vancouver Discipline Matrix**

| | First Offense | | Second Offense | | Third Offense | |
|---|---|---|---|---|---|---|
| Offense Class | Minimum | Maximum | Minimum | Maximum | Minimum | Maximum |
| 1 | N/A | Memo of Correction | N/A | Written Reprimand | Memo of Correction | 1-Day Suspension |
| 2 | Memo of Correction | Written Reprimand | Memo of Correction | Written Reprimand | 1-Day Suspension | 3-Day Suspension |
| 3 | Memo of Correction | 1-Day Suspension | Written Reprimand | 3-Day Suspension | 1-Day Suspension | 5-Day Suspension |
| 4 | Written Reprimand | 3-Day Suspension | 1-Day Suspension | 5-Day Suspension | 3-Day Suspension | 15-Day Suspension |
| 5 | 1-Day Suspension | 5-Day Suspension | 3-Day Suspension | 15-Day Suspension | 10-Day Suspension | Termination |
| 6 | 5-Day Suspension | Termination | 15-Day Suspension | Termination | Termination | N/A |
| 7 | Termination | N/A | N/A | N/A | N/A | N/A |

They provide a better sense of what the range of sanctions might be for classes of misconduct, which officers generally believe is a positive step. Even so, in some cases, the old system has been re-arranged to fit in a matrix and the punishment orientation remains. Although a discipline matrix provides a range of sanctions, it does not remove discretion entirely (nor should it) and leaves the department open to the criticism of inconsistent application of discipline when the luster of a new approach begins to fade.

### Education-Based Discipline[6]

Education-Based Discipline (EBD) is the creation of Sheriff Leroy Baca and the Los Angeles County Sheriff's Department (LASD). It represents the most significant departure from traditional police disciplinary practice in the United States and perhaps the world. As the name implies, the process is designed to focus on behavioral change through education rather than punishment. The process gives the individual the option of voluntarily participating in a personally designed remedial plan that can include education, training or other options designed to address the misconduct issue, including writing a research paper. Moreover, all of the activities related to the plan are conducted during on-duty time. The option to participate is open to employees who are facing a one- to 30-day suspension. One mandatory component of the program is an eight-hour training session developed specifically for EBD called the Lieutenants' Interactive Forum for Education (LIFE) Class. It is conducted by lieutenants and middle managers from LASD and focuses on understanding the influences that affect decision-making. In a Leadership Message from Sheriff Baca (2007), he said:

> Our leadership values require us to believe that until a Department member leaves our service, he or she will always be our responsibility. We must always care for all of our personnel, work closely with those who are experiencing problems, and be straightforward in building a trustworthy relationship.
>
> We must care and give to those in need whether they like us or not. Ineffective discipline is when we fail to be fair. Not listening to why Department members have acted in violation of a policy is widely believed to be unfair, especially by me.
>
> The focus of discipline should be on creation of a corrective action plan rather than punishment for punishment's sake. The plan should emphasize training and remediation along with more creative interventions designed to correct deficits in performance and maximize the likelihood of the Department member and his or her peers responding appropriately in the future.

EBD is just getting under way at LASD but has attracted the interest and encouragement of union leaders across the country — traditionally the loudest critics of punishment-based practices. Sheriff

Baca has clearly demonstrated considerable leadership and courage in implementing a system that is likely to have as many critics as supporters.

### Mediation

Although not widely used, some police agencies have turned to mediation between officers and citizens as a way of resolving complaints. A national survey identified 16 police departments with mediation programs (Walker, Archbold and Herbst, 2002). Some suggest that the approach has had value in helping both officers and citizens understand their own actions during the encounter. Mediation is often used as an alternative to the formal disciplinary process and usually it is the officer's decision to participate. This approach is most suitable for complaints involving discourtesy, insensitivity and minor procedural issues.

The Denver (Colo.) Police Department has made mediation a part of its overall approach to handling citizen complaints and discipline. A complaint is dropped if officers involved volunteer to participate in mediation regardless of the outcome. With professional mediators, officers and citizens meet at a neutral location to discuss the circumstances of the complaint. The satisfaction level of both officers and citizens in the way complaints have been handled in the three years the program has been operating has increased from 10-15 percent to 75-85 percent (Proctor, Clemmons and Rosenthal, 2009).

An evaluation of the mediation approach used by the Pasadena (Calif.) Police Department in 2005 indicated that it had great promise for improving understanding and trust between the police and the community (Police Assessment Resource Center, 2008).

### Peer Review

In the early 1970s, the Oakland and Kansas City Police Departments implemented a peer review process based on work that social psychologist Dr. Hans Toch did in a correctional setting with corrections officers. The process involved experienced senior officers reviewing the behavior of officers who received a complaint or reached a predetermined threshold volume in areas such as use of force, resist arrests and vehicle collisions. Identifying officers, through analysis of variables of this type, represented one of the first forms of early intervention.

Officers could elect to participate in peer review rather than the formal disciplinary process if they were facing charges or exceeded the thresholds. The peer review panel considered the circumstances and suggested behavior changes they believed would help minimize further complaints. In one situation, the panel conducted a role play session with the officer and learned he was violating the personal space of people during the interaction, which tended to intimidate them. The panel suggested he move back a few feet to put him in a safer position and to reduce the potential for intimidation. He complied and had no further difficulty in his interactions with citizens.[7]

A project evaluation determined that officers who participated in peer review when compared to a control group were not significantly different in

their behaviors, attitudes and peer ratings (Pate et al., 1976). The idea was not adopted on a permanent basis by either department following the trial, nor is there any indication it has been tried by other agencies — a disappointing outcome given the overall power of peer influence on officer conduct and the focus of the program on behavior change rather than punishment. It seems that peer review is worthy of further exploration as a formal — or perhaps informal — initiative aimed at encouraging and reinforcing positive attitudes and behavior.

### Early Intervention[8]

Early intervention systems are designed to track various indicators and provide early identification of officers whose performance indicates emerging problems and then intervene in a useful way. In large departments, these are often complex database management systems that track a wide variety of performance indicators, including citizen complaints, use of force, sick leave, performance evaluations, training, failure to appear in court and car stops, among others. Thresholds are established that let the officer and supervisor know there may be a problem that needs correction before it becomes a disciplinary issue. These systems are not a part of the police disciplinary process, although they are closely connected as they help resolve potential performance issues before an officer reaches the stage where the disciplinary process is engaged. They also serve as one important way of addressing the challenges presented by that small group of officers who account for a large number of citizen complaints and other misconduct issues. Such officers can be identified sooner and steps can be taken to address the behavioral problems.

Police agencies that have adopted early intervention systems believe they have value. The U.S. Department of Justice frequently includes in its consent decrees or memoranda of understanding the requirement to put such systems in place.[9] Although they have not been the subject of rigorous evaluations to determine their effectiveness at dealing with problematic behavior, these systems continue to evolve as more police agencies adopt them. A closer look at early intervention systems may provide greater insight on the most appropriate behavioral indicators, suitable thresholds and most effective intervention strategies.

### The Charlotte-Mecklenburg Police Department Discipline Philosophy[10]

In 2000, the Charlotte-Mecklenburg Police Department (CMPD) restructured its internal affairs investigative process in response to concerns about the length of time involved and officers' concerns about the consistency and fairness of discipline. It adopted the disciplinary philosophy developed and implemented in St. Petersburg, Fla., in 1993. The original philosophy was devised by the then-chief of the St. Petersburg Police Department[11] for several reasons. The first purpose was to inform the department and the community about how disciplinary decisions would be made. Florida's public records law made the outcomes known in St. Petersburg, but the decisions were made behind closed doors and neither the public nor police employees knew what was considered in determining sanctions for misconduct. The philosophy contributed to

a better understanding of how these decisions would be made.

The second purpose was to provide operational definitions of "consistency" and "fairness." For employees and their unions, these are the two most frequently voiced concerns with discipline. Officers and their representatives want to know that similar misconduct will receive the same sanctions regardless of who violated the rules. Employees are particularly concerned that supervisors, managers and favored people in the organization might be treated more leniently than they would be. This helps explain the favorable view unions often hold toward the use of a disciplinary matrix because the sanctions are spelled out for various levels and types of misconduct.

For the Charlotte-Mecklenburg Police Department, **consistency** is defined as holding everyone equally accountable for unacceptable behavior and **fairness** is understanding the circumstances that contributed to the behavior while applying the consequences in a way that reflects this understanding (Charlotte-Mecklenburg Police Department, 2001).

This definition formally introduces the notion that "fairness" includes an understanding of the circumstances in which the misconduct took place. A violation of a rule or policy can take place because the officer made an honest mistake in judgment. It also can occur when the officer is fully aware of the rule but goes forward with the conduct anyway. The officer in both cases should be held accountable for the violation, but the two cases beg for different treatment.

The third purpose was to provide guidance to supervisors and managers participating in the disciplinary process on the factors they should consider when making their decisions. Factors to be considered, with brief explanations, are as follows (Charlotte-Mecklenburg Police Department, 2001):

- **Employee Motivation.** The police department exists to serve the public. One factor in examining an employee's conduct will be whether or not the employee was operating in the public interest. An employee who violates a policy in an effort to accomplish a legitimate police purpose that demonstrates an understanding of the broader public interest inherent in the situation will be given more positive consideration in the determination of consequences than one who was motivated by personal interest. Obviously there will be difficulty from time to time in determining what is in the public interest. For example, would it be acceptable for an employee to knowingly violate an individual's First Amendment right to the freedom of speech to rid the public of what some might call a nuisance? Or is it acceptable as being in the public interest to knowingly violate a Fourth Amendment right against an unlawful search to arrest a dangerous criminal? Although it would clearly not be acceptable in either case for an employee to knowingly violate a Constitutional right, these are very complex issues that officers are asked to address. The police have a sworn duty to uphold the Constitution. It is in the **greater public interest** to protect those Constitutional guarantees in carrying out that responsibility

even though it might be argued the public interest was being better served in the individual case. But if an employee attempts to devise an innovative, nontraditional solution for a persistent crime or service problem and unintentionally runs afoul of minor procedures, the desire to encourage creativity in our efforts at producing public safety will carry significant weight in dealing with any discipline that might result.

- **The Degree of Harm.** The degree of harm an error causes is also an important aspect in deciding the consequences of an employee's behavior. Harm can be measured in a variety of ways. It can be measured in terms of the monetary cost to the department and community. An error that causes significant damage to a vehicle for example could be examined in light of the repair costs. Harm can also be measured in terms of the personal injury the error causes such as the consequences of an unnecessary use of force. Another way in which harm can be measured is the impact of the error on public confidence. An employee who engages in criminal behavior — selling drugs for example — could affect the public confidence in the police if the consequences do not send a clear, unmistakable message that this behavior will not be tolerated.

- **Employee Experience.** The experience of the employee will be taken into consideration as well. A relatively new employee (or a more experienced employee in an unfamiliar assignment) will be given greater consideration when judgmental errors are made. In the same vein, employees who make judgmental errors that would not be expected of one who has a significant amount of experience may expect to receive more serious sanctions.

- **Intentional/Unintentional Errors.** Employees will make errors that could be classified as intentional and unintentional. An **unintentional** error is an action or decision that turns out to be wrong, but at the time it was taken, seemed to be in compliance with policy and the most appropriate course based on the information available. A supervisor for example, might give permission for a vehicle pursuit to continue on the basis the vehicle and occupants met the general description of one involved in an armed robbery. The pursuit ends in a serious accident, and it is learned the driver was fleeing because his driver's license was expired. Under these circumstances, the supervisor's decision would be supported because it was within the policy at the time it was made. **Unintentional** errors also include those momentary lapses of judgment or acts of carelessness that result in minimal harm (backing a police cruiser into a pole for example, failing to turn in a report, etc). Employees will be held accountable for these errors but the consequences will be more corrective than punitive unless the same errors persist.

  An **intentional** error is an action or a decision that an employee makes that is known to be in conflict with law, policy, procedures or rules (or should have [been] known) at the time it is taken. Generally, intentional errors will be treated more seriously and

carry greater consequences. Within the framework of intentional errors there are certain behaviors that are entirely inconsistent with the responsibilities of police employees. These include lying, theft, or physical abuse of citizens and other equally serious breaches of the trust placed in members of the policing profession. The nature of the police responsibility requires that police officers be truthful. It is recognized however, that it is sometimes difficult to determine if one is being untruthful. **The department will terminate an employee's employment when it is clear the employee is intentionally engaging in an effort to be untruthful. Every effort will also be made to separate individuals from the department found to have engaged in theft or serious physical abuse of citizens.**

- **Employee's Past Record.** To the extent allowed by law and policy an employee's past record will be taken into consideration in determining the consequences of a failure to meet the department's expectations. An employee who continually makes errors can expect the consequences of this behavior to become progressively more punitive. An employee who has a record of few or no errors can expect less stringent consequences. Also, an employee whose past reflects hard work and dedication to the community and department will be given every consideration in the determination of any disciplinary action.

Laying out these factors helps police commanders think through the circumstances involved in the misconduct. The philosophy explicitly points out that unintentional mistakes are to be treated differently from intentional misconduct and that officers who run afoul of policy while genuinely trying to serve the public good should be given consideration in determining sanctions. Although thoughtful chiefs and commanders undoubtedly consider these factors when faced with the responsibility of making discipline decisions, it is important to put them in writing as a part of the department's directive system. Not only does this let employees know how they will be treated, the transparency also adds legitimacy to the process inside and outside of the organization.

However, laying out these factors in writing within the directives system is not, by itself, enough. In Charlotte–Mecklenburg, the philosophy was presented to both the civil service board and the citizens review committee before it was adopted. This also provided the opportunity for news media review. The philosophy was presented and discussed by the chief before supervisory and command staff, officer-in-service training, promotional classes and every class of recruit officers. In July 2005, the department published a widely circulated guidebook titled *Employee Conduct: Investigations and Discipline* that was aimed at audiences inside and outside the department. The disciplinary philosophy was also addressed in the guidebook. All of these steps served to ensure that both employees and the community were informed of the department's approach to discipline.

### Other Alternatives

Conversations about improving police disciplinary processes often turn to the use of civilian

review or approaches that professional associations of lawyers, doctors and others use to guide and control members. Civilian review is widely used in the United States with the hope that it will improve the legitimacy of handling, investigating and resolving citizen complaints. The closest equivalent within the police profession is where state-level police standards boards have the authority to revoke an officer's certification, effectively taking away his or her ability to work in the state as a sworn officer. There are as many variations of civilian review as there are cities that have implemented this process. Some review boards receive complaints and forward them on to the police department for investigation and resolution. In other communities, an appointed group of civilians conducts the investigation. Some review boards have the authority to recommend disciplinary action. Many such review boards come into play after an investigation is complete, and some are focused on specific misconduct categories like use of force. Some act only when a citizen appeals directly to them. Civilian review boards are certainly an important ingredient in disciplinary processes and constitute one of many possibilities that ought to be considered when reviewing alternatives to traditional discipline. The models that other professions use to sanction their members do not seem to offer much promise. One of the most significant obstacles is that they do not offer any greater legitimacy — perhaps less — than the processes currently in use in policing.

None of the alternatives discussed above represent complete departures from the traditional police disciplinary processes. They represent efforts to change the things that can be changed within the plethora of constraints imposed by law, contracts and tradition. They represent steps toward what may potentially be more effective methods of handling discipline.

## A Way Forward

In a perfect world, employees would fully understand the organization's expectations, report to work on time and always do the right thing. In such a world, employees would manage their own behavior with little need for elaborate disciplinary processes. Although that perfect world does not exist in policing today, a large majority of employees have no experience with the formal disciplinary processes because they do understand the expectations, treat people respectfully and consistently do their jobs in an acceptable manner. In exchange, these employees expect to be treated in a fair and consistent manner should they run afoul of a policy, rule, or regulation, or are the subject of a citizen complaint. Given all of the issues and concerns with disciplinary processes, how do police executives create systems that address mistakes and misconduct fairly while meeting the expectations of the community and employees? What would that process look like? Is it a matter of implementing one of the approaches described above? Is it a matrix that specifies sanctions, or an education-focused approach, or creation of a philosophy that guides how sanctions are determined? Is it some combination of these approaches, or something that has yet to be invented?

There are no definitive answers to these questions. As one works toward answering them, the complexity of the administration of discipline in

a police organization must be taken into account. A police chief does not have complete control of all the factors that influence disciplinary outcomes, but they should all be considered. Court decisions, state law, local ordinances, union contracts, civilian review, civil service, arbitrators, politics, complaint processes, investigative practices and organizational culture are all in play when disciplinary actions are taken. With all of this complexity, police executives might understandably shy away from a complete overhaul of the disciplinary process and focus on those parts over which they have some control or influence and that they believe might, with a little persuasion, be acceptable to stakeholders.

One approach to improving discipline might be the use of a problem-solving process to engage as many of the stakeholders as possible in examining how discipline is handled. It might also be of value to identify specific characteristics of a discipline process that would respond to the agreed deficiencies of current approaches and therefore be regarded as priorities for any changes made.

### Problem Solving

Problem solving offers great potential as a way to approach the development of better disciplinary processes and a helpful way of looking at misconduct and other disciplinary problems at both the organizational and individual levels. Police officers in many parts of the world have received problem-solving training over the past 25 years and often apply their knowledge to crime and other problems. One of the more commonly used approaches is the SARA[12] model developed by Police Executive Research Forum staff and members of the Newport News (Va.) Police Department in the mid-1980s (Eck and Spelman, 1988). SARA guides officers through a four-step process to problem solving:

**S**canning: Identifying and selecting problems for further study.

**A**nalysis: Breaking the problem down and looking at all aspects.

**R**esponse: Developing responses based on the analysis.

**A**ssessment: Determining if the response had the desired impact.

It can be used to look at disciplinary problems from a number of perspectives. The SARA model is applied to discipline problems in table 2 (p. 20). Problem solving seems to be helpful in looking at specific areas where policies or procedures are frequently violated.

### Disciplinary Process Characteristics

Even an organization with all the right policies, training and effective supervision needs a disciplinary process that deals with mistakes and misconduct in the most appropriate manner. Given the vast differences in police agencies, state laws, union contracts, forms of government and communities, it is unlikely that one model would meet the requirements of all agencies. Rather than try to focus on one or two approaches, it seems more helpful to identify characteristics that will contribute to an effective disciplinary process:

**Table 2. SARA Model**

| | Scanning | Analysis | Response | Assessment |
|---|---|---|---|---|
| Discipline Problems | • Complaints<br>– Citizens<br>– Officers/supervisors<br>– Other agencies<br>• Use-of-force reports<br>• Arrest reports/charges<br>• In-car camera screening<br>• Early intervention criteria<br>• News stories<br>• Division/unit statistics<br>• Internal investigations | • Individual with multiple complaints/misconduct<br>• Types of complaints (e.g., discourtesy, excessive force, court absences)<br>• Concentration of complaints (e.g., midnight patrol shift, narcotics, particular supervisor)<br>• Frequency of complaints/ misconduct<br>• Demographics of complainant/ officer (e.g., race, gender, age, experience)<br>• Department policy, procedures<br>• Training | • Warning<br>• Counseling<br>• Training<br>• Policy/procedure change -<br>• Mentor/coach<br>• Reassignment<br>• Suspensions/fines<br>• Employment termination | • Complaint/ misconduct reduction<br>• Satisfaction survey improvements<br>• Commendations<br>• Media coverage |

- **Early intervention at the lowest level possible.** A key part of effective discipline is recognizing mistakes and misconduct as soon as they occur and taking appropriate corrective action. It is not unusual for police officers to say on learning an officer has been severely disciplined or terminated that it was about time the department addressed the behavior. Officers are often aware of the misconduct of others but fail to see that bringing it to the attention of supervisors is one of their responsibilities. The best intervention, and likely the most effective, comes from peers and first line supervisors. Peers can and do influence behavior in both positive and negative ways. An environment that encourages employees and supervisors to take corrective action on minor mistakes helps create a culture in which everyone takes responsibility for their own behavior and for the behavior of others who may need guidance from time to time. It should also be clear, at the same time, that serious misconduct will be handled and properly documented through the formal investigative and disciplinary processes.

- **Fair and consistent application of discipline.** One of the most difficult challenges for discipline in a police organization is ensuring both the perception and reality of fairness and consistency. Employees who experience the discipline process must understand the reasons for the actions taken by the department and how they can avoid similar problems in the future. They must have the sense that everyone in the organization is held accountable for their behavior, and if the sanctions are different for similar behaviors, that they are appropriate for the circumstances.

  Developing a sense of fairness and consistency among employees is difficult to achieve. It requires that department and hopefully union

leadership will spend time in recruit and in-service training explaining the complaint, investigation and disciplinary processes. Chief executives must invest time in these forums explaining their perspective on discipline. They must also be ready to explain their decisions to employees and the community within the framework allowed by state and local law.

- **Behavioral focus.** The primary focus of discipline should be on changing unacceptable behavior. If the behavior can be changed by a supervisor cautioning the employee or showing the proper way to handle a situation, that should be all that is required. If the disciplinary decision includes sanctions, the employee is entitled to an explanation of the reasons for the sanctions and their connection to the behavior problem. Training should be an option for addressing honest mistakes. It is one thing for officers to make judgmental errors because they do not know the correct procedure or have the right knowledge. It is quite another for them to know what to do but intentionally fail to follow policy and procedures. The latter may require more severe sanctions to reinforce departmental guidelines. Even punishment must be carried out with a view toward behavioral change.

- **Timely.** Both internal investigations protocol and the disciplinary process must have established completion deadlines. To ensure these deadlines are met, a monitoring component that tracks progress on the case from the initial complaint to its resolution is an important piece of the process.

- **Transparent.** While respecting individual privacy rights and staying within the framework of the law, police agencies must be as open as they can possibly be to their employees and the community they serve. Transparency increases the community's confidence that mistakes and misconduct are treated seriously. Transparency helps employees see that the department leadership supports employees but is also willing to publicly acknowledge mistakes. Openness helps contribute to an environment in which accountability is an important individual and organizational value.

  This means that police agencies must, at a minimum, share statistical data with the community on police misconduct, sustained complaints and disciplinary action. Many police departments do this by publishing an annual report that is made available to the news media and the public. It also means that complainants receive timely feedback on the outcome of their complaint.

  Consideration should be given to including a peer on disciplinary review boards so a street officer's perspective is considered when arriving at the decision. Some agencies have citizens sit in on the board hearings either as observers or as voting members of the board.

Disciplinary processes that contain these characteristics are likely to have greater legitimacy in the eyes of the employees and the community.

Both are wary of a process that they do not understand, that is not transparent in many communities and that takes an inordinate amount of time to complete.

## Conclusion

The purpose of police discipline is to help employees serve the public while staying within the framework of law, policy, procedures, training and organizational expectations for their behavior. Effective discipline requires that employees understand these boundaries and expectations. When officers stray, measured consequences are consistently and fairly applied to hold them accountable and to change their behavior. Ideally, employees clearly understand the relationship between their behavior and the consequences, and naturally make the appropriate adjustments. In this ideal system, the complainant and the general public know employees will be held accountable for their behavior, and this assurance contributes to their confidence in the police. It seems police discipline should be a straightforward process that everyone understands. Clearly it is not.

In reality, police discipline is a messy, complicated and controversial process. It takes a long time from the misconduct to the outcome and, more often than not, the outcome is appealed and the sanctions are reversed. In the majority of communities, the feedback that complainants receive is limited to the investigative outcome: quite commonly a finding of "not sustained" that they struggle to understand.

This is a process that could do with a great deal of improvement. It is encouraging to see that some police agencies, such as the Los Angeles County Sheriff's Department, are pursuing cutting-edge changes. But far too many agencies are unwilling to take the risks involved in engaging stakeholders in a sincere effort to relieve the frustrations in a process that frequently fails to achieve its core purposes.

## Endnotes

1. In a study of the Lansing (Mich.) Police Department, researchers found that officers believed that discipline was unfairly and inconsistently applied. They felt that command-level personnel were treated differently than officers and that publicity, rather than behavior, dictated the disciplinary outcome.

2. See the *Sourcebook of Criminal Justice Statistics* section on public opinion, http://www.albany.edu/sourcebook/toc_2.html (accessed August 11, 2009). On honesty and ethical standards in 2003, 56 percent of white respondents rated the police as "high/very high" while only 31 percent of black respondents did. In 2008, white ratings were 55 percent while blacks increased to 46 percent. On confidence in 2004, 70 percent of whites indicated "a great deal" or "quite a lot," while blacks were at 41 percent. In 2009, ratings by both whites and blacks dropped to 63 percent and 38 percent, respectively.

3. A case in Charlotte, N.C., involving a 15-month employee goes to this point. The officer has been criminally charged with sexually assaulting six women while on duty and the case has attracted

enormous public attention and concern. News reports indicate the officer had been the subject of disciplinary action on two occasions and the media wanted access to the file which, with the approval of city council, is permissible under certain circumstances. The city council decided not to review or open the file to the public, which effectively ends the matter unless attorneys in the civil or criminal trials are able to convince the court to open the file.

4. For a detailed account of the Denver effort, see *Report on the Manager of Safety's Disciplinary Advisory Group* and the companion *Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines* at http://www.denvergov.org/PoliceDisciplineHandbook/tabid/432137/Default.aspx.

5. A growing number of police and sheriff's agencies have been working on improving their disciplinary processes. The few named here are generally reflective of the changes that have been made by others.

6. See the Los Angeles County Sheriff's Department website, http://www.lasd.org/divisions/leadership-training-div/bureaus/ebd/about.html, for detailed information on the Education-Based Discipline program. Information about the concept comes from this site unless otherwise noted.

7. Author's recounting of a conversation with the officer involved when the author was a police officer in Kansas City.

8. For a good overview of early intervention systems, see *Early Intervention Systems for Law Enforcement Agencies: A Planning and Management Guide* (Walker, 2003). The Charlotte-Mecklenburg Police Department (2005) publication *Early Intervention System: A Tool to Encourage & Support High Quality Performance,* is also a good example of reaching out to the public to explain the system.

9. The Department of Justice's use of the Pattern and Practice legislation has been very limited during the past 10 years. There are indications that these investigations will be pursued more vigorously in the future.

10. The full CMPD Discipline Philosophy can be found at CMPD.org under the "Directives" tab: http://charmeck.org/city/charlotte/CMPD/zstorage/InsideCMPD/Documents/100004DisciplinePhilosophy.pdf.

11. The chief was Darrel W. Stephens, author of this paper. Parts of the philosophy have been adopted by other agencies. Recently, the Milwaukee (Wis.) Police Department incorporated the entire philosophy in its procedures.

12. The Center for Problem-Oriented Policing provides a detailed discussion of the SARA model: http://www.popcenter.org/about/?p=sara.

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# Law Enforcement Oath of Honor

*On my honor, I will never*
*betray my badge, my integrity,*
*my character or the public trust.*

*I will always have the courage to hold*
*myself and others accountable for our actions.*

*I will always uphold the constitution, my*
*community, and the*
*agency I serve.*

International Association of Chiefs of Police

# Law Enforcement Code of Ethics

*As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.*

*I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.*

*I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.*

*I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held as long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession ... law enforcement.*

# LEADERSHIP

- *Leadership* is the process of influencing human behavior to achieve organizational goals that serve the public, while developing individuals, teams, and the organization for future service.

- *Management* is the process of combining human and technical resources to achieve organizational goals. Management involves the application of various functions including planning, organizing, coordinating, leading, and controlling.

| Leaders | Managers |
|---|---|
| Ask why | Ask how |
| Ignite people to perform | Direct allocation of resources |
| Focus on people | Focus on systems & structure |
| Inspire trust | Rely on control |
| Have a long range perspective | Have a short range view |
| Have an eye on the horizon | Have an eye on the bottom line |
| Innovate | Administer |
| Challenge the status quo | Accept the status quo |
| Do the right thing | Do things right |

# ORGANIZATIONAL CULTURE

Definition:

"A pattern of shared basic assumptions, that the group has learned as it solved its problems of external adaptations and internal integration, that has worked well enough to be considered valid and is, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems."

# SWOT Analysis

The first step of a SWOT Analysis is to begin with the *Internal Assessment: Strengths and Weaknesses*. An organizational strength is something a police department is good at doing or a characteristic that gives it enhanced ability to achieve objectives and fulfill its mission.

Strengths may include:

- Employees' skills, expertise, commitment
- Physical assets: equipment, vehicles, department
- Human assets: training and development of your workforce
- Intangible assets: reputation, community support, organizational culture
- Partnerships/cooperative ventures: political support

Secondly, it is imperative to analyze weaknesses. An organizational weakness is anything internal that detracts from the department's ability to carry out its mission efficiently and effectively.

Weaknesses may include:

- Deficiencies in personnel training and certification
- Lack of managerial development
- Lack of physical assets
- Lack of information sharing.

# SWOT Analysis
# 5 Frames of Reference for an Internal Assessment

1. Structural Frame of Reference

The analytical focus of the structural frame is the form and design of the organization. Its primary concern is how the organization and its subunits are structured, fit and work together. Points of analysis include the elements of organizational design such as mission, goals, objectives, chain of command, span of control, unit size, formal roles, job descriptions, unit outcome objectives and measures, policy, and procedures. Organizational structure should be viewed simply as a tool to accomplish the mission of the department. The structural frame of reference also includes analyzing the department's facility, equipment, and work environment.

Structural Frame Checklist:

1. What is the department's (division's) mission?
2. Is it clearly understood by its members?
3. Have goals and objectives been defined and evaluation measures identified to members?
4. Does our current organizational structure contribute to the mission?
5. Has accountability been established clearly in policy, job descriptions and reality?
6. Are job descriptions clear and current?
7. Has position-based authority been established?
8. Is the chain of command appropriate for the mission?
9. Is the span of control appropriate?
10. Is there a policy or does it need to be written?
11. Are the procedures current?
12. How are accomplishments measured?

# SWOT Analysis
# 5 Frames of Reference for an Internal Assessment

2. Human Resources Frame of Reference

This frame of reference is concerned with the organization's human resources. It considers recruitment, selection, training, development, employee recognition, motivation and communication as important factors in creating excellence. The human resource perspective requires that a good fit be made between management's objectives and people. A core belief of this frame of reference is that people who feel they are doing meaningful work and are respected in the workplace will give their talents and commitment to their organization. According to this frame of reference, the department should be concerned with the competency, commitment, and teamwork of their people.

This frame views leadership, management style, job analysis, employee selection, training, empowerment, personnel and organizational development, networking, consultation, employee involvement, and self-managed work teams as critical factors in organizational effectiveness. Command and supervisory staff are responsible for the competency and commitment of their employees. Managers and supervisors who treat their employees badly and with little regard will develop a conflicting or combative workforce that can make lives miserable…remember, <u>people are our greatest resources</u>!

Human Resources Frame Checklist:

1. What kind of leadership style does this division or unit need?
2. What type of people should be selected for this assignment?
3. What are my people's competency and commitment to our mission?
4. What type of training is needed?
5. How should we develop staff?
6. How will we evaluate individual and division and/or unit performance?
7. What are the interpersonal relationships involved?
8. How much empowerment and discretion should my people have?
9. How do my people communicate between themselves and others?
10. What kind of teamwork is needed?

# SWOT Analysis
# 5 Frames of Reference for an Internal Assessment

3. Cultural Frame of Reference

An organization's values, beliefs, and accepted ways of behavior make up its culture. Stories, rituals, and myths transmit this culture from one generation of employees to another. An organization's history and traditions are the source of these stories, rituals and myths. They form the basis of the organization's culture and belief system. The importance of an organization's culture is that it provides a sense of meaning and purpose to the behavior of its members.

When an organization situation is analyzed from this frame of reference, the critical point is not the situation but what the situation means to the members of the organization involved. The reasons why people act in a specific manner can be found in their values and the meaning they attach to their behavior. These beliefs, values, and acceptable modes of behavior are learned through the process of organizational socialization.

Cultural Frame Checklist:

1. What is the true vision of this organization and its members?
2. What are the values, beliefs, history, and tradition of this organization?
3. What image, Front and Back Stage, does the organization present?
4. How are accountability and ethics maintained in the organization?
5. What are the acceptable modes of behavior in the organization?

# SWOT Analysis
# 5 Frames of Reference for an Internal Assessment

4. Political Frame of Reference

This frame of reference views the department as consisting of different groups and individuals competing with each other for power and limited resources. Politics and conflict are a normal part of any organization's life because different groups and individuals develop their own agendas to meet their needs and wants. They will often try to advance their agenda instead of the organization's mission and objectives. Command and supervisory personnel who are diagnosing a situation within this frame of reference must understand the political context of their organization. Who are the internal and external power holders and what is their impact on the organization?

Command and supervisory members need to know how to use, confront, and manage power and conflict as productively as possible. Conflict analysis, tactics of conflict creation, and/or control and power are tools that can be used when resolving interpersonal and organizational problems. In order to use this frame of reference, Command and supervisory personnel must be able to analyze the political context of their organization and understand what their sources of power are. Power comes from positional authority, individual expertise, control of rewards and punishments, alliances and networks, control of organizational symbols, and personal attributes. Knowing how to use power is a skill. Using power inappropriately can result in failure for both the organization and management.

If managers and supervisors fail to understand the political frame of reference, they will be ignoring an important aspect of organizational life. Knowing who holds power inside and outside your organization is the first step to successful networking and getting your mission accomplished. However, over the use of power as a management tool will increase conflict and prevent task accomplishment. It can lead employees and peers to feel they are being manipulated and devalued, which may induce them into becoming overly cynical, pessimistic and combative.

Political Frame Checklist:

1. Who are the power holders our organization must deal with?
2. How is power distributed and used in this organization?
3. What are the networks necessary for the accomplishment of my job?
4. Who are the pressure groups we must be aware of?
5. What are the latent & manifest conflict relationships that exist within my organization?
6. What is the source of conflict?
7. How are resources distributed?

# SWOT Analysis
# Frames of Reference for an Internal Assessment

5. Technology Frame of Reference

Organizational technology refers to the tools or processes used by organizations to fulfill their function. It provides the means by which "data" and "raw information" (intelligence) are obtained and transformed into useful, and actionable information. This information becomes the basis for strategic decision-making, strategy development, and the deployment of personnel and resources.

This frame of reference's focus is on the manner in which information is obtained and processed. What are our information needs? Where can we obtain the data to support our analysis? Is it accurate and timely? How will we check its reliability? How will it be processed? Who needs this information? How do we use this information to address problems?

We exist in a technological age. Information gathering and processing is the lifeblood of an effective organization. Failure to engage the organization's environment in a structured manner to gain accurate and timely intelligence and to employ modern technology (tools/process, GIS systems) to process this information and to distribute it to those who need it will render an organization obsolete. Command and supervisory staff's failure to use technology properly will eventually victimize the organization and result in crisis management (knee-jerk responses).

Technology Frame Checklist:

1. What are our information needs?
2. Where do we obtain this information (sources)?
3. How will this information be processed?
4. Who needs this information?
5. When do they need it?
6. How will it be distributed to those who need it?
7. What do our management information systems tell us?
8. How is information used to solve problems?
9. What technology do we have and need? How can we get it?

# COMMUNITY SURVEY STEPS

1. Determine your objective

2. Decide the attribute you want to measure

3. Determine who your audience is

4. Develop questions using scales that are appropriate for the audience

5. Check the reliability of the survey before it is distributed

6. Determine how the survey will be distributed

7. Ask respondents to participate in the survey

8. Communicate results and use the data

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## CODE OF ETHICS

**AS A LAW ENFORCEMENT OFFICER,** my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all persons to liberty, equality and justice.

**I WILL** keep my private life unsullied as an example to all, and will conduct myself in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

**I WILL** never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

**I RECOGNIZE** the badge of my office as a symbol of public faith and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will never engage in acts of corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

**I KNOW** that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

**I WILL** constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...**LAW ENFORCEMENT**.

NEWS

# City Of Austin Approves $425,000 Settlement In Excessive Force Case

**The city of Austin unanimously approves $425,000 settlement in the Breaion King excessive force case**

HPM NEWS STAFF | MAY 25, 2018, 9:32 AM


**Spectrum News Austin**
@SpecNewsATX

JUST IN: #ATXCouncil unanimously approves $425,000 settlement in the Breaion King excessive force case:

specne.ws/ZJuj8y

1:10 PM - May 24, 2018 · Austin, TX

1 See Spectrum News Austin's other Tweets

The city of Austin is paying $425,000 to settle a lawsuit filed by a black woman who was thrown to the ground by a white officer durir 2015 traffic stop, and then told by another officer that blacks have, “violent tendencies.”

The Austin American Statesman reports the City Council voted unanimously to a settle a lawsuit filed by schoolteacher, Breaion King

King was arrested after being stopped for speeding three years ago.

Her case garnered national attention after patrol car dash-cam video of the incident was released in July 2016.

“This was not our city at its best,” Austin Mayor Steve Adler said.

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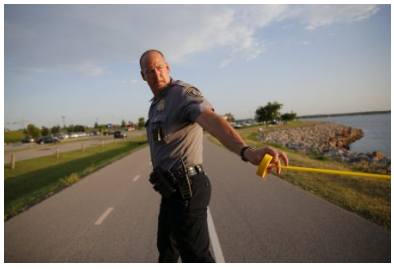
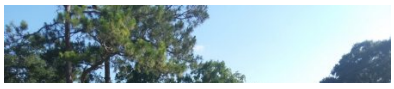


Gunman Who Fired Into An Oklahoma City Restaurant Was Shot Dead By 2 Bystanders



Police Response To Santa Fe School Shooting Remains Unclear

What Houston Is Learning About Underground Tunnels To Mitigate Flooding

WATCH: 'Ghost Shoes' Display At Memorial Hermann Commemorates Unbuckled Lives Lost

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What Happens If You Call That Phone Number On Your Texas Driver's License?

LISTEN: Anthony Bourdain On Food, Art, And His Favorite Place To Eat In Houston

Houston, Other Mayors, Push To Curb Gun Violence, Help Immigrants

Work Starts On Billion-Dollar Project To Replace Houston Ship Channel Toll Bridge

Celebrity chef Anthony Bourdain found dead in France at 61

813 F.3d 205
United States Court of Appeals,
Fifth Circuit.

Stephen C. **STEM**, Plaintiff–Appellant
v.
Ruben GOMEZ; City of **Hearne**, Texas, Defendants–Appellees.

No. 15–50264.
|
Feb. 8, 2016.

**Synopsis**

**Background:** Former police officer filed § 1983 action against city and its mayor alleging that his termination without notice or hearing deprived him of due process. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., 2015 WL 300738, dismissed complaint and denied officer's motion for leave to amend complaint. Officer appealed.

**Holdings:** The Court of Appeals, Leslie H. Southwick, Circuit Judge, held that:

[1] dismissal for lack of subject matter jurisdiction was not warranted;

[2] officer did not have protected property interest in continued employment;

[3] city's sovereign immunity barred officer's claims for back pay or benefits;

[4] officer's claim that mayor violated his rights under state statute fell within scope of ultra vires exception to city's sovereign immunity; and

[5] mayor was not proper defendant in officer's action.

Affirmed in part, reversed in part, and remanded.

West Headnotes (31)

**[1] Federal Courts**
Jurisdiction

**Federal Courts**
Pleading

District court decision to dismiss for failure to state claim or for lack of subject matter jurisdiction is reviewed de novo.

3 Cases that cite this headnote

**[2] Federal Civil Procedure**
Construction of pleadings

**Federal Civil Procedure**
Matters deemed admitted;acceptance as true of allegations in complaint

In analyzing motion to dismiss for failure to state claim, all well-pleaded facts are accepted as true and should be examined in light most favorable to plaintiff.

2 Cases that cite this headnote

**[3] Federal Civil Procedure**
Insufficiency in general

Dismissal is appropriate if complaint fails to plead sufficient facts to state claim that is plausible, rather than merely conceivable, on its face.

1 Cases that cite this headnote

**[4] Federal Civil Procedure**
Insufficiency in general

Claim has facial plausibility, and should not be dismissed for failure to state claim, when complaint's factual content allows court to draw reasonable inference that defendant is liable.

1 Cases that cite this headnote

**[5] Federal Courts**
Pleading

  

Denial of motion to amend is reviewed for abuse of discretion.

6 Cases that cite this headnote

**[6] Federal Courts**
Necessity of Objection;Power and Duty of Court

**Federal Courts**
Presumptions and burden of proof

If challenge to jurisdiction is also challenge to existence of federal cause of action, district court should assume jurisdiction exists and deal with objection as direct attack on merits of plaintiff's case.

1 Cases that cite this headnote

**[7] Federal Courts**
Pleadings and Motions

So long as complaint is drafted to seek recovery directly under Constitution or laws of United States, failure to state proper cause of action calls for judgment on merits and not for dismissal for want of jurisdiction.

Cases that cite this headnote

**[8] Federal Courts**
Pleadings and Motions

Nonexistence of cause of action is no proper basis for jurisdictional dismissal unless claim was clearly made for purpose of obtaining jurisdiction or is frivolous.

1 Cases that cite this headnote

**[9] Federal Courts**
Civil rights and discrimination in general

Dismissal for lack of subject matter jurisdiction was not warranted in police officer's § 1983 action alleging that his termination violated due process, despite city's contention that, because officer had no property interest in continued employment, there was no jurisdiction to consider his § 1983 claim, where officer's claim was not frivolous. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

**[10] Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

For § 1983 purposes, "person" includes local governing body if action claimed to be unconstitutional implemented decision officially adopted and promulgated by that body's officers. 42 U.S.C.A. § 1983.

Cases that cite this headnote

**[11] Civil Rights**
Liability of Public Employees and Officials

When government official is sued under § 1983, plaintiff must allege that official was either personally involved in deprivation or that his wrongful actions were causally connected to it.

2 Cases that cite this headnote

**[12] Constitutional Law**
Rights and Interests Protected in General

To warrant protection under Due Process Clause, property interest must be more than abstract need, desire, or unilateral expectation to continued public employment; rather, claimant must show legitimate claim of entitlement to procedure that is intended to protect interest acquired in specific benefits. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

**[13] Constitutional Law**
Termination or discharge

Property interest protected by Due Process Clause will exist in continued public employment if right to terminate without cause is eliminated, but employee who is terminable at will generally has no

  

constitutionally-protected property interest. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

**[14] Constitutional Law**
Source of right or interest

For due process purposes, property interest is not derived from Constitution but from independent source such as state law, contract, or other understandings. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

**[15] Constitutional Law**
Property Rights and Interests

For due process purposes, property interest cannot be defined by procedures provided for its deprivation. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

**[16] Constitutional Law**
Source of right or interest

Although state law is source of property right, question of whether property interest protected by due process is created is answered by federal constitutional law. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

**[17] Labor and Employment**
Termination;cause or reason in general

Under Texas law, causal basis for termination is generally not needed, as employment is at-will unless contract, statute, or other authority overrides that presumption.

Cases that cite this headnote

**[18] Federal Courts**
Inferior courts

When interpreting state law, federal court is guided by decisions of state intermediate appellate courts unless other persuasive data indicate that state's supreme court would decide otherwise.

Cases that cite this headnote

**[19] Constitutional Law**
Termination or discharge

**Municipal Corporations**
Notice and time of hearing

Under Texas law, as predicted by the Court of Appeals, statute barring disciplinary action against law enforcement officer in absence of complaint that was signed, delivered, investigated, and supported by evidence did not create protected property interest in police officer's continued employment with city, and thus city's failure to provide officer with notice or hearing before terminating him did not violate due process. U.S.C.A. Const.Amend. 14; V.T.C.A., Government Code § 614.023.

4 Cases that cite this headnote

**[20] Constitutional Law**
Termination or discharge

City's merely conditioning employee's removal on compliance with certain specified procedures does not necessarily mean that employee has substantive property right in continued employment that is protected by Due Process Clause. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

**[21] Federal Courts**
Failure to mention or inadequacy of treatment of error in appellate briefs

If party fails to mention district court's disposition of certain claims in its briefing, such claims are considered abandoned.

1 Cases that cite this headnote

**[22] Municipal Corporations**
Capacity to sue or be sued in general

**States**

  

Liability and Consent of State to Be Sued in General

Under Texas law, sovereign immunity protects state, its political subdivisions, and cities from lawsuits for money damages or other retroactive relief by depriving court of subject matter jurisdiction.

2 Cases that cite this headnote

**[23] States**

Declaratory judgment

Under Texas law, state's sovereign immunity still applies when plaintiff mischaracterizes suit for money damages as one for declaratory judgment.

1 Cases that cite this headnote

**[24] Municipal Corporations**

Wrongful dismissal

Under Texas law, city's sovereign immunity barred terminated police officer's claims for back pay or benefits based on his allegedly wrongful termination.

Cases that cite this headnote

**[25] States**

What are suits against state or state officers

Under Texas law, lawsuits asserting ultra vires exception to state's sovereign immunity must be brought against state actors in their official capacity and not state itself, even though claims are effectively against state, and must allege, and ultimately prove, that such state officials acted without legal authority or failed to perform purely ministerial act.

1 Cases that cite this headnote

**[26] Municipal Corporations**

Acts ultra vires in general

Under Texas law, former police officer's claim that mayor, acting in his official capacity, violated his rights under statute barring disciplinary action against law enforcement officer in absence of complaint that was signed, delivered, investigated, and supported by evidence fell within scope of ultra vires exception to city's sovereign immunity. V.T.C.A., Government Code § 614.023.

1 Cases that cite this headnote

**[27] Municipal Corporations**

Wrongful dismissal

Under Texas law, city council members, rather than mayor, were proper defendants in former police officer's action alleging that his termination violated statute barring disciplinary action against law enforcement officer in absence of complaint that was signed, delivered, investigated, and supported by evidence, even though council acted upon mayor's recommendation, absent allegation that mayor had statutory role in council meetings, cast vote to dismiss officer, or recounted final tally among those who did vote. V.T.C.A., Government Code § 614.023.

1 Cases that cite this headnote

**[28] Federal Courts**

Jurisdiction of Entire Controversy; Pendent and Supplemental Jurisdiction

Judicial economy, convenience, fairness, and comity require federal court to avoid unnecessarily deciding novel and significant matters of state law.

Cases that cite this headnote

**[29] Federal Civil Procedure**

Liberality in allowing amendment

Court must have substantial reason to deny party's request for leave to amend. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

5 Cases that cite this headnote

**[30] Federal Civil Procedure**

Form and sufficiency of amendment; futility

  

When amended complaint would still fail to survive motion to dismiss, it is not abuse of discretion to deny motion. Fed.Rules Civ.Proc.Rule 15(a)(2), 28 U.S.C.A.

4 Cases that cite this headnote

**[31] Federal Courts**
Jurisdiction of Entire Controversy; Pendent and Supplemental Jurisdiction

**Federal Courts**
Effect of dismissal or other elimination of federal claims

Courts are to consider judicial economy, convenience, fairness, and comity, and specifically whether it has dismissed all claims over which it has original jurisdiction, when deciding whether to exercise supplemental jurisdiction. 28 U.S.C.A. § 1367(c).

Cases that cite this headnote

**Attorneys and Law Firms**

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Charles D. Olson, Michael W. Dixon, Esq., Haley & Olson, P.C., Charles Alfred Mackenzie, Esq., Law Office of C. Alfred Mackenzie (argued), Waco, **TX**, for Defendant–Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before PRADO, SOUTHWICK, and GRAVES, Circuit Judges.

**Opinion**

LESLIE H. SOUTHWICK, Circuit Judge:

City councilmembers in **Hearne**, Texas, terminated former police officer Stephen **Stem's** employment without notice or a hearing. **Stem** filed suit alleging the councilmembers' actions violated state law and denied him constitutional due process. The district court dismissed the suit. We AFFIRM in part and REVERSE and REMAND in part.

FACTS AND PROCEDURAL BACKGROUND

On May 6, 2014, Stephen **Stem**, a second-year officer at the **Hearne** Police Department, was dispatched to **Hearne** resident Pearlie Golden's home on a 9–1–1 call. Roy Jones, Golden's nephew, placed the emergency call. Jones said Golden, who had recently failed a driver's license renewal test, threatened him with a gun after he had taken away her car keys. **Stem** alleged that when he arrived at the home, Golden pointed the gun at him and refused to put it down upon **Stem's** direction. **Stem** said he then fired his weapon "in response to the immediate and deadly threat." Golden was wounded and later died.

**Stem** alleged that following the shooting there were "considerable protests from residents of **Hearne**" and groups from outside **Hearne**. The **Hearne** City Council posted a notice for a May 10 meeting, listing **Stem's** employment as an agenda item. The mayor and city attorney announced prior to the meeting that they would recommend terminating **Stem**. At the May 10 meeting, councilmembers discharged **Stem**. **Stem** said he never received a signed, written complaint from any city official prior to his dismissal.

In September 2014, a Texas grand jury failed to indict **Stem** on any charges related to the incident. One month later, **Stem** ***209** filed this lawsuit against the city of **Hearne**, Texas, and its mayor in his individual and official capacities (collectively, the "defendants"). **Stem** alleged that Texas Government Code Section 614.023 created a "constitutionally protected property interest" in his employment as a police officer. Section 614.023 provides that where a "complaint" is filed against an officer covered by the statute [1]:

(a) A copy of a signed complaint ... shall be given to the officer ... within a reasonable time after the complaint is filed.

(b) Disciplinary action may not be taken against the officer ... unless a copy of the signed complaint is given to the officer....

(c) ... [T]he officer ... may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:

  

(1) the complaint is investigated; and

(2) there is evidence to prove the allegation of misconduct.

Tex. Gov't Code Ann. § 614.023.

Stem argues that the defendants' "prejudg[ment]" of him and failure to provide due process in connection with his termination deprived him of due process under the Fourteenth Amendment. Stem brought suit for the deprivation under 42 U.S.C. § 1983. Stem also sought a declaratory judgment that the defendants violated his constitutional rights and state law by terminating his employment without following the requirements of Section 614.023. The defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. Stem opposed the motion and also sought leave to amend any deficiencies in his complaint. In January 2015, the district court denied leave to amend and dismissed for failure to state a claim and for lack of jurisdiction. Stem timely appealed.

## DISCUSSION

**[1]** **[2]** **[3]** **[4]** A district court decision to dismiss for failure to state a claim or for lack of subject matter jurisdiction is reviewed *de novo. Bowlby v. City of Aberdeen,* 681 F.3d 215, 219 (5th Cir.2012) (failure to state a claim); *Ghanem v. Upchurch,* 481 F.3d 222, 223 (5th Cir.2007) (lack of subject matter jurisdiction). In analyzing the claims, all well-pleaded facts are accepted as true and should be examined "in the light most favorable to the plaintiff." *Bowlby,* 681 F.3d at 219. Dismissal is appropriate if a complaint fails to plead sufficient "facts to state a claim ... that is plausible[, rather than merely conceivable,] on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the ... [complaint's] factual content ... allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

**[5]** Denial of a motion to amend is reviewed for abuse of discretion. *Ackerson v. Bean Dredging LLC,* 589 F.3d 196, 208 (5th Cir.2009).

### *I. Dismissal for Lack of Jurisdiction*

**[6]** **[7]** **[8]** The defendants argue that the district court lacked subject matter jurisdiction. They contend that because Stem had no property interest in continued employment, there was no jurisdiction to consider his Section 1983 claim. The argument ***210** blurs jurisdiction with the merits. If the challenge to jurisdiction "is also a challenge to the existence of a federal cause of action," a district court should assume jurisdiction exists and "deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. May 1981) (relying on *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). So long as a complaint is drafted "to seek recovery directly under the Constitution or laws of the United States," a "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell,* 327 U.S. at 681–82, 66 S.Ct. 773. More recently, the Supreme Court explained that "the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 96, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The only exceptions are where the claim was clearly made "for the purpose of obtaining jurisdiction" or is "frivolous." *Bell,* 327 U.S. at 682–83, 66 S.Ct. 773.

**[9]** Stem stated a claim for relief under a federal statute. *See* 42 U.S.C. § 1983; 28 U.S.C. § 1331. It was not frivolous, and the *Bell* exceptions are inapplicable. The district court erred in dismissing Stem's claims for lack of jurisdiction.

The court also dismissed for failure to state a claim. We turn to whether that dismissal was valid.

### *II. Dismissal of Section 1983 Claim*

**[10]** **[11]** To state a claim under Section 1983, a plaintiff must assert facts to support that a person acting under color of state law denied the plaintiff a right under the Constitution or federal law. *Martin v. Thomas,* 973 F.2d 449, 452–53 (5th Cir.1992). A "person" includes a local governing body if the action claimed to be unconstitutional implemented a "decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). When a government official is sued under Section 1983, the plaintiff must allege that the official "was either personally involved in the deprivation or that his wrongful actions were causally connected" to

it. *James v. Tex. Collin Cnty.,* 535 F.3d 365, 373 (5th Cir.2008).

Stem asserts that Section 614.023, particularly subsection (c) which established a procedure for addressing complaints, provided him with a constitutionally protected property interest in his job. He alleges that he was unlawfully denied due process guaranteed to him under the Fourteenth Amendment when the mayor recommended discharging him without notice or a hearing and the Hearne City Council acted on that recommendation.

**[12]** **[13]** A property interest is more than "an abstract need," a "desire," or a "unilateral expectation" to continued employment. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A claimant must show a "legitimate claim of entitlement" to a procedure which is intended to protect an interest "acquired in specific benefits," in this case, a job. *See id.* at 576–77, 92 S.Ct. 2701. A property interest will exist in continued employment if the right to terminate without cause is eliminated. *See Bolton v. City of Dallas,* 472 F.3d 261, 264 (5th Cir.2006). Conversely, an employee who is terminable at will generally has no constitutionally-protected property interest. *See Muncy v. City of Dallas,* 335 F.3d 394, 398–99 (5th Cir.2003).

**[14]** **[15]** **[16]** A property interest is not derived from the Constitution but from an independent source such as state law, a contract, or other "understandings." *Evans* ***211** *v. City of Dallas,* 861 F.2d 846, 848 (5th Cir.1988). Therefore, a property interest "cannot be defined by the procedures provided for its deprivation." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Though state law is the source of the right, the question of whether a property interest is created is answered by federal constitutional law. *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756–57, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).

Stem argues that because his dismissal related to "complaints about his use of force against Ms. Golden," Section 614.023 provided him with a right to continued employment unless the city could produce corroborating evidence that proved the alleged misconduct. *See* Tex. Gov't Code Ann. § 614.023(c). He expanded that assertion at oral argument, contending that Section 614.023 sets a for-cause threshold for dismissal of an officer protected by the statute whenever either a citizen complaint or a criticism from inside city government "may lead to disciplinary action."

For support, Stem cites a state appellate decision. *See Turner v. Perry,* 278 S.W.3d 806 (Tex.App.–Houston [14th Dist.] 2009, pet. denied). There, a school district terminated a peace officer's employment for job performance deficiencies including "inappropriate interaction with students." *Id.* at 813. The officer filed a lawsuit which included a due process claim stemming from the school district's failure to follow the requirements of Section 614.023(c) in firing him. *Id.* at 813, 821–22. The intermediate Texas court agreed. It held that state law and district policy adopting Section 614.023(c) conferred a property interest on the officer: "in the absence of complaints that were signed, delivered, investigated, and supported by evidence, [the officer] had a legitimate expectation of continued employment." *Id.* at 822.

A different Texas intermediate court seemingly disagreed with this reasoning, holding that the statute did not alter the general rule of at-will employment. *Staff v. Wied,* 470 S.W.3d 251, 258 (Tex.App.–Houston [1st Dist.] 2015, pet. filed).

The defendants in this case argue that Section 614.023(c) provides nothing more than a "procedure for terminating an officer when the termination from employment is 'based on the subject matter' of a complaint." The district court agreed, citing Texas's presumption of an at-will employment relationship and finding nothing in the statute that would affect the presumption. Dismissing Stem's reliance on the *Turner* decision, the district court said its result "was the combination of the statute and [a] policy manual" specifically adopting Section 614.023, "which created the property interest found in that case, and which is not present in this case."

The district court was correct that *Turner* emphasized the school district's incorporation of Section 614.023 into its manual. *See Turner,* 278 S.W.3d at 822 & n. 21. Nonetheless, state statutes themselves can create a property right in continued employment. *See Henderson v. Sotelo,* 761 F.2d 1093, 1095–96 (5th Cir.1985) (citing *Slochower v. Bd. of Higher Educ.,* 350 U.S. 551, 554, 76 S.Ct. 637, 100 L.Ed. 692, *modified on denial of reh'g,* 351 U.S. 944, 76 S.Ct. 843, 100 L.Ed. 1470 (1956)). The statutory procedures at issue are to be applied in certain

  

disciplinary situations without any stated requirement that they first be adopted by the governing body itself as policy. *See* Tex. Gov't Code Ann. §§ 614.021–.023.

**[17]** Stem argues that Section 614.023 grants covered employees the right to a finding of cause before they can be fired. A causal basis for termination is generally ***212** not needed in Texas, where employment is at-will unless a contract, statute, or other authority overrides that presumption. *See Mott v. Montgomery Cnty.,* 882 S.W.2d 635, 637–38 (Tex.App.–Beaumont 1994, writ denied). Section 614.023 certainly does not explicitly provide that an officer facing a complaint can only be terminated for cause. Section 614.023 also does not resemble other statutes that clearly establish such a rule. For example, a stronger argument for a property interest would arise from a statute that requires a Civil Service Commission authorized by a city's electorate to "adopt rules that prescribe cause for removal or suspension" for police and fire personnel. Tex. Loc. Gov't Code Ann. §§ 143.008, 143.051; *see also* 59 TEX. JUR.3D POLICE, ETC. § 28 (explaining the process due before an officer may be terminated under Section 143.051). We also must consider that "courts should not insert words in a statute except to give effect to clear legislative intent." *In re Bell,* 91 S.W.3d 784, 790 (Tex.2002).

Before a property interest would exist, Section 614.023 would have to constrain the city in a meaningful way from discharging a protected employee. There is no property right if rules only provide considerations for the exercise of discretion. *See Moore v. Otero,* 557 F.2d 435, 437 n. 6 (5th Cir.1977). To determine whether the statute meaningfully limits the city's discretion, we examine how the statute operates, its relevant legislative history, and case law.

First, Section 614.023's protections apply when disciplinary action is based on the subject of a "complaint." One implication is that in all other situations, an officer may be discharged for a good reason, a bad reason, or no reason without the process provided. Stem does not assert that his termination was the result of any particular person's submission to his employer of an objection to Stem's conduct. Regardless, as discussed in more detail below, we decline to delve into the question of whether a "complaint" exists. No authority from the Texas Supreme Court has been discovered defining that state statutory term, and we may avoid announcing a non-authoritative definition.

Second, the relevant legislative history, including a staff-prepared "bill analysis," is instructive. In determining the meaning of a statute, the Texas Supreme Court analyzes statements by the legislation's authors, testimony at committee hearings, and bill analyses.[2] *Quick v. City of Austin,* 7 S.W.3d 109, 123 (Tex.1998). When Section 614.023(c) was enacted in 2005, the bill analysis prepared by the Texas House Research Organization stated that the original draft of the legislation required that there be "sufficient evidence," not just "evidence" as provided in the final statute. TEX. H. RESEARCH ORG., BILL ANALYSIS, H.B. 639, 79th Leg., Reg. Sess. (2005). Legislative drafters intentionally declined to define what would constitute "sufficient evidence to prove an allegation of misconduct," so that "discretion to decide what is sufficient [would be] in the hands of the state and local departments, where it lies already." *Id.* Additionally, before sending the bill to the Texas Senate ***213** for consideration, state representatives removed the term "sufficient" altogether, thereby eliminating any threshold amount of evidence that must be present before disciplinary action may be taken. TEX. H. JOURNAL, H.B. 639, 79th Leg., Reg. Sess., 565–66 (2005).

Third, in other cases, we have considered laws requiring a specific procedure to be followed prior to termination and held that no property interest existed. One of our decisions dealt with a building inspector who filed suit under Section 1983 against a city because his employment was summarily terminated. *Henderson,* 761 F.2d at 1094–95. The inspector claimed he was unlawfully deprived of property without due process of law. *Id.* at 1095. He claimed a property interest in continued employment in the city charter, which "provide[d] that the City Manager 'shall ... appoint and/or remove all department heads ... with the advice and consent of the [City] Commission.' " *Id.* at 1096. We held that the charter provision was a pre-termination procedure that did not create a property right. *Id.* at 1097. One of the Texas courts of appeals, when analyzing Section 614.023, relied in part on *Henderson* to hold that "either the State or the employer may implement policies and procedures for resolving complaints and grievances without altering the employee's status as an at-will employee." *Staff,* 470 S.W.3d at 258.

**[18]** **[19]** **[20]** In summary, there is no authoritative decision from the Texas Supreme Court as to whether Section 614.023(c) creates a property interest. When

  

interpreting state law, we are "guided by the decisions of state intermediate appellate courts unless other persuasive data indicate[ ] that the [state's] Supreme Court would decide otherwise." *Patin v. Thoroughbred Power Boats Inc.,* 294 F.3d 640, 646 (5th Cir.2002). Here, there is a disagreement among the state courts of appeals. *Compare Staff,* 470 S.W.3d at 258, *with Turner,* 278 S.W.3d at 821–22. In our view, Section 614.023 assures that an officer against whom a complaint is filed understands the allegations against him and receives a meaningful investigation into the accuracy of those allegations. A right to an investigation, though, does not create a property right. *See Henderson,* 761 F.2d at 1097–98; *Davis v. Dallas Indep. Sch. Dist.,* 448 Fed.Appx. 485, 496 (5th Cir.2011). A city's " 'merely conditioning an employee's removal on compliance with certain specified procedures' does not necessarily mean that an employee has a substantive property right in continued employment." *Irby v. Sullivan,* 737 F.2d 1418, 1422 n. 4 (5th Cir.1984) (quoting *Bishop v. Wood,* 426 U.S. 341, 345, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)). We also know that the legislation was not aimed at abrogating the right to discharge at will. TEX. H. RESEARCH ORG., BILL ANALYSIS, H.B. 639, 79th Leg., Reg. Sess. (2005). Finally, it is not even clear that the statute applies here, because the statutory meaning of a "complaint" is unsettled.

The district court did not err in dismissing **Stem's** Section 1983 claim. Section 614.023 is analogous to the charter provision in *Henderson.* Both laws require some action to be taken before termination of employment can occur, but no property right is created by that requirement.

*III. Dismissal of State–Law Claims*

**[21]** The district court implicitly dismissed **Stem's** claims under the Federal Declaratory Judgment Act and against the mayor in his individual capacity when it dismissed the case. **Stem** does not argue on appeal that this was error. If a party fails to mention a district court's disposition of certain claims in its briefing, such claims "are considered abandoned." ***214** *Huckabay v. Moore,* 142 F.3d 233, 238 n. 2 (5th Cir.1998). Thus, we decline to discuss the Federal Declaratory Judgment Act or the individual claim against the mayor.

**Stem's** state-law declaratory relief claim was brought under the Texas Uniform Declaratory Judgment Act, Texas Civil Practice and Remedies Code Chapter 37. He seeks back pay and benefits against the city and mayor in his official capacity. The district court concluded that sovereign immunity barred such relief. Additionally, the district court held that **Stem** failed to sue the proper parties and that Section 614.023 is inapplicable to **Stem's** situation.

**[22]** **[23]** **[24]** Under Texas law, sovereign immunity protects the state, its political subdivisions, and cities from lawsuits for money damages or other retroactive relief by depriving a court of subject matter jurisdiction. *See City of El Paso v. Heinrich,* 284 S.W.3d 366, 375–76 (Tex.2009); *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex.2006). Immunity still applies when a plaintiff mischaracterizes a suit for money damages as one for a declaratory judgment. *City of Dallas v. Albert,* 354 S.W.3d 368, 378 (Tex.2011). Though sovereign immunity may be waived, there is no waiver in Section 614.023 and its related sections. *See* Tex. Gov't Code Ann. §§ 614.021–.023. Because sovereign immunity has not been waived, we agree that **Stem** is not entitled to seek back pay or benefits.

**[25]** **Stem**, however, also seeks prospective relief in the form of reinstatement. He contends that the *ultra vires* exception to sovereign immunity allows his claim for prospective relief to proceed. The Texas Supreme Court has clarified the law related to claims for declaratory relief and this exception. *See Heinrich,* 284 S.W.3d at 375–76. In *Heinrich*, the widow of a police officer filed suit under the Texas Uniform Declaratory Judgment Act claiming a city violated her statutory rights when it altered her pension benefits. *Id.* at 369–70. The court explained that an *ultra vires* lawsuit aimed at "requir[ing] state officials to comply with [a] statut[e] ... [is] not prohibited by sovereign immunity." *Id.* at 372. Such lawsuits, however, must be brought against state actors in their official capacity and not the state itself, even though the claims are effectively against the state. *Id.* at 372–73. *Ultra vires* lawsuits also must "allege, and ultimately prove, that [such state officials] acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372. The court allowed the widow to pursue her claims for prospective relief against the state officials pursuant to the *ultra vires* exception but dismissed her claims for retrospective monetary relief and her claims against the city and other governmental entities. *Id.* at 369, 379–80.

**[26]** Here, **Stem** has filed suit against the City of **Hearne** and the mayor in his individual and official capacity for

trampling on Stem's rights guaranteed by Section 614.023. Under *Heinrich,* sovereign immunity insulates the city from the lawsuit. *Id.* at 379–80. The district court properly dismissed that claim. Stem's claim against the mayor in his official capacity does fall under the *ultra vires* exception, and is not initially barred. *Id.* at 372–73.

**[27]** Despite clearing the hurdle related to sovereign immunity, Stem's claim against the mayor in his official capacity was nonetheless properly dismissed. Section 614.023(c) expressly provides that a covered individual "may not be indefinitely ... terminated from employment based on the subject matter of the complaint unless ... the complaint is investigated[,] and ... there is evidence to prove the allegation of misconduct." Therefore, the proper defendants ***215** are the city officials who had the power to terminate Stem's employment, actually did terminate his employment, and now have the power to reinstate him.

Stem alleges in his complaint that the mayor recommended his dismissal and that the Hearne City Council acted on that recommendation. Yet, the only official capacity claim Stem brought was against the mayor. The complaint does not assert that the mayor has a statutory role in City Council meetings, claim the mayor actually cast a vote to dismiss Stem, or recount the final tally among those who did vote. Stem explains in his brief that "[t]he mayor called the meeting, set the agenda, and presided over the meeting where he and the Council voted to terminate" him. The Supreme Court has said that a court may draw reasonable inferences in determining "facial plausibility" for purposes of a Rule 12(b)(6) motion. *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Without more details, though, the only reasonable inference that can be drawn from the complaint is that the mayor simply recommended dismissal. Thus, Stem failed to state a claim against the mayor in his official capacity. The district court properly dismissed his claim.

**[28]** The district court also stated that "Chapter 614 is inapplicable to [Stem's] separation." As previously discussed, we do not find it necessary to determine the statute's applicability. Texas courts have not resolved important questions about Section 614.023, such as the kind of complaint and complainant that activate the procedural safeguards in the statute.[3] Section 614.023 applies to a broad array of law enforcement officers and others. *See* Tex. Gov't Code Ann. § 614.001(3). Therefore, any interpretation of Section 614.023 could have a far-reaching impact on governmental entities' internal operations and the way community members interact with their police, fire safety, and other peace-keeping personnel. We have held that Stem's claim for declaratory relief against the city and mayor in his official capacity fail for other reasons. Principles of federalism and comity must be considered as to every aspect of a suit, and "judicial economy, convenience, fairness, and comity" require us to avoid unnecessarily deciding novel and significant matters of state law. *See Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988). One clear benefit of pretermitting such issues is that before they again present themselves in federal court, a clear answer from Texas precedent may be available.

*IV. Motion for Leave to Amend*

**[29]** **[30]** Stem moved for leave to amend his complaint as to his state-law declaratory judgment claim. Leave to amend should be "freely give[n] ... when justice so requires." FED.R.CIV.P. 15(a)(2). A court must have a " 'substantial reason' to deny a party's request for leave to amend." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n,* 751 F.3d 368, 378 (5th Cir.2014) (quoting *Jones v. Robinson Prop. Grp., L.P.,* 427 F.3d 987, 994 (5th Cir.2005)). "[F]ailure to provide an adequate explanation to support ... denial of leave" may be grounds for reversal. *Marucci* ***216** *Sports,* 751 F.3d at 378 (quotation marks omitted). When an amended complaint would still "fail to survive a Rule 12(b)(6) motion," it is not an abuse of discretion to deny the motion. *Id.*

When requesting leave to amend, Stem specifically provided that his amended complaint would (1) plead that Section 614.023 has been adopted by the city, (2) plead that the city had followed the mandates of Section 614.023 in the past, (3) name each councilmember who voted to terminate his employment and/or the police chief as defendants, and (4) request prospective relief. The district court failed to address Stem's request in its opinion dismissing the lawsuit, judgment denying all outstanding motions, and opinion in response to Stem's motion for reconsideration.

The first and second proposed amendments, which might correct pleading deficiencies related to Stem's Section 1983 claim, would have been futile. We have held that Section 614.023 creates no property interest in

employment. Therefore, Stem cannot plead that he was deprived of a constitutional right. Denying an amendment to the Section 1983 claim was not error. Stem's third and fourth proposals, though, would have cured previously discussed deficiencies in Stem's complaint related to his state-law claim for declaratory relief. The amendment would not have been futile.

**[31]** We find that in this situation, the "failure to provide an adequate explanation to support" the denial of leave to amend is grounds for reversal. *Marucci,* 751 F.3d at 378. There may have been unarticulated but valid reasons, such as that the amendment would have merely corrected the pleading of a state-law claim after the dismissal of all federal claims. Courts are to consider "judicial economy, convenience, fairness, and comity," and specifically whether it "has dismissed all claims over which it has original jurisdiction," when deciding whether to exercise supplemental jurisdiction. *See Carnegie–Mellon,* 484 U.S. at 350, 108 S.Ct. 614; 28 U.S.C. § 1367(c). Because the decision is to be made at the discretion of the district court, we remand for an explanation of the discretion's exercise.

* * *

We REVERSE the district court's denial of Stem's motion for leave to amend his complaint, and REMAND. We REVERSE the district court's dismissal for lack of jurisdiction. We otherwise AFFIRM.

**All Citations**

813 F.3d 205, 41 IER Cases 103

Footnotes

1 The parties do not contest that Stem was a "peace officer" under Texas Government Code Chapter 614.

2 The Texas Legislature's House Research Organization and Senate Research Center prepare bill analyses to explain the "version of [a] bill as it was reported by [a] ... committee and first considered by" the corresponding body. Tex. H. Research Org., *Bill Analyses,* TEX. HOUSE OF REPRESENTATIVES, http://www.hro.house.state.tx.us/BillAnalysis.aspx (last visited Dec. 6, 2015); Tex. Senate Research Ctr., *Bill Analyses,* TEX. SENATE, http://www.senate.state.tx.us/SRC/BA.htm (last visited Dec. 6, 2015). Texas courts consider bill analyses as persuasive legislative history in determining legislative intent. *See Quick v. City of Austin,* 7 S.W.3d 109, 123 (Tex.1998).

3 *See Guthery v. Taylor,* 112 S.W.3d 715, 721–23 (Tex.App.–Houston [14th Dist.] 2003, no pet.) (holding that a complainant is any "person claiming to be the victim of misconduct by a[n] ... officer" by referencing Local Government Code Section 143.123); *Treadway v. Holder,* 309 S.W.3d 780, 784 (Tex.App.–Austin 2010, pet. denied) (holding 2–1 that a "complaint" includes internal complaints by an agency head); *City of Houston v. Wilburn,* 445 S.W.3d 361, 365 (Tex.App.–Houston [1st Dist.] 2013, no pet.) (avoiding the "question of whether Chapter 614 requires a signed complaint in all circumstances resulting in disciplinary action against employees under its purview").

510 S.W.3d 435
Supreme Court of Texas.

**COLORADO** COUNTY, Texas, R.H. "Curly" Wied, In his Official & Individual Capacity, Petitioner,
v.
Marc **STAFF**, Respondent

NO. 15–0912
|
Argued October 4, 2016
|
OPINION DELIVERED: February 3, 2017

**Synopsis**

**Background:** Terminated deputy sheriff brought action against sheriff and county, alleging that the county sheriff's department violated statutes by terminating his employment without obtaining and giving him a copy of signed complaint and without allowing him an opportunity to respond to the allegations before he was disciplined. The 25th District Court, **Colorado** County, entered summary judgment in favor of sheriff. Former deputy sheriff appealed. The Houston Court of Appeals, First District, Evelyn V. Keyes, J., 470 S.W.3d 251, reversed. Sheriff filed petition for review, which the Supreme Court granted.

**Holdings:** The Supreme Court, Guzman, J., held that:

[1] statutes, requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer, were applicable to sheriff's termination of deputy sheriff if termination was based on complaint of misconduct, even though deputy's employment was terminable at will;

[2] as matter of first impression, phrase "person making the complaint" under statute, requiring complaint against peace officer to be signed by person making the complaint, was not limited to the victim of the alleged misconduct, abrogating *Guthery v. Taylor*, 112 S.W.3d 715; and

[3] even if deputy sheriff's termination for cause was based on complaint, disciplinary process culminating in deputy sheriff's removal from his position for county sheriff's office complied with statutory procedural requirements for disciplining peace officers based on complaint.

Reversed.

West Headnotes (20)

**[1] Municipal Corporations**
Charges

**Public Employment**
Law enforcement personnel

Statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint provide covered employees with procedural safeguards to reduce the risk that adverse employment actions would be based on unsubstantiated complaints. Tex. Gov't Code Ann. §§ 614.022, 614.023.

1 Cases that cite this headnote

**[2] Appeal and Error**
Statutory or legislative law

Statutory construction issues pertaining to when and how a statute applies are questions of law that the Supreme Court reviews de novo under familiar statutory construction principles.

1 Cases that cite this headnote

**[3] Statutes**
Intent

**Statutes**
Language and intent, will, purpose, or policy

When construing a statute, the Supreme Court's primary objective is to give effect to the Legislature's intent; the Supreme Court seeks that intent first and foremost in the statutory text, and where text is clear, text is determinative of intent.

  

4 Cases that cite this headnote

**[4] Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

**Statutes**
Relation to plain, literal, or clear meaning;ambiguity

The plain meaning of the text of a statute is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.

5 Cases that cite this headnote

**[5] Constitutional Law**
Judicial rewriting or revision

**Statutes**
Purpose and intent;determination thereof

When interpreting the Legislature's words, the Supreme Court must never rewrite the statute under the guise of interpreting it, and it may not look beyond its language for assistance in determining legislative intent unless the statutory text is susceptible to more than one reasonable interpretation.

1 Cases that cite this headnote

**[6] Appeal and Error**
Cross-motions

**Appeal and Error**
Summary judgment

When both parties move for summary judgment and the trial court grants one motion and denies the other, the Supreme Court determines all issues presented and renders the judgment the trial court should have rendered.

4 Cases that cite this headnote

**[7] Public Employment**
Removal, separation, termination, and discharge

**Sheriffs and Constables**
Term and tenure of office

Statutes, requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint, were applicable to sheriff's termination of deputy sheriff if termination was based on complaint of misconduct, even though deputy's employment was terminable at will; statutes did not alter the at-will relationship, but prescribed procedures applicable when sheriff elected to terminate employment based on complaint of misconduct, rather than terminating at will. Tex. Gov't Code Ann. §§ 614.022, 614.023.

Cases that cite this headnote

**[8] Public Employment**
Authority to impose adverse action; manner and mode of imposition

**Sheriffs and Constables**
Term and tenure of office

The general rule is that a deputy sheriff serves at the sheriff's pleasure, which means the public official chosen by the voters to serve the public's interest holds the power and discretion to terminate the employment of subordinates and is accountable to no one other than the voters for his conduct. Tex. Loc. Gov't Code Ann. § 85.003(c).

Cases that cite this headnote

**[9] Public Employment**
Selection of officers

**Public Employment**
Authority to impose adverse action; manner and mode of imposition

**Sheriffs and Constables**
Term and tenure of office

Sheriffs hold virtually unbridled authority in hiring and firing their employees, and as a

  

general proposition, may terminate a deputy's employment for good cause, bad cause, or no cause at all. Tex. Loc. Gov't Code Ann. § 85.003(c).

Cases that cite this headnote

**[10] Public Employment**
Indefinite term;employment at-will

**Sheriffs and Constables**
Term and tenure of office

A deputy sheriff has precarious tenure and no entitlement to continued employment unless an exception to the at-will doctrine is recognized at law or the at-will employment relationship has been modified by express agreement or supplanted by a civil-service system. Tex. Loc. Gov't Code Ann. §§ 85.003(c), 85.003(f).

Cases that cite this headnote

**[11] Municipal Corporations**
Charges

**Public Employment**
Removal, separation, termination, and discharge

Statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint apply when an at-will employer terminates for cause that derives from allegations in a complaint of misconduct instead of terminating at will for no cause or terminating for other cause. Tex. Gov't Code Ann. §§ 614.022, 614.023.

Cases that cite this headnote

**[12] Municipal Corporations**
Charges

**Public Employment**
Removal, separation, termination, and discharge

Statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint do not abrogate the right to discharge an employee at will or require cause for termination; rather, the statutes set out a process for addressing discipline, including termination, when discipline is based on a "complaint" of misconduct. Tex. Gov't Code Ann. §§ 614.022, 614.023.

1 Cases that cite this headnote

**[13] Municipal Corporations**
Grounds for removal or suspension

**Municipal Corporations**
Charges

**Public Employment**
Removal, separation, termination, and discharge

If an employer terminates or indefinitely suspends a covered peace officer based on the subject matter of a complaint, rather than dismissing the officer at will, removal on the basis of a misconduct complaint requires compliance with statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer. Tex. Gov't Code Ann. §§ 614.022, 614.023.

1 Cases that cite this headnote

**[14] Municipal Corporations**
Charges

**Public Employment**
Suspension or other discipline

Statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint do not give an employee a right to continued employment, but the statutes do require compliance with the statutory process before an employee may be permanently encumbered by a damaging discharge record. Tex. Gov't Code Ann. §§ 614.022, 614.023.

  

Cases that cite this headnote

**[15]** **Municipal Corporations**
Grounds for removal or suspension

**Municipal Corporations**
Charges

**Public Employment**
Removal, separation, termination, and discharge

Statutes requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint do not preclude termination of employment absent compliance with the statutory process, but when allegations of misconduct are serious enough to warrant termination, independently or as a component of cumulative discipline, a complaint must be filed, investigated, and substantiated. Tex. Gov't Code Ann. §§ 614.022, 614.023.

Cases that cite this headnote

**[16]** **Municipal Corporations**
Charges

**Public Employment**
Suspension or other discipline

Phrase "person making the complaint" as used in statutes, requiring complaints against peace officers to be in writing, signed by the person making the complaint, and submitted to the officer in order for the officer to be disciplined based on the complaint, was not limited to the victim of the alleged misconduct; the word "complaint" meant expression of dissatisfaction, the term "person" referred to natural person, and special definition of "complainant" provided in statute governing investigation of misconduct complaints against fire fighters and police officers in municipalities could not be adopted to add victim of misconduct limitation to statutory phrase; abrogating *Guthery v. Taylor*, 112 S.W.3d 715. Tex. Gov't Code Ann. §§ 614.022, 614.023; Tex. Loc. Gov't Code Ann. § 143.123.

2 Cases that cite this headnote

**[17]** **Statutes**
Undefined terms

**Statutes**
Relation to plain, literal, or clear meaning;ambiguity

Where terms are not statutorily defined, the Supreme Court must give them their ordinary and common meaning unless the context suggests the Legislature intended a different or more technical meaning or unless such a construction leads to absurd results.

2 Cases that cite this headnote

**[18]** **Statutes**
Undefined terms

In determining the ordinary and common meaning of an undefined word in a statute, the Supreme Court may consider a variety of sources, including dictionary definitions, judicial constructions of the term, and other statutory definitions.

1 Cases that cite this headnote

**[19]** **Statutes**
Subject or purpose

Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby; this rule of statutory construction applies when statutory phrases are substantially the same. Tex. Gov't Code Ann. § 311.011(b).

1 Cases that cite this headnote

**[20]** **Public Employment**

  

Law enforcement personnel

**Sheriffs and Constables**

Term and tenure of office

Even if deputy sheriff's termination for cause was based on complaint of misconduct during traffic stop, disciplinary process culminating in deputy sheriff's removal from his position for county sheriff's office complied with statutory procedural requirements for disciplining peace officers based on complaint of misconduct, where supervisor signed deficiency notice detailing incidents of performance deficiencies, deputy sheriff received the deficiency notice within two days of initiation of internal investigation, he suffered no disciplinary action until complaint was in hand, and his immediate termination was equivalent to suspension during the investigation. Tex. Gov't Code Ann. §§ 614.022, 614.023.

Cases that cite this headnote

***438** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

**Attorneys and Law Firms**

Jason Eric Magee, **Colorado** County, Texas, Wied, R.H. Curly, Austin TX, for Petitioner.

Daniel A. Krieger, **Staff**, Marc, League City TX, for Respondent.

**Opinion**

Justice Guzman delivered the opinion of the Court.

Chapter 614, Subchapter B of the Texas Government Code provides covered peace officers certain procedural safeguards to help ensure adverse employment actions are not based on unsubstantiated complaints of misconduct. [1] Under Subchapter B, a covered peace officer cannot be disciplined based on a "complaint" unless the complaint is (1) in writing, (2) "signed by the person making the complaint," and (3) presented to the employee "within a reasonable time after the complaint is filed." [2] Moreover, ultimate disciplinary action (indefinite suspension or termination) may not be "based on the subject matter of [a] complaint" of misconduct absent an investigation and some supporting evidence. [3]

The statutory-construction issues raised in this employment-termination dispute concern the events necessary to trigger and satisfy Chapter 614, Subchapter B's procedural requirements. The issues presented include whether Subchapter B's disciplinary procedures apply to at-will employment relationships; whether those procedures apply to any complaint of misconduct or only citizen-generated complaints; and whether a complaint must be signed by the "victim" of the alleged misconduct ***439** and presented to the employee some time before discipline is imposed.

We hold that (1) Chapter 614, Subchapter B does not alter the at-will relationship, but prescribes procedures that apply when the employer elects to terminate employment based on a complaint of misconduct rather than terminating at will; (2) the statutory phrase "the person making the complaint" is not limited to the "victim" of the alleged misconduct; and (3) in this case, a signed disciplinary notice provided to the employee contemporaneously with suspension of employment was sufficient to meet Chapter 614, Subchapter B's notice requirements and allowed the officer ample opportunity to defend himself to the final decisionmaker. We therefore reverse the court of appeals' judgment and render judgment in the employer's favor.

## I. Background

After serving as a **Colorado** County Deputy Sheriff for nearly five years, Mark **Staff's** employment was terminated. Contemporaneously with **Staff's** dismissal, he received a "Performance Deficiency Notice (Termination)" signed by his supervisor, Lieutenant Troy Neisner (Deficiency Notice). Though the County is an at-will employer with "the right to terminate employment for any legal reason or no reason," the Deficiency Notice identified and provided details about three specific incidents in which **Staff's** interactions with the public were characterized as "rude," "unacceptable," "unprofessional," "grossly unprofessional," and contrary to departmental policy. Per the Deficiency Notice, these incidents did not constitute a "complete record" of **Staff's**

performance deficiencies or "an exhaustive list of the reasons for [his] termination," but were merely "recent [performance] deficiencies."

While other unspecified performance issues may have impacted the termination decision,[4] the Deficiency Notice identifies the impetus for Staff's dismissal as an internal investigation initiated after County Attorney Ken Sparks informed Sheriff R.H. "Curly" Wied that Staff's behavior during a recorded traffic incident was "inappropriate and needed to be addressed." Sparks suggested the Sheriff review a DVD of dash-cam footage of the event, which Staff had provided to support criminal charges he filed against the motorist. According to Sparks, assistant county attorneys had also viewed the recording and "felt [Staff's] conduct and/or behavior was inappropriate and concerning enough to bring it to his attention."

Sparks gave the DVD to Sheriff Wied, who immediately forwarded it to Lt. Neisner. Lt. Neisner and two other officers, Sergeant Girndt and Sergeant Edman, independently reviewed the video footage. As recounted in the Deficiency Notice, Staff's behavior toward the motorist was "demeaning" and involved "screaming," "taunting," and "apparent rage" that "escalated" the incident and "resulted in an arrest for an accident in which ... no damage to any vehicle" had occurred. Based on the video depiction of Staff's conduct, "it was determined without question that [Staff's] behavior was unacceptable and unprofessional" on the occasion in question.

As a result of that incident, Lt. Neisner and Sgt. Edman conducted "spot checks" of Staff's dash-cam videos to evaluate his ***440** performance and found his behavior to be unacceptable on at least one other occasion. The Deficiency Notice states that, during a traffic stop that occurred shortly before the inciting incident, Staff was "argumentative," "scream[ed]" at a "calm" and "compliant" motorist, repeatedly asked questions that had already been answered, and "continued to escalate the incident higher by threatening to take the subject to jail several times for not cooperating, although there was no evidence of her not cooperating on video." Lt. Neisner and Sgt. Edman deemed Staff's behavior "rude," "unacceptable," and "grossly unprofessional."

In addition to the foregoing events, which occurred in the weeks preceding Staff's termination, the Deficiency Notice recalled a nearly five-year-old incident involving similar behavior. About a month after Staff was hired, he reportedly displayed his badge during an off-duty traffic stop and "cussed, ranted, and raved" at a motorist for "speeding up and slowing down [,] preventing [him] from passing." The Deficiency Notice states that Staff was formally reprimanded for his conduct and admonished that further misconduct could result in termination of employment.

Lt. Neisner informed Staff that all three incidents violated section 22 of the Colorado County Sheriff's Office Policy Manual, *Conduct: Unbecoming an Employee*. Lt. Neisner therefore "recommended" immediate termination of Staff's employment and terminated Staff's employment "effective immediately." However, Lt. Neisner also advised Staff that he had 30 days to appeal the termination to Sheriff Wied for a "final" decision on the matter. The signed Deficiency Notice was provided to Staff at the time of termination, which was two days after Sparks had reported his concerns about Staff's conduct to Sheriff Wied.

Staff timely appealed the termination decision to Sheriff Wied, seeking reinstatement. In an exchange of initial letters, Sheriff Wied advised Staff to "articulate all of his responses to his termination and the reasons for his appeal" prior to the appeal deadline. Each incident had been identified in the Deficiency Notice with factual details and objective criteria such as case number or date and time, and the Sheriff's office had produced copies of the video recordings and other relevant documents at Staff's request. However, rather than contesting the substantive grounds for termination or attempting to contextualize his behavior, Staff's appeal to Sheriff Wied complained of procedural irregularities in the process leading to his discharge. Citing sections 614.022 and 614.023 of the Texas Government Code, Staff asserted he could not be disciplined absent a written complaint signed by "the person who was the subject of the alleged misconduct," that no such document had ever been provided to him, and as a result, he had no opportunity to respond to the complaint or explain his actions.

After Sheriff Wied summarily upheld the termination decision, Staff sued the sheriff and Colorado County (collectively, Sheriff Wied) for declaratory, injunctive,

  

and monetary relief. Staff alleged the Colorado County Sheriff's Department violated Government Code sections 614.022 and 614.023 by terminating his employment without obtaining and giving him a copy of a signed complaint and without allowing him an opportunity to respond to the allegations before he was disciplined.

In cross-motions for partial summary judgment, the material facts were not disputed. Nor was there any dispute that Staff was covered under Chapter 614, Subchapter *441 B.[5] However, in seeking summary judgment on liability, the parties relied on conflicting constructions of the relevant statutory provisions. The parties' summary-judgment positions diverged as to whether the circumstances attending Staff's termination triggered the statutory process and, if so, whether Sheriff Wied complied with the statutory requirements.

Staff's summary-judgment motion asserted Chapter 614, Subchapter B applied because his employment was terminated based on an investigation that originated with Sparks's complaint; Sparks did not sign a written complaint against Staff; Colorado County's investigation of Sparks's complaint was "ex parte" and did not afford Staff an opportunity to respond to the allegations; the Deficiency Notice Lt. Neisner signed did not satisfy the statutory requirement of a signed complaint because "the investigation into the complaint did not begin internally, but was generated as the result of an external communication with the Sheriff's Office"; and even if the Deficiency Notice would otherwise be sufficient, Staff had no opportunity to defend himself against the allegations because he did not receive the notice until discipline was imposed. The central theme of Staff's summary-judgment motion was that an internal report based on an external complaint alleging misconduct is insufficient to satisfy the statutory requirements.

Sheriff Wied's motion for partial summary judgment argued that Chapter 614, Subchapter B did not apply to Staff's termination because Staff's employment was terminable at will; termination "was not based on a specific complaint"; and the grounds for termination stated in the Deficiency Notice were not exhaustive. In the alternative, Sheriff Wied asserted the disciplinary process satisfied the statutory requirements as a matter of law because (1) the allegations of misconduct were investigated and supported by evidence; (2) the Deficiency Notice qualified as a signed complaint regarding those allegations; (3) the signed complaint was provided to Staff promptly after the internal investigation was initiated; and (4) Staff had an opportunity to respond to the allegations in the Deficiency Notice before Sheriff Wied—the head of the law-enforcement agency and final decisionmaker—acted on it.

The trial court granted Sheriff Wied's motion for partial summary judgment and denied Staff's motion. The trial court subsequently rendered final judgment dismissing Staff's claims and awarding Sheriff Wied $10,483.07 for reasonable and necessary attorney's fees and up to $30,000 in conditional appellate attorney's fees.

The court of appeals reversed, rendered judgment that Sheriff Wied violated Chapter 614, and remanded the case to the trial court for a decision on Staff's request for attorney's fees under Texas's Uniform Declaratory Judgment Act.[6] As an initial matter, the court held Colorado County's status as an at-will employer would not preclude application of sections 614.022 and 614.023, because the statute does not limit an employer's authority to *442 discharge an employee but merely prescribes procedures that apply only "when a complaint of misconduct forms the basis of the decision to terminate employment."[7] The court further held that Sheriff Wied did not comply with the statute because he terminated Staff's employment based on a "complaint" of misconduct without obtaining and providing a complaint signed by "the victim of the alleged misconduct."[8] The court concluded Sparks was the complaining party, because the misconduct allegations originated with him.[9] Accordingly, the internally generated Deficiency Notice Lt. Neisner signed did not constitute a "complaint" within the meaning of section 614.022, and no statutorily-compliant complaint was provided to him before he was terminated "effective immediately."[10]

We granted Sheriff Wied's petition for review to address statutory issues of first impression that have broad application to law-enforcement agencies, peace officers, and other public servants and their employers.[11]

## II. Discussion

The dispute in this case turns on the proper construction of Chapter 614, Subchapter B as applied to the

  

undisputed facts.[12] Subchapter B addresses termination of a covered peace officer's employment, and any other "disciplinary action," that is based on a "complaint" of misconduct.[13] The statute imposes certain procedures the head of a local law-enforcement agency must follow to "consider[ ]" a complaint or take disciplinary action, including terminating employment "based on the subject matter of the complaint."[14]

**[1]** Subchapter B, a statute of notable brevity, provides:

> **§ 614.022 Complaint to Be in Writing and Signed by Complainant**
>
> To be considered by the head of a ... local law enforcement agency, the complaint must be:
>
> (1) in writing; and
>
> (2) signed by the person making the complaint.[15]
>
> **§ 614.023 Copy of Complaint to Be Given to Officer or Employee**
>
> (a) A copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed.
>
> (b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee.
>
> ***443** (c) In addition to the requirement of Subsection (b), the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:
>
> (1) the complaint is investigated; and
>
> (2) there is evidence to prove the allegation of misconduct.[16]

These statutes provide "covered employees with procedural safeguards to reduce the risk that adverse employment actions would be based on unsubstantiated complaints."[17] In enacting these statutes, the Legislature "determined that the value of these protections outweighs the fiscal and administrative burdens incurred by complying with statutory requirements."[18]

Sheriff Wied argues that (1) Subchapter B does not apply to employment relationships that are terminable at will, and (2) to the extent it does apply, no process is triggered absent a citizen-generated complaint that provides the sole basis for disciplinary action. According to Sheriff Wied, County Attorney Ken Sparks did not file a "complaint" against **Staff**, but merely discussed evidentiary problems in a case referred for prosecution by the Sheriff's office. The communication, he says, "demonstrated the necessary and required coordination of the Texas judicial system between the prosecuting attorney ... and the law enforcement agency ... to effectively prosecute criminal violations." He asserts, moreover, that the problem Sparks identified was merely an example of **Staff's** deficiencies, and not the exclusive basis for disciplinary action. In short, there was no "complaint" that provided the basis for **Staff's** termination and, even if there were, **Staff** could be terminated at will notwithstanding a pending complaint. In the alternative, Sheriff Wied maintains the disciplinary process fully complied with the statutory requirements.

**Staff** counters that, under the statute's plain language, the statutory procedures are a predicate to discipline when an allegation of misconduct from any source—whether external to the law-enforcement agency or arising from within the agency—plays a part in the disciplinary action. Accordingly, the statutory process was triggered because Sparks's complaint about **Staff's** behavior was the catalyst for his dismissal. Relying on judicial constructions of the statute, **Staff** argues the Deficiency Notice cannot meet the signed-complaint requirement because it was not signed by "the victim of the alleged misconduct."[19] Per **Staff**, the only possible victims of his behavior are the affected citizens and perhaps the county attorney, whose criminal prosecution could have been frustrated by evidentiary problems arising from **Staff's** recorded encounter with the defendant.[20] **Staff** does not allow ***444** that his public interactions may have harmed the integrity of the sheriff's department or impaired the effective administration of justice by his colleagues,[21] but even if so, **Staff** says the Deficiency Notice did not satisfy Subchapter B's requirements because Lt. Neisner imposed discipline cotemporally with that document's presentment to him. Though **Staff** does not contend the

  

allegations were not investigated or supported by some evidence, he asserts the failure to provide a signed copy of a complaint before dismissal precluded his participation in the investigation and hampered his ability to defend himself.

**[2]** The parties' arguments present statutory construction issues pertaining to when and how the statute applies. These are questions of law that we review de novo under familiar statutory construction principles. [22]

### A. Applicable Standards of Review

**[3]** **[4]** **[5]** When construing a statute, our primary objective is to give effect to the Legislature's intent. [23] We seek that intent "first and foremost" in the statutory text, [24] and "[w]here text is clear, text is determinative" of intent. [25] "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." [26] When interpreting the Legislature's words, however, we must never "rewrite the statute under the guise of interpreting it," [27] and we may not look beyond its language for assistance in determining legislative intent unless the statutory text is susceptible to more than one reasonable interpretation. [28]

**[6]** The statutory-construction issues integral to the disposition of this appeal arise in the context of cross-motions for summary judgment based on undisputed material facts. When both parties move for summary judgment and the trial court grants one motion and denies the other, as in this case, we determine all issues presented and render the judgment the trial court should have rendered. [29]

### B. At–Will Employment

**[7]** We begin our analysis by considering Sheriff Wied's principal argument, that ***445** sections 614.022 and 614.023 are inapplicable because **Staff's** employment was terminable at will and there were other grounds for termination besides any specific "complaint" that might have triggered the statutory process. In other words, the existence of a "complaint" is immaterial if the sheriff could have discharged **Staff** for any other reason.

**[8]** **[9]** **[10]** Appointment of a deputy sheriff involves the public welfare and the expenditure of public funds. The general rule is that a deputy sheriff serves at the sheriff's pleasure, [30] which means the public official chosen by the voters to serve the public's interest holds the power and discretion to terminate the employment of subordinates and "is accountable to no one other than the voters for his conduct." [31] Sheriffs hold "virtually unbridled authority in hiring and firing their employees," [32] and as a general proposition, may terminate a deputy's employment for good cause, bad cause, or no cause at all. [33] Thus, a deputy sheriff has "precarious tenure" [34] and no entitlement to continued employment unless an exception to the at-will doctrine is recognized at law [35] or the at-will employment relationship has been modified by express agreement [36] or supplanted by a civil-service system. [37]

**[11]** In this case, the parties agree **Staff's** employment was terminable at will, but take contrary positions on Subchapter B's application in the at-will context. In Sheriff Wied's view, the statutory procedures apply only when a misconduct complaint is the sole basis for termination. **Staff** contends—and the court of appeals held—that the statute applies whenever the decision to terminate employment is ***446** based on a complaint of misconduct. [38] We agree with **Staff** and the court of appeals. Although Sheriff Wied could have discharged **Staff** for any reason or no reason, Chapter 614, Subchapter B nevertheless applies when an at-will employer terminates for cause that derives from allegations in a complaint of misconduct instead of terminating at will for no cause or terminating for other cause. [39]

**[12]** **[13]** Sections 614.022 and 614.023 do not abrogate the right to discharge an employee at will or require cause for termination. [40] Rather, the statute sets out a process for addressing discipline, including termination, when discipline is based on a "complaint" of misconduct. If an employer terminates or indefinitely suspends a covered employee based on the subject matter of a complaint—rather than dismissing the employee at will—removal *on*

  

*the basis of a misconduct complaint* requires compliance with the statutory procedure.

**[14]** The creation of procedural rights for cause-based dismissal does not limit the sheriff's ability to terminate at will. Nor does conditioning an employee's removal on compliance with specified procedures in specified circumstances equate to an entitlement to continued employment or a modification of the at-will employment relationship.[41] Rather, the statutory process helps ensure that cause-based removals of a specified nature bear a modicum of proof and that the affected employee has notice of the basis for removal. Simply stated, Chapter 614 does not give an employee a right to continued employment, but it does require compliance with the statutory process before an employee may be permanently encumbered by a damaging discharge record.

Removal based on an allegation of misconduct naturally carries more significant consequences than dismissal at will,[42] and ***447** the procedural safeguards provided in Chapter 614, Subchapter B advance two significant objectives: (1) ameliorating the risk that disciplinary action might be based on frivolous complaints and (2) helping to ensure an affected employee has sufficient notice of the charges to defend against the allegations.[43] Providing notice affords the employee an opportunity to address the matter but does not preclude the employer from terminating employment so long as the "complaint" has been investigated and "there is evidence to prove the allegation of misconduct."[44]

**[15]** In sum, Chapter 614, Subchapter B does not preclude termination of employment absent compliance with the statutory process, but when allegations of misconduct are serious enough to warrant termination —independently or as a component of cumulative discipline—a complaint must be filed, investigated, and substantiated.[45] The statute prescribes a procedure that applies when termination or indefinite suspension is "based on the subject matter of [a misconduct] complaint."[46] Though the statutory process may cause an administrative burden on law-enforcement agencies, the procedural protections offered by the statute outweigh the corresponding burden.[47]

The issue here is not whether Sheriff Wied could have discharged **Staff** at will rather than for sufficient cause; the issue is whether his termination for cause was based on a "complaint," within the meaning of the statute. If it was, the allegations in the complaint could not provide a basis for his discharge unless he was timely provided a copy of the "complaint" "signed by the person making the complaint."

### *448 C. Invoking and Fulfilling Chapter 614, Subchapter B's Requirements

**[16]** **[17]** The parties' arguments require us to consider, as a matter of first impression, the kind of "complaint" and "person making the complaint" that is necessary to both activate and satisfy the statute's procedural safeguards.[48] Subchapter B does not define or elaborate on the nature of a "complaint" or the type of "person" who may make and sign a complaint. Because these terms are not statutorily defined, we must give them their ordinary and common meaning unless the context suggests the Legislature intended a different or more technical meaning or unless such a construction leads to absurd results.[49]

**[18]** In determining the ordinary and common meaning of an undefined word in a statute, we may consider a variety of sources, including dictionary definitions, judicial constructions of the term, and other statutory definitions.[50] A review of dictionary definitions reveals that "complaint" refers to "the act or action of expressing protest, censure, or resentment: expression of injustice";[51] a "formal allegation or charge against a party made or presented to the appropriate court or officer";[52] "something that is the cause or subject of protest or grieved outcry";[53] "a statement that a situation is unsatisfactory or unacceptable";[54] and "a reason for ... [or] the expression of dissatisfaction."[55] Statutory definitions of the term generally accord with the foregoing.[56] As the authorities ***449** consistently confirm, the word "complaint" ordinarily means an expression of dissatisfaction, including an allegation made by one against another.[57]

When a "complaint" is made, however, the procedures in Chapter 614, Subchapter B come into play and limit

the law-enforcement agency's ability to take "disciplinary action" based on the complaint. Though the ordinary meaning of "complaint" encompasses allegations that may be formal or informal, written or unwritten, satisfaction of the statute requires complaints that are in writing and "signed by the person making the complaint." [58]

The term "person" generally refers to a natural person (i.e., any individual), [59] and under Subchapter B's plain language, more than one "person" could make a "complaint." Applying the ordinary meaning of the terms to the facts in this case, the county attorney could be a "person" who may make and sign a written "complaint" for purposes of triggering and satisfying the statute's procedural requirements, and Lt. Neisner could as well.

Courts construing the statute, however, have recognized distinctions that affect when the procedural requirements are invoked and limit who may discharge them. Some cases have held that Chapter 614, Subchapter B applies to "any allegation of misconduct that could result in disciplinary action," [60] but disagreement exists about whether the statute applies to misconduct allegations that originate from within the law-enforcement agency as opposed to ***450** those arising from external sources. [61] Others hold that internal disciplinary matters based on the agency head's personal knowledge do not constitute a "complaint" under section 614.022 and 614.023, and consequently, compliance with the statutory process is not required. [62] With regard to the signed-complaint requirement, judicial constructions of the statute have narrowed the ordinary meaning of "person making the complaint," such that only the "victim" of the alleged misconduct can fulfill that requirement. [63]

We need not consider in this case whether Chapter 614, Subchapter B is implicated by an internally generated complaint; whether or under what circumstances disciplinary action by an agency head or someone else in the chain of command invokes the statute; what constitutes "personal knowledge" that may be sufficient to remove disciplinary action from Chapter 614's ambit; or whether personal knowledge may be acquired technologically and, if so, how concerns about authenticity or completeness factor into the analysis. [64] ***451** Rather, we conclude that the dispositive issue under the facts presented is whether "the person making the complaint" must be "the victim of the alleged misconduct." Adhering to the precepts that "[e]nforcing the law as written is a court's safest refuge in matters of statutory construction" and that "we should always refrain from rewriting text that lawmakers chose," [65] we hold the statute's plain language does not support a construction that restricts the meaning of "the person making the complaint" to "the victim of the alleged misconduct."

### D. Collateral Linguistic Restraints on Plain Language

The "victim of misconduct" limitation is borrowed from a special definition of the term "complainant" provided in section 143.123 of the Texas Local Government Code, which is part of a civil-service statute enacted to "secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants." [66] Chapter 143's purpose is similar but not identical to Chapter 614, Subchapter B's purpose, because the latter does not guarantee "permanent employment tenure" for covered public servants and "free[dom] from political influence" may be advanced by Subchapter B but is not an express statutory objective.

Section 143.123, which governs investigation of misconduct complaints against fire fighters and police officers in municipalities meeting a threshold population requirement, defines "complainant" for purposes of that section as "a person claiming to be the victim of misconduct by a fire fighter or police officer." [67] The term "complainant" includes a person who is a peace officer. [68] The theory that the Legislature intended "a person making a complaint" under Chapter 614, Subchapter B to bear a similarly narrow meaning derives from a syllogism of sorts.

**[19]** That is:

- In common parlance, a "person making a complaint" is the same thing as a "complainant."
- Under a special definition in a statute of similar purpose (section 143.123 of the Local Government Code), the term ***452** "complainant" is restricted to an alleged "victim of misconduct."

  

- Therefore, the Legislature likely intended a "person making a complaint" in section 614.022 of the Government Code to refer only to "the victim of misconduct." [69]

This analysis relies on a principle of statutory construction that,

> Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. The rule applies when the phrases are substantially the same. [70]

Stated another way, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." [71]

A few practical considerations prevent us from drawing the same conclusion about the impact of the special definition of "complainant" in section 143.123, however. First, "complainant" is not a term the Legislature used in enacting sections 614.022 and 614.023 or the predecessor statute. [72] Although the term was added to section 614.022's caption during codification, [73] "the title of the section carries no weight, as a heading 'does not limit or expand the meaning of a statute.' " [74]

Second, while a "person making a complaint" and a "complainant" are similar terms, for purposes of determining whether statutory language shares a technical meaning, the relevant statutory comparators are "person making the complaint," as used in section 614.022, and "complaint by a complainant" in section 143.123. When stated thusly, the fallacy of the syllogism as a basis for discerning intent to cabin the plain meaning of section 614.022's language is more readily apparent.

We further observe that section 143.123 appears to contemplate investigation of complaints made by persons other than "complainants" and to use the special definition of that term to differentiate between processes that apply depending on the source of the information under investigation. Section 143.123 requires disclosure of "the name of each person who complained" concerning the matters under investigation; prohibits interrogation of a fire fighter or police officer "based on [an unverified] complaint by a complainant who is not a peace officer"; permits interrogation ***453** based on "events or conduct reported by a witness who is not a complainant without disclosing the name of the witness"; permits interrogation by anonymous complainants if "the departmental employee receiving the anonymous complaint" swears and certifies that the complaint was anonymous; and requires disclosure of "the name of each complaining party." [75] A "person making a complaint" within the meaning of Chapter 614.022 could reasonably encompass all of these categories of individuals.

Finally, we note that there is a distinct difference between consulting other statutory definitions to determine common meaning and engrafting a special definition from one statute to circumscribe the plain meaning of a term used in another. [76] While doing so may be appropriate when a word with an established meaning is employed in a subsequently enacted statute of similar purpose, that is not the case here; the special definition in section 143.123 was enacted more than fifteen years later, [77] making an inference of legislative intent to similarly constrain the meaning of the words in section 614.022 much less compelling. [78]

While it is clear that the main objective of sections 614.022 and 614.023 is to provide procedural safeguards for covered employees, it seems inconceivable that the Legislature intended to hamstring employers from investigating and disciplining errant employees charged with safekeeping the public trust. No reasonable construction of the statute can support reading it as requiring employers to turn a deaf ear and a blind eye to allegations of misconduct serious enough to warrant termination of employment unless "the victim of the misconduct" is both willing and able to sign a complaint. [79]

Thus, we are not persuaded that resorting to extra-textual sources informs the ***454** statutory analysis, and we do not agree that the special definition of "complainant"

in section 143.123(a)(1) can be adopted to restrict the plain meaning of the words the Legislature enacted in Chapter 614, Subchapter B. Doing so would add limitations neither found in nor supported by the text and is unnecessary to avoid an absurd consequence.

### E. Application

**[20]** Considering the plain meaning of the language in Chapter 614, Subchapter B, we conclude the disciplinary process culminating in **Staff's** removal from his position as a deputy sheriff for the **Colorado** County Sheriff's Office complied with both the letter and the spirit of the law.

The statute requires a signed complaint setting forth the allegations of misconduct.[80] That requirement was satisfied by the Deficiency Notice Lt. Neisner signed. While the statute does not set forth required contents for a "complaint" or establish particular standards for specificity, the information detailed in the Deficiency Notice serves the "overarching statutory purposes"[81] of (1) reducing the risk that adverse employment actions will be based on unsubstantiated complaints and (2) ensuring the affected employee receives sufficient information to enable him to defend against the allegations.[82]

The statute also requires that the signed complaint be presented to the employee within a reasonable time and precludes imposition of any discipline "unless a copy of the signed complaint is given to the officer or employee."[83] **Staff** received the signed Deficiency Notice within two days of the initiation of an internal investigation. He suffered no disciplinary action until the complaint was in hand. Unlike sections 614.023(a) and (c), there is neither an express nor implied temporal limitation on presentment of a complaint in relation to the imposition of discipline. Nothing in the statute requires the complaint to be served before discipline is imposed or precludes disciplinary action while an investigation is ongoing. Nor does the statute require an opportunity to be heard before disciplinary action may be taken. In some situations, presentment of a complaint contemporaneously with the imposition of discipline may not be "within a reasonable time after the complaint is filed," but that is not the case here.

The statute further requires that indefinite suspension or termination from employment based on a complaint's subject matter be deferred until an investigation uncovers some evidence to prove the allegations.[84] However, once again, there is no requirement that the affected employee be offered a pre-termination opportunity to be heard or participate in the investigative process. Moreover, despite the Deficiency Notice's statement that **Staff's** employment was terminated "effective immediately," his termination was actually conditioned on his right to appeal within a time certain. In substantive effect, "immediate termination" was equivalent to suspension during the investigation—which the statute does not prohibit. Thereafter, **Staff** had ***455** ample opportunity to marshal any evidence bearing on the matters identified in the Deficiency Notice and to defend himself before Sheriff Wied—the head of the law-enforcement agency—"considered" the complaint and upheld the termination decision.[85]

## III. Conclusion

Under Chapter 614, Subchapter B, a disciplinary action may follow a signed complaint, or information that has been reported may prompt an internal investigation that generates a report sufficient to satisfy the statutory requirements. In this case, **Staff** had sufficient information to allow him to investigate the allegations and ample opportunity to defend himself and bring forth additional facts or circumstances for Sheriff Wied's consideration. Accordingly, assuming Chapter 614, Subchapter B applies under the circumstances, we hold Sheriff Wied complied with the statute. We therefore reverse the court of appeals' judgment and render judgment in Sheriff Wied's favor.

### All Citations

510 S.W.3d 435, 2017 IER Cases 32,957, 60 Tex. Sup. Ct. J. 397

Footnotes

  

1 TEX. GOV'T CODE §§ 614.021–.023; *see, e.g.*, *Paske v. Fitzgerald*, 499 S.W.3d 465, 474 (Tex. App.–Houston [1st Dist.] 2016, no pet.); *City of Plainview Tex. v. Ferguson*, No. 07–14–00405–CV, 2016 WL 3522129, at *2 (Tex. App.–Amarillo 2016, pet. filed) (mem. op.); *Harris Cty. Sheriff's Civil Serv. Comm'n v. Guthrie*, 423 S.W.3d 523, 529–30 (Tex. App.–Houston [14th Dist.] 2014, pet. denied); *Lang v. Tex. Dep't of Pub. Safety*, No. 03–12–00497–CV, 2014 WL 3562738, at *9 (Tex. App.–Austin 2014, no pet.) (mem. op.).

2 TEX. GOV'T CODE §§ 614.022, .023(a)-(b).

3 *Id.* § 614.023(c).

4 Though not mentioned in the Deficiency Notice, an "Annual Performance Evaluation" made three years into **Staff's** tenure as a deputy sheriff states that, during the review period, **Staff** had been "counseled regarding dealing with citizens in an unprofessional manner" and had "commonly displayed problems making contacts with members of the public."

5 Chapter 614, Subchapter B applies to "a peace officer under Article 2.12, Code of Criminal Procedure, or other law who is appointed or employed by a political subdivision of this state," unless the political subdivision is subject to a meet-and-confer or collective-bargaining agreement that has been established under chapters 143 or 174 of the Local Government Code and that "includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer or fire fighter, as applicable." *Id.* § 614.021.

6 ***Staff*** *v. Wied,* 470 S.W.3d 251, 262 (Tex. App.–Houston [1st Dist.] 2015).

7 *Id.* at 258.

8 *Id.* at 261.

9 *Id.*

10 *Id.* at 261–62.

11 In addition to peace officers appointed or employed by a political subdivision, Chapter 614, Subchapter B, applies to law-enforcement officers for the State of Texas, certain state and local fire fighters, detention officers, and county jailers. TEX. GOV'T CODE § 614.021.

12 *See BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1, 7 (Tex. 2016) ("Traditional summary judgment is proper when the movant establishes that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (statutory construction presents a question of law reviewed de novo).

13 TEX. GOV'T CODE §§ 614.021–.023.

14 *Id.* §§ 614.022–.023.

15 *Id.* § 614.022.

16 *Id.* § 614.023.

17 *Turner v. Perry*, 278 S.W.3d 806, 823 (Tex. App.–Houston [14th Dist.] 2009, pet. denied).

18 *Id*.

19 *See Guthery v. Taylor*, 112 S.W.3d 715, 723 (Tex. App.–[14th Dist.] 2003, no pet.) (construing "person making the complaint" to mean "complainant" and applying a special definition of that term from a civil-service statute with a similar purpose); *see also* TEX. LOC. GOV'T CODE § 143.123(a)(1) (" 'Complainant' means a person claiming to be the victim of misconduct by a fire fighter or police officer.").

20 Considering that the county attorney had no better knowledge about the inciting incident than Lt. Neisner, **Staff's** distinctions split remarkably fine hairs. He invokes Chapter 614, Subchapter B's requirements on the basis of the county attorney's report about the video's contents, but in the same breath, argues Lt. Neisner could not have made a complaint based on equal access to the same information. *Cf. Fudge v. Haggar*, 621 S.W.2d 196, 198–99 (Tex. App.–Texarkana 1981, writ ref'd n.r.e.) (while information provided from an external source prompted an internal investigation, the investigating supervisor could satisfy the signed-complaint requirement based on an investigation that was conducted internally).

21 *Cf. City of DeSoto v. White*, 288 S.W.3d 389, 396 (Tex. 2009) (observing the "vital role" of police officers in our society and "the need for continued public trust in the exercise of their duties").

22 *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

23 *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015).

24 *Id.*

25 *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

26 *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011); *see Keystone RV Co. v. Tex. Dep't of Motor Vehicle*, 507 S.W.3d 829, 2016 WL 6677935, at *1 n.7 (Tex. App.–Austin 2016, no pet.) ("[C]ontext informs, among other considerations,

  

whether the Legislature intended words in their 'plain' or 'common' meaning, in a narrower or more technical connotation, or whether the facially 'plain' meaning would yield the rarity of 'absurd results' the Legislature could not possibly have intended.").

27 *In re Ford Motor Co.*, 442 S.W.3d 265, 284 (Tex. 2014).

28 *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012).

29 *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

30 TEX. LOC. GOV'T CODE § 85.003(c), (f); *see also Cty. of Dallas v. Wiland*, 216 S.W.3d 344, 347 (Tex. 2007).

31 *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) ("Because of the unique structure of county government in Texas, ... elected county officials, such as the sheriff and treasurer hold [ ] virtually absolute sway over the particular tasks or areas of responsibility entrusted to [them] by state statute and [are] accountable to no one other than the voters for [their] conduct therein."); *see also Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.–Austin 1997, writ denied) (recognizing the "policy that elected officers, such as sheriffs, discharge the public trust and carry the responsibility for the proper discharge of that trust, and therefore, should be free to select persons of their own choice to assist them" (citing *Renfro v. Shropshire*, 566 S.W.2d 688, 691 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.))).

32 *Irby v. Sullivan*, 737 F.2d 1418, 1421 (5th Cir. 1984).

33 *See, e.g.*, *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998); *Abbott*, 946 S.W.2d at 517.

34 *Murray v. Harris*, 112 S.W.2d 1091, 1094 (Tex. Civ. App.—Amarillo 1938, writ dism'd); *see also Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981) ("[D]eputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all.").

35 *See, e.g.*, *Battin v. Samaniego*, 23 S.W.3d 183, 188 (Tex. App.–El Paso 2000, pet. denied) (observing the Legislature can make exceptions to the at-will employment relationship and discharge may not violate the law); *Mott v. Montgomery Cty., Tex.*, 882 S.W.2d 635, 637–38 (Tex. App.–Beaumont 1994, writ denied) (termination of employment cannot contravene a statute or result from the employee's refusal to perform an illegal act).

36 *See Cty. of Dall. v. Wiland*, 216 S.W.3d 344, 348 (Tex. 2007).

37 *See* TEX. LOC. GOV'T CODE § 85.003(f) (deputies covered by a county civil-service statute adopted under Chapter 158 of the Local Government Code "may be suspended or removed only for a violation of a civil service rule adopted under that system").

38 470 S.W.3d 251, 258 (Tex. App.–Houston [1st Dist.] 2015).

39 *Paske v. Fitzgerald*, 499 S.W.3d 465, 475 (Tex. App.–Houston [1st Dist.] 2016, no pet.) (observing that not every termination of a law-enforcement officer necessarily has its genesis in a "complaint").

40 *See, e.g.*, *Stem v. Gomez*, 813 F.3d 205, 212–13 (5th Cir. 2016) ("Section 614.023 certainly does not explicitly provide that an officer facing a complaint can only be terminated for cause. Section 614.023 also does not resemble other statutes that clearly establish such a rule.").

41 *Cf. Renken v. Harris Cty.*, 808 S.W.2d 222, 225 (Tex. App.–Houston [14th Dist.] 1991, no writ); *Irby v. Sullivan*, 737 F.2d 1418, 1422 n.4 (5th Cir. 1984) (" '[M]erely conditioning an employee's removal on compliance with certain specified procedures' does not necessarily mean that an employee has a substantive property right in continued employment." (quoting *Bishop v. Wood*, 426 U.S. 341, 345, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976))). *But see Turner v. Perry*, 278 S.W.3d 806, 822 (Tex. App.–Houston [14th Dist.] 2009, pet. denied) (holding school district police officer had a constitutionally protected property interest in continued employment pursuant to Chapter 614, Subchapter B, which was expressly adopted in the school district's policy manual and had previously been applied to the officer).

42 In any employment context, being discharged for misconduct is manifestly more consequential than termination at will. But for peace officers, the ensuing repercussions may be even more serious. For example, when a licensed peace officer's employment is terminated, the law-enforcement agency must submit a report to the Texas Commission on Law Enforcement that includes a statement about whether the licensee was honorably discharged, generally discharged, or dishonorably discharged and, to the extent required by the Commission, provide an explanation of the circumstances under which the person was terminated. TEX. OCC. CODE § 1701.452(a), (b). A peace officer is not "honorably discharged" if the officer was terminated for insubordination or untruthfulness, due to allegations of criminal misconduct, a documented performance problem, or a disciplinary investigation. *Id.* § 1701.452(b). A law-enforcement agency cannot hire a licensed peace officer before "making a request to the commission for any employment termination report regarding the person" or "obtain[ing] from the commission any service ... records regarding the person maintained by the commission." *Id.* § 1701.451(a). Moreover, "[t]he commission shall suspend the license of an officer ... on notification that the officer has been dishonorably discharged if the officer has previously been dishonorably discharged from another law enforcement agency." *Id.* § 1701.4521(a).

43 *See Treadway v. Holder*, 309 S.W.3d 780, 784–85 (Tex. App.–Austin 2010, pet. denied) (failure to provide proper documentation of the complaints against an officer impairs the officer's ability to investigate or defend against the complaints).

44 *See* TEX. GOV'T CODE § 614.023.

45 The statute does not prescribe a quantum of proof for substantiating an allegation of misconduct. Though an initial draft of section 614.023(c)'s enacting legislation included language requiring "*sufficient* evidence to prove an allegation of misconduct," that language did not make the final cut. A bill analysis indicates that language was specifically amended to (1) limit investigation and proof to indefinite suspension or termination and (2) require " 'evidence' rather than 'sufficient evidence' as in the original bill, to prove any allegation of misconduct." *See* House Comm. on Urban Affairs, Bill Analysis, Tex. H.B. 639, 79th Leg., R.S. (2005) (responding to opponents' concerns that no threshold standard of proof was required and supporters' position that silence on the quantum of evidence "would leave the discretion to decide what is sufficient in the hands of state and local departments where it lies already[, so] state and local agencies would lose no authority by the requirement of a sufficient evidence standard"). We have emphasized that courts must take statutes as they find them and must presume the Legislature included words in them that it intended to include and omitted words it intended to omit. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

46 TEX. GOV'T CODE § 614.023(c).

47 *Turner*, 278 S.W.3d at 823.

48 *Stem v. Gomez*, 813 F.3d 205, 215 (5th Cir. 2016) ("Texas courts have not resolved important questions about [Chapter 614, Subchapter B].").

49 *See FKM P'ship, Ltd. v. Bd. of Regents of the Univ. of Hous. Sys.*, 255 S.W.3d 619, 633 (Tex. 2008) ("We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired, but otherwise, we construe the statute's words according to their plain and common meaning unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results.").

50 *See, e.g.*, *TGS–NOPEC Geophysical*, 340 S.W.3d at 441 (consulting dictionaries to ascertain the generally accepted definition of undefined statutory language).

51 WEBSTER'S THIRD NEW INT'L DICTIONARY (2002).

52 *Id.*

53 *Id.*

54 NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

55 *Id.*

56 *See, e.g.*, TEX. GOV'T CODE, Title 2, Subtitle G App. A–1 § 1.06(G) (" 'Complaint' means those written matters received by the Office of the Chief Disciplinary Counsel that, either on the face thereof or upon screening or preliminary investigation, allege Professional Misconduct or attorney Disability, or both, cognizable under these rules or the Texas Disciplinary Rules of Professional Conduct."); TEX. HEALTH & SAFETY CODE § 555.001 (" 'Complaint' means information received by the office of independent ombudsman regarding a possible violation of a right of a resident or client and includes information received regarding a failure ... to comply with [relevant] polices and procedures ...."); TEX. INS. CODE §§ 542.005(a) (defining "complaint" as "any written communication primarily expressing a grievance"), 751.003(a)(1) ( " 'Complaint' means a written or documented oral communication, the primary intent of which is to express a grievance or an expression of dissatisfaction."), 843.002(6) (defining "complaint" as "any dissatisfaction expressed orally or in writing by a complainant to a health maintenance organization regarding any aspect of the health maintenance organization's operation"); *cf. also* TEX. GOV'T CODE, Title 2, Subtitle G App. A–1 § 1.06(R) (" 'Grievance' means a written statement, from whatever source, apparently intended to allege [attorney misconduct or disability] received by the Office of the Chief Disciplinary Counsel.").

57 *Paske v. Fitzgerald*, 499 S.W.3d 465, 474 (Tex. App.–Houston [1st Dist.] 2016, no pet.).

58 The analysis in one case suggests that failure to obtain a signed complaint from the victim of misconduct might *preclude the statute's application* altogether. *See Gehring v. Harris Cty. Tex.*, Civ. A. H–15–0726, 2016 WL 269620, at *11 (S.D. Tex. Jan. 21, 2016) ("Gehring does not assert that any of the alleged victims in the three incidents signed a written complaint against him that was the basis of the disciplinary measures taken against [him], but which was not provided to him before those measures were taken. Thus Gehring has failed to state a plausible claim under the Texas Government Code."). Although the analysis in the opinion is not entirely clear, reading the statute in such a manner would conflate application of the statute with satisfaction of its requirements and would allow employers to skirt the statutory requirements simply by choosing not to comply with the statute. This is not a reasonable construction of the statute.

  

59 NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) ("person" means "a human being regarded as an individual"); WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("person" is "an individual human being," "a human being as distinguished from an animal or thing"). Depending on the context, however, the term may also include an artificial person, such as a government agency, partnership, association, corporation, trust, or other legal entity. *See, e.g.*, TEX. GOV'T CODE § 311.005 (unless a statute or context employing the word or phrase requires a different definition, "person," when used in a statute, "includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity"); TEX. INS. CODE § 843.002(21) (defining "person" as "any natural or artificial person, including an individual, partnership, association, corporation, organization, trust, [and other legal entities]"). While including artificial persons seems unlikely in this context, the issue is immaterial to the appeal's disposition.

60 *Bracey v. City of Killeen*, 417 S.W.3d 94, 99 (Tex. App.–Austin 2013, no pet.); *Treadway v. Holder*, 309 S.W.3d 780, 782–86 (Tex. App.–Austin 2010, pet. denied); *id*. at 786–89 & n.1 (WALDROP, J., dissenting) (agreeing with the majority that the statute makes no distinction between "external" complaints and "internal" complaints, but arguing the term "complaint" does not include allegations of misconduct originating within the officer's own "chain of command," which are properly characterized as disciplinary matters that do not require protection under Chapter 614, Subchapter B).

61 *Compare Paske*, 499 S.W.3d at 475 ("[A] 'complaint' may originate from either outside a law enforcement agency or from within it" but not all dismissals "necessarily have [their] genesis in a 'complaint' "), *Treadway*, 309 S.W.3d at 784 ("[A]ny 'allegation of misconduct' for which disciplinary action may be imposed represents a complaint, regardless of the source."), and Tex. Att'y Gen. Op. No. GA–0251 (2004) ("The authority of a head of police department to discipline is not limited to complaints filed by a citizen ...; [a]s circumstances warrant, a superintendent of the school district or others may initiate disciplinary action by filing a signed complaint, or complaints may prompt an internal investigation and report by the police department sufficient to satisfy the [statutory] requirements."), *with Gehring*, 2016 WL 269620, at *11 (holding that an officer failed to state a plausible claim under Chapter 614, Subchapter B, because the statute applies only when "a written signed complaint has been made by a victim, not a law enforcement agency's internal observation") *and Jackley v. City of Live Oak*, No. SA–08–CA–0211–OG, 2008 WL 5352944, at *5 (W.D. Tex Dec. 19, 2008) ("Because the letter put [the terminated police officer] on notice of an internal investigation, rather than an investigation of a complaint by a citizen, it was appropriately signed by [the City Manager]" as "there is nothing in the statute to indicate that sections 614.022–[.]023 apply to anything other than citizen-generated complaints"); *cf. Baldridge v. Brauner*, No. 01–10–00852–CV, 2013 WL 4680219, at *5 (Tex. App.–Houston [1st Dist.] 2013, pet. denied) (declining to consider whether section 614.023 applies to internal performance issues because the employer complied with the statute in any event; multiple potential grounds for termination were given and statutory requirements were satisfied with regard to at least one of the stated grounds).

62 *See Paske*, 499 S.W.3d at 475; *Treadway*, 309 S.W.3d at 786–89 & n.1 (Tex. App.–Austin 2010, pet. denied) (WALDROP, J., dissenting) (agreeing with the majority that the statute makes no distinction between "external" complaints and "internal" complaints, but arguing the term "complaint" does not include those generated within the officer's own "chain of command"); *accord Rogers v. City of Yoakum*, 660 Fed.Appx. 279, 285 (5th Cir. Aug. 30, 2016) (Chapter 614, Subchapter B was not implicated when the city manager fired the police chief for mishandling an investigation into allegations of misconduct about a subordinate officer; the termination decision was based on the city manager's "*own* observations of [the chief's] behavior and his responses to issues within the department" (citing *Paske*, 499 S.W.3d at 475)). *But see Treadway*, 309 S.W.3d at 783–85 (applying Chapter 614, Subchapter B to complaint that originated within the chain of command).

63 *See, e.g.*, *Guthery v. Taylor*, 112 S.W.3d 715, 723 (Tex. App.–Houston [14th Dist.] 2003, no pet.).

64 In this case, the video recordings, which conferred some degree of "personal knowledge" to those who viewed them, were obtained directly from **Staff's** vehicle. Accordingly, concerns about authenticity might not be as significant as those that could arise from viral videos, for example, or recordings provided by a third party. But even if authenticity is not a concern, image capture might not tell the whole story. Here, for example, the Deficiency Notice observes that, in one of **Staff's** traffic-stop encounters, "there was no evidence of her not cooperating *on the video*." (Emphasis added.) A picture may be worth a thousand words, but not every narrative is a short story. Even when there is relatively "objective" evidence available, complying with Chapter 614, Subchapter B's requirements would allow an affected employee to respond with evidence that could provide critical context.

65 *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).

66 TEX. LOC. GOV'T CODE § 143.001; *see Guthery*, 112 S.W.3d at 722–23 (deriving "victim of misconduct" limitation by reference to section 143.001).

  

67 TEX. LOC. GOV'T CODE § 143.123(a)(1); *see also id.* § 143.101 (except as otherwise provided, Chapter 143, Subchapter G applies only to a municipality with a population of 1.5 million or more); *id.* §§ 143.301, .312(b)(1) (defining "complainant" similarly in a civil-service statute applicable to certain municipalities with a population of 460,000 or more or which operate under a city-manager form of government).

68 *See id.* § 143.123(e) ("complainant" may not be assigned to investigate a complaint), (f) (a fire fighter or police officer may not be interrogated based on "a complaint by a complainant who is not a peace officer unless the complainant verifies the complaint"); *see also id.* § 143.312(f), (g) (same).

69 *See generally Guthery*, 112 S.W.3d at 721–22.

70 *Brown v. Darden*, 121 Tex. 495, 50 S.W.2d 261, 263 (Tex. 1932) (internal citation and punctuation omitted); *see also L&M–Surco Mfg., Inc. v. Winn Tile Co.*, 580 S.W.2d 920, 926 (Tex. Civ. App.—Tyler 1979, writ dism'd) (observing the principle "applies with particular force where the meaning of a word as used in one act is clear or has been judicially determined, and the same word is subsequently used in another act pertaining to the same subject").

71 TEX. GOV'T CODE § 311.011(b).

72 *See* Act of May 16, 1969, 61st Leg., R.S., ch. 407, § 1, 1969 Tex. Gen. Laws 1333, 1333–34, *amended and codified by* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, secs. 614.022–.023, 1993 Tex. Gen. Laws 583, 679 (amended 2005) (current version at TEX. GOV'T CODE §§ 614.022–.023).

73 *See* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, sec. 614.022, 1993 Tex. Gen. Laws 583, 679 (amended 2005) (current version at TEX. GOV'T CODE § 614.022).

74 *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 809 (Tex. 2010) (quoting TEX. GOV'T CODE § 311.024).

75 TEX. LOC. GOV'T CODE § 143.123(e), (f).

76 In point of fact, when the Legislature specially defines the term "complainant," the special definition usually accords with the common meaning of the term and is not restricted to an alleged "victim." *Compare* TEX. GOV'T CODE, Title 2, Subtitle G App. A–1 § 1.06(F) (defined as "the person, firm, corporation or other entity, including the Chief Disciplinary Counsel initiating a Complaint or Inquiry"); TEX. GOV'T CODE §§ 437.401 (meaning "an individual who brings an action or proceeding under this subchapter"), 571.002 (meaning "an individual who files a sworn complaint with the commission"); TEX. INS. CODE §§ 843.002(5) (meaning "an enrollee, or a physician, provider, or other person designated to act on behalf of an enrollee, who files a complaint"), 1305.004 (meaning "a person who files a complaint under this chapter," including an employee, employer, health-care provider, or another person designated to act on behalf of an employee); TEX. LABOR CODE § 21.002(4) (meaning "an individual who brings an action or proceeding under this chapter"); *and* TEX. PROP. CODE § 301.003(2), (12) (meaning "a person, including the commission, that files a complaint under Section 301.081," and "person" defined to include an individual and various artificial beings), *with* TEX. GOV'T CODE § 552.3215(a)(1) (meaning "a person who claims to be the victim of a violation of this chapter") *and* TEX. LOC. GOV'T CODE §§ 143.123(a)(1), .312(b)(1) (meaning "a person claiming to be the victim of misconduct by a fire fighter or police officer").

77 Act of May 27, 1985, 69th Leg., R.S., ch. 958, § 19, sec. 30, 1985 Tex. Gen. Laws 3227, 3240 (amended 1987) (amended 1989) (current version at TEX. LOC. GOV'T CODE § 143.123(a)(1)).

78 *But see Guthery v. Taylor*, 112 S.W.3d 715, 722 n.7 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (applying section 143.123's definition of "complainant"—despite its status as a subsequently enacted statute—based on "the relationship between the two statutes").

79 The absurdity is manifest in a scenario involving an allegation of excessive force where the victim is incapacitated, but a witness to the event steps forward to make a complaint.

80 TEX. GOV'T CODE §§ 614.022, .023(a).

81 *Lang v. Tex. Dep't of Pub. Safety*, No. 03–12–00497–CV, 2014 WL 3562738, at *9 (Tex. App.–Austin July 18, 2014, no pet.) (mem. op.).

82 *See Turner v. Perry*, 278 S.W.3d 806, 823–24 (Tex. App.–Houston [14th Dist.] 2009, pet. denied) (vague or anonymous complaints lacking names, dates, and other details prevented the officer from investigating the allegations and defending against them).

83 TEX. GOV'T CODE § 614.023(a), (b).

84 *Id.* § 614.023(c).

85 *Id.* § 614.022.

**End of Document**

2018 WL 2027748
Only the Westlaw citation is currently available.
United States District Court,
W.D. Texas, Austin Division.

Breaion KING Plaintiff,
v.
The CITY OF AUSTIN, TEXAS, and
Officer Bryan Richter, Defendants.

Cause No.: A–16–CA–1020–SS
|
Signed 05/01/2018

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**ORDER**

SAM SPARKS, SENIOR UNITED STATES DISTRICT JUDGE

***1** BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant Bryan Richter (Officer Richter)'s Motion to Exclude the Expert Testimony of Kevin Cokley [#36] and Plaintiff Breaion King's Response [#41] in opposition; Officer Richter's Motion for Summary Judgment and Supplement [#37, #38] and Plaintiff's Response and Supplement [#41, #45] in opposition; and the City of Austin (the City)'s Motion for Summary Judgment [#39], Plaintiff's Response [#44] in opposition, and the City's Reply [#46] thereto. Having reviewed the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

**Background**

As stated in a prior order, this case arises out of Plaintiff's allegations she was subjected to excessive use of force and racial discrimination by Officer Richter of the Austin Police Department (APD) in the course of a routine traffic stop. Plaintiff claims Officer Richter and the City are liable to her under 42 U.S.C. § 1983 for violating her constitutional rights and under 42 U.S.C. § 1981 for violating her federal rights. Am. Comp. [#12] at 10.

The facts recounted here are drawn from the summary judgment record, which includes video recordings of the traffic stop at issue and Officer Richter's prior uses of force. On summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party, but the Court "assign[s] greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011).

**I. Officer Richter's History**

After completing APD's training academy, Officer Richter became a full-time APD officer on April 22, 2010. City's Mot. Summ. J. [#39–2] Ex. B (Manley Aff.) ¶ 12. As of December 2013, Officer Richter's supervisors perceived Officer Richter had a higher than normal rate of using force, receiving complaints, and conducting pursuits. Resp. City's Mot. Summ. J. [#44–6] Ex. F (Richter's Internal Affairs File) at 13–14. In response, one supervisor conducted an analysis of Officer Richter's use of force but concluded Officer Richter's rate of using force was in line with that of five of his peer officers who worked in the same area. *Id.* The same supervisor noted he had counseled Officer Richter several times on his tactical decision-making to avoid getting into hands-on situations. *Id.*

To support her claims against the City, Plaintiff points to three incidents where Officer Richter used force that occurred prior to the traffic stop underlying this case. A brief overview of these incidents as captured on video provides context for this opinion. [1]

In the most recent incident, on June 30, 2013, Officer Richter pulled over a male motorist and a female passenger for failing to turn on their headlights. *See*

Resp. City's Mot. Summ. J. [#44–10] Ex. J (June 30, 2013 Incident Video) at 1:30–18:25. Officer Richter asked the motorist to step out of the vehicle, frisked him, and then asked the motorist questions regarding his alcohol consumption. *Id.* Officer Richter then asked the motorist to perform a field sobriety test. *Id.* During the sobriety test, the motorist requested a lawyer and refused to continue. *Id.* The motorist began shouting at Officer Richter, and Officer Richter reached for him. *Id.* The motorist withdrew his arm from Officer Richter's grasp and Officer Richter responded by wrapping his arm around the motorist's neck and flipping both the motorist and himself to the ground. *Id.* Another officer ran out from a patrol vehicle to assist and the female passenger also exited her vehicle, videotaping the struggle with her cell phone. *Id.* Officer Richter commanded her to return to the vehicle, and while she was doing so, Officer Richter ran after her. *Id.* Officer Richter grabbed the female passenger by her arms, swept her legs out from under her, and dropped her to the pavement. [2] *Id.* The APD supervisor who reviewed the incident concluded Officer Richter's use of force was "within APD policy[;] there is a training opportunity that may be addressed, but the response can be termed objectively reasonable!" Resp. City's Mot. Summ. J. [#44–13] Ex. M (Prior Incident Reports) at 2.

***2** A little less than a year earlier, on August 19, 2012, Officer Richter responded to a call regarding individuals who had been fighting via his patrol vehicle. Resp. City's Mot. Summ. J. [#44–11] Ex. K (August 19, 2012 Incident Video) at 8:40–9:30. Once he arrived in the area, Officer Richter exited his vehicle and approached four individuals who were walking down the sidewalk. Officer Richter began handcuffing one of the individuals while a fellow officer arrested another. *Id.* Officer Richter then grabbed the individual he was arresting and threw him to the ground. *Id.* The video shows no indication the individual was resisting arrest. *Id.* An APD supervisor reviewed the incident and concluded Officer Richter's use of force was "objectively reasonable and within policy." Prior Incident Reports at 6.

Officer Richter was involved in another use of force incident on November 19, 2011. Resp. City's Mot. Summ. J. [#44–12] Ex. L (November 19, 2011 Incident) at 3:15–6:10. There, Officer Richter arrived on scene to support a fellow officer who had pulled over a motorist. *Id.* Without saying anything, the other officer and Officer Richter approached the vehicle, opened the vehicle's door, and grabbed the motorist. *Id.* Officer Richter told the motorist if he did not get out of the vehicle immediately, he would be tazed. *Id.* A third officer joined and the three officers pulled the motorist out of his vehicle and onto the ground. *Id.* Officer Richter tazed the motorist at least twice for failing to comply with orders to put his hands behind his back. *Id.* During both tazings, the motorist lay on the ground. *Id.* The APD supervisor who "read the report and supplement ... found the force used to be objectively reasonable and within policy[.]" Prior Incident Reports at 7.

Officer Richter did not receive any supplementary training or discipline concerning his use of force before the traffic stop underlying this case. Resp. City's Mot. Summ. J. [#44–3] Ex. C (Richter Dep.) at 54:13–57:19.

**II. The Traffic Stop**

Plaintiff is a black woman who weighs approximately 120 pounds and is about five feet, five inches tall. On June 15, 2015, between 12:30 and 1:30 p.m., Plaintiff was driving north on I–35. It is undisputed Plaintiff was exceeding the speed limit by approximately fifteen miles per hour. Richter's Mot. Summ. J. [#37–5] Ex. D (King Dep.) at 16:22–24. Plaintiff observed Officer Richter's patrol car approach with his overhead lights engaged. *See id.* at 16:25–17:22. Plaintiff claims she initially assumed Officer Richter was pursuing another vehicle, but pulled into a Wendy's parking lot when she realized he was pursuing her vehicle. *Id.* Plaintiff parked and exited her vehicle at least in part in an effort to get out of the ticket. *Id.*

As Plaintiff was walking toward the restaurant, Officer Richter's patrol car pulled into the parking lot. Richter's Mot. Summ. J. [#37–2] Ex. A (Richter Dash Camera Video) at 1:21–24. Officer Richter excited his patrol car and directed Plaintiff three times to return to her vehicle. *Id.* at 1:30–40. Plaintiff eventually did so, returning to a seated position in her car with the driver's door open and her legs outside the car. *Id.* at 1:40–50. Officer Plaintiff then asked Plaintiff for her driver's license. *Id.* at 1:49–51. Plaintiff asked, "But I'm already stopped so technically can you stop me?" *Id.* at 1:59–2:04. In response, Officer Richter stated "Ma'am, you were about to go inside without a wallet, so I know you're only coming here because you know I was coming to pull you over." *Id.* at 2:05–09. Officer Richter continued, "I can absolutely stop you if you're already parked .... Take a seat back in your car please and close the door." *Id.* at 2:10–17. Officer

Richter requested Plaintiff "put [her] feet back in the car so [he] could close the door." *Id.* at 2:18–20. Plaintiff asked Officer Richter, "Can you please hurry up?" *Id.* at 2:20–22.

***3** What happened next is unclear from Officer Richter's dash cam video. *Id.* at 2:22–33. The video shows Officer Richter reached into the Plaintiff's vehicle. *Id.* Audio from the video includes Plaintiff screaming "don't touch me" and "oh my God." *Id.* Officer Richter simultaneously shouted at Plaintiff to "stop resisting." *Id.* Officer Richter ordered Plaintiff to get out of the car and Plaintiff said "I'm getting out. Let me get out. Do not touch me." *Id.* at 2:33–38. Officer Richter again ordered Plaintiff to "get out of the car now" and the video shows Officer Richter hauled Plaintiff from her vehicle. *Id.* at 2:38–40. He swung Plaintiff's body around in the air so her legs collided with a truck two parking spaces over and subsequently slammed her to the ground. *Id.* at 2:40–2:44. Plaintiff landed facing the ground with one arm pinned underneath her body and the other arm in Officer Richter's grip. *Id.*

Officer Richter then got on top of Plaintiff, pressing his elbow into her neck, and ordered her to put her hands behind her back. *Id.* at 2:44–2:48. The video shows the two individuals locked in a struggle. *Id.* at 2:48–3:00. Plaintiff claims she attempted to comply with Officer Richter's commands while still protecting herself from being smashed into the pavement. Resp. Richter's Mot. Summ. J. [#43] at 4. Officer Richter claims Plaintiff was resisting being handcuffed. Richter's Mot. Summ. J. [#37] at 3–4. At one point in the video, both Plaintiff and Officer Richter stood up and Officer Richter had Plaintiff's arms secured behind her back. Richter Dash Camera Video at 3:00–04. Officer Richter then attempted an unsuccessful leg sweep in an effort to drop Plaintiff back to the ground. *Id.* Next, he lifted Plaintiff up and slammed her back on to the ground, but Plaintiff was able to break her fall with one leg to some degree. *Id.* at 3:04–09. Plaintiff claims Officer Richter put her in a chokehold, but Officer Richter claims no chokehold was used. The two struggled until Officer Richter forced Plaintiff to lie flat on the ground and fastened handcuffs around Plaintiff's wrists. *Id.* at 3:09–48.

Once Plaintiff was securely handcuffed, Officer Richter lifted Plaintiff from the ground by her handcuffed arms. *Id.* at 3:48–52. With Plaintiff's arms stretched backwards behind her head, Officer Richter steered Plaintiff to his patrol car and into the backseat. *Id.* at 3:52–4:20. Less than one minute passed between Officer Richter's first words to Plaintiff and Officer Richter's initial use of force. *Id.* at 1:30–2:22.

As Officer Richter propelled Plaintiff to his patrol car, other APD officers arrived. Officer Richter told his fellow officers Plaintiff attempted to throw a "haymaker" at him and she had said "no" when he asked her to put her legs in her vehicle. *Id.* Resp. Richter's Mot. Summ. J. [#43] Ex. I. (Breckenridge Dash Camera Video) at 1:55–2:09; 9:47–56.

**II. Subsequent Events**

Plaintiff was placed in Officer Spradlin's patrol car for transport to the police station. During the ride, Plaintiff and Officer Spradlin had the following conversation, which was recorded on video:

> **Officer Spradlin:** Well let me ask you this. Why are so many people afraid of black people?
>
> **Plaintiff:** That's what I wanna figure out! Because I'm not a bad black person.
>
> **Officer Spradlin:** I can give you a really good ... a really good idea of why it might be that way.
>
> **Plaintiff:** Why?
>
> **Officer Spradlin:** Violent tendencies. And I want you to ... I want you to think about that. I'm not saying anything... I'm not saying it's true. I'm not saying I can prove it or nothing. But 99% of the time when you hear about stuff like that, it's the black community that's being violent. That's why a lot of the white people are afraid, and I don't blame them. There are some guys I look at ... I, yeah ... I know it's my job to deal with them and I know it's probably going to go ugly... But that's the way it goes. But yeah, some of them, because of their appearance or whatnot, some of them are very intimidating.

***4** Resp. Richter's Mot. Summ. J. [#43–8] Ex. H (Spradlin Seat Camera Video) at 49:16–50:11.

Plaintiff was charged with resisting arrest, but the charge was later dismissed. Resp. Richter's Mot. Summ. J. [#43] at 6. Plaintiff was issued a speeding ticket, which she paid. King Dep. at 17:8–10.

  

Officer Richter's supervising sergeant, lieutenant, and commander reviewed his use of force on Plaintiff and determined he did not violate APD's policy on use of force. City's Mot. Summ. J. [#39–2] Ex. B (Manley Aff.) ¶ 22. Officer Richter was not disciplined but he was issued a "Conduct Counseling Memo," which addressed needed corrective measures including an impartial attitude and courtesy. *Id.*

On July 19, 2016, when then Chief of Police Acevedo learned of the incident between Plaintiff and Officer Richter, an APD Internal Affairs Division investigation was opened. *Id.* ¶ 23. Five months later, on December 6, 2016, the investigation concluded. *Id.* Based on the investigations findings, Chief Acevedo concluded Officer Richter violated APD policy concerning use of force. *Id.* However, Chief Acevedo found a written reprimand was the maximum penalty he could impose because Texas law prohibits a department head from suspending an officer later than the 180th day after the department learns of the alleged violation (180–Day Rule). *Id.*; TEX. LOCAL GOV'T CODE § 143.117. Chief Acevedo therefore issued Officer Richter a written reprimand. *Id.*

In commenting on Officer Richter's use of force to APD commanders, Chief Acevedo stated if Plaintiff had been "a pretty white girl in her Sunday best dress ... I don't think Richter would have responded that way." Resp. City's Mot. Summ. J. [#44–4] Ex. D–1 (Acevedo Radio Interview) at 10.

**III. Procedural History**

This case was filed on August 30, 2016. The Court granted the City's initial motion to dismiss Plaintiff's complaint for failure to plead sufficient factual allegations to state a claim for relief but granted Plaintiff leave to file an amended complaint. Plaintiff did so, and the Court found Plaintiff's amended complaint adequate to allow a reasonable inference of liability and allowed the case to proceed.

Following a period of discovery, Officer Richter now moves to exclude the testimony of Kevin Cokley, a purported expert in psychology and African American studies. Additionally, Officer Richter and the City independently move for summary judgment. These motions are ripe for decision.

**Analysis**

**I. Motion to Exclude Expert Testimony**

Officer Richter moved to exclude the testimony of Kevin Cokley under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Mot. Exclude [#36]. However, this Court finds it difficult to decide *Daubert* objections to expert witnesses outside of the trial context. For this reason, it is the Court's practice to consider *Daubert* objections to a witness during the trial. All trials on this docket are "on the clock," with limited time to present the evidence. When a *Daubert* objection is lodged during trial, the Court will recess the jury, listen to the testimony, and make a ruling consistent with the evidence being presented. If the *Daubert* objection is sustained, the time necessary to hear the witness's testimony outside the presence of the jury will be subtracted from the presenter of the witness. If the *Daubert* objection is overruled, the time consumed by listening to the witness outside the presence of the jury will be deducted from the objector. Therefore, the Court dismisses Officer Richter's motion to exclude the expert testimony of Kevin Cokley without prejudice to re-urging at trial.

**II. Motions for Summary Judgment**

**A. Legal Standard**

***5** Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

  

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*

"Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

**B. Application**

The Court first evaluates Officer Richter's summary judgment motion and then turns to the City's.

**1. Officer Richter's Summary Judgment Motion**

Under 42 U.S.C. § 1983, Plaintiff contends Officer Richter used excessive force in violation of the Fourth Amendment and impermissibly discriminated against her on the basis of her race in violation of the Fourteenth Amendment. Plaintiff further asserts Officer Richter violated her rights under 42 U.S.C. § 1981 by discriminating against her on the basis of race. Moving for summary judgment, Officer Richter argues he is entitled to qualified immunity on Plaintiff's excessive force claim.[3] Officer Richter also claims he cannot be held liable for violating Plaintiff's rights under § 1981 because that statute only applies where a contractual relationship exists. The Court denies Officer Richter's motion for summary judgment for the reasons discussed below.

**a. No Qualified Immunity**

***6** Qualified immunity protects public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis involves two considerations: "(1) whether facts alleged or shown by plaintiff make out the violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant's alleged misconduct." *Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009). Thus, the Court first examines whether Plaintiff has asserted a violation of a constitutional right and then considers whether that right was clearly established at the time of Officer Richter's alleged misconduct.

**i. Violation of a Constitutional Right**

The Fourth Amendment confers a right to be free from excessive force during an arrest, investigatory stop, or other "seizure" of person. *Graham v. Connor*, 490 U.S. 386, 388 (1989). To establish a claim of excessive force under the Fourth Amendment, a plaintiff must show "(1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable." *Cass v. City of Abilene*, 814 F.3d 721, 731 (5th Cir. 2016). Plaintiff claims she suffered severe bruising and abrasions, swelling in her wrists, and psychological injuries as a result of Officer Richter's use of force, and Officer Richter does not dispute the existence of a constitutionally cognizable injury for purposes of summary judgment. *See* Richter's Mot. Summ. J. [#37] at 7–15. The relevant inquiries, therefore, are whether Plaintiff's injury resulted from the use of clearly excessive and objectively unreasonable force. Under Fifth Circuit precedent, these inquiries are "often intertwined." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012).

The Supreme Court has long recognized the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion of threat thereof to effect it. *Graham*, 490 U.S. at 396. Determining whether force is excessive or unreasonable "requires careful attention to the facts and circumstances

of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* Additional considerations that "may bear on the reasonableness or unreasonableness of the force used [include]: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015).

Moreover, the "reasonableness" of a particular use of force is judged from the perspective of an officer at the scene, rather than the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396. "Not every push or shove even if it may later seem unnecessary in the peace of a judge's chamber violated the Fourth Amendment." *Id.* (citation and internal quotation marks omitted). It is well-established that an officer may consider a suspect's refusal to comply with instructions in assessing whether physical force is needed to effectuate the suspect's compliance. *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (per curiam). In sum, excessive force claims are "necessarily fact-intensive" and whether the force used was excessive "depends on the facts and circumstances of each particular case." *Id.* (citation and quotation marks omitted).

***7** Many facts of this case are in dispute. Under Plaintiff's version of the facts, in combination with the few undisputed facts, a reasonable jury could find Officer Richter's use of force was clearly excessive and objectively unreasonable. It is undisputed Plaintiff was stopped for a minor traffic violation, speeding. According to Plaintiff's account, there was no reason to believe her actions posed a threat to Officer Richter or the public. [4] Plaintiff denies ever saying "no" to any of Officer Richter's requests or refusing to place her feet in her vehicle. The only contradictory evidence stems from Officer Richter's account of the interaction. Moreover, it is undisputed that once Plaintiff returned to her vehicle, she made no attempt to flee. Plaintiff's account suggests Officer Richter began using force in reaction to her question "Can you please hurry up?"

A reasonable jury could conclude a reasonable officer would have found any use of force unnecessary. Under the totality of the circumstances as alleged by Plaintiff—that is, a mid-day traffic stop where the suspect was a petite woman seated in her vehicle who was not attempting to flee or actively resist—an officer at the scene would have found pulling the woman from her vehicle, swinging her body around in the air so her legs collided with another vehicle, and slamming her to the ground to be objectively unreasonable. Thus, a fact issue exists on whether Officer Richter violated Plaintiff's constitutional right to be free from excessive force.

**ii. Clearly Established Right**

The Court also concludes Plaintiff's constitutional right was clearly established at the time of Officer Richter's alleged misconduct. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Lytle v. Bexar Cty.*, 560 F.3d 404, 410 (5th Cir. 2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001) *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009) ). If officers of reasonable competence could differ on the lawfulness of defendant's actions, the defendant is entitled to qualified immunity. *See Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ). Though the Court views all facts in the light most favorable to Plaintiff, the burden remains on Plaintiff "to negate the [qualified immunity] defense once properly raised." *See Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008).

At the time of the traffic stop at issue, it was clearly established law that "an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation." *Hanks v. Rogers*, 853 F.3d 738, 747 (5th Cir. 2017) (finding this principle to be clearly established law for purposes of a traffic stop in 2013). Under Plaintiff's version of the facts, Officer Richter stopped Plaintiff for a minor traffic offense, Plaintiff was seated in her vehicle posing no immediate flight risk or threat, and she offered only passive resistance. A reasonable officer would have known

  

abruptly resorting to overwhelming physical force rather than continuing verbal negotiations was unlawful in such a situation.

***8** Genuine material fact issues preclude a determination of whether Officer Richter is entitled to qualified immunity on Plaintiff's excessive force claim. Viewing the facts in the light most favorable to Plaintiff, a reasonable jury could find Officer Richter violated Plaintiff's right to be free from excessive use of force, a right clearly established at the time of the traffic stop. Consequently, the Court denies Officer Richter's motion for summary judgment on his entitlement to qualified immunity concerning Plaintiff's excessive force allegation.

**b. § 1981**

Officer Richter argues Plaintiff's racial discrimination claim under 42 U.S.C. § 1981 fails because she did not identify an impaired contractual relationship under which she has rights. Richter's Mot. Summ. J [#37] at 6–7. Officer Richter relies on *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) in asserting § 1981 only applies in situations involving a contractual relationship. *Id.*

Officer Richter has not provided the Court with sufficient binding authority to merit judgment as a matter of law on Plaintiff's § 1981 claim. In particular, Officer Richter offers no authority from the United States Supreme Court or the Fifth Circuit demonstrating lack of a contractual relationship is fatal to Plaintiff's claim. Whether a contractual relationship is necessary condition for every claim under § 1981 is not well settled. *See Lozana v.* Ortega, No. EP–14–CV–239–KC, 2014 WL 6611595, at *7 (W.D. Tex. Nov. 19, 2014) (holding the plaintiff's § 1981 claims for racial discrimination against an officer failed without allegations the officer interfered with the plaintiff's contractual rights); *Garza v. U.S. Marshals Serv.*, No. CIV.A. B–07–052, 2008 WL 501292, *5 (S.D. Tex. Feb. 21, 2008) (finding only the plaintiff failed to allege his assault by officers was motivated by racial animus or the result of racially disparate treatment and not addressing the need for a contractual relationship); *Mazloum v. D.C. Metro Police Dep't*, 552 F. Supp. 2d 24, 37 (D.D.C. 2007) (concluding *Domino's* does not require a contractual relationship for every § 1981 claim). Furthermore, nothing in the record suggests trying Plaintiff's § 1981 claim would be prejudicial or would expand the scope of trial.[5] Therefore, the Court declines to grant summary judgment for Officer Richter on Plaintiff's § 1981 claim and will carry it to trial.

**2. The City's Summary Judgment Motion**

In *Monell v. Department of Social Services*, the Supreme Court held that a municipality cannot be held liable under § 1983 on a theory of *respondeat superior.* 436 U.S. 658, 691 (1978). Municipalities and other local governments may incur § 1983 liability, however, where official policy or custom causes a constitutional violation. *Bennet v. City of Slidell*, 728 F.2d 762, 766 (5th Cir. 1984). For municipal liability to attach, the plaintiff must prove three elements: (1) a policymaker; (2) an official policy; and (3) a "violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell*, 436 U.S. at 694). Official policy may be found in "written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009). When a policy is not facially unconstitutional, a plaintiff must demonstrate the municipality's adoption of the policy occurred with "deliberate indifference to the known or obvious fact ... constitutional violations would result." *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quotation omitted).

***9** Plaintiff claims the City is liable under § 1983 because it maintained inadequate hiring, training, and discipline policies causing Officer Richter's alleged excessive use of force and racial discrimination. Plaintiff also claims the City had an unwritten custom of racial discrimination.[6] Moving for summary judgment, the City argues Plaintiff has no evidence the City had inadequate hiring or training policies or a custom of racial discrimination. The City also contends evidence demonstrates its disciplinary policies are not inadequate as a matter of law.[7] As described below, the Court grants in part and denies in part the City's motion for summary judgment.

**a. Hiring Policies**

First, the Court agrees the City is entitled to summary judgment on Plaintiff's allegation the City maintained inadequate hiring policies. In responding to the City's

motion for summary judgment, Plaintiff provided no evidence or argument supporting her claims the City had inadequate hiring policies. *See* Resp. City's Mot. Summ. J. [#44]. The Court does not find any evidence in the record suggesting the City's hiring policy was a moving force for the alleged violation of Plaintiff's rights. As conclusory allegations are insufficient to defeat a motion for summary judgment, the Court grants the City's motion for summary judgment concerning the City's hiring policies. *See Turner*, 476 F.3d at 343.

**b. Inadequate Training and Discipline Policies**

Plaintiff presented sufficient evidence to raise a fact issue on the City's liability under § 1983 for inadequate remedial training and discipline policies. To prevail on an inadequate training or discipline claim, a plaintiff must prove (1) the municipality's training or discipline policy was inadequate; (2) the inadequate training or discipline policy was a moving force in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy or discipline policy. *See Valle v. City of Hous.*, 613 F.3d 536, 544 (5th Cir. 2010).

To show the City's training or discipline policies were inadequate Plaintiff presented video evidence Officer Richter repeatedly used arguably excessive force. *See* June 30, 2013 Incident Video; August 19, 2012 Incident Video; November 19, 2011 Incident Video. The racial identities of the individuals Officer Richter previously used force against remain unclear. *Id.* A reasonable jury could find Officer Richter was involved in several incidents where he used arguably excessive force, which could be interpreted as a pattern of excessively using force, potentially against racial minorities. *See Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001) ("A pattern could evidence not only the existence of a policy but also official deliberate indifference."). But Officer Richter was not provided any remedial training or discipline. Richter Dep. at 54:13–57:19. Plaintiff's evidence is sufficient for a reasonable jury to find the City did not provide remedial training or discipline where an officer struggled with when and to what degree to use force and therefore that the City's training and discipline policies were inadequate.

***10** Plaintiff also raises a factual question on whether the failure to provide Officer Richter additional training or discipline was the moving force for Plaintiff's injuries. Plaintiff's evidence suggests Officer Richter's prior uses of force were of a similar type as Plaintiff alleges occurred here. It is reasonable to conclude "the highly predictable consequence" of not disciplining or training officers following the questionable use of force "was that they would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk." *See Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009) (quotation omitted). Plaintiff's evidence is sufficient to establish that the City's inadequate training and discipline policies were the moving force for the violation of Plaintiff's rights.

Additionally, a material fact issue exists on whether the City was deliberately indifferent in adopting and applying its training and discipline policies. To show deliberate indifference, a plaintiff may either (1) show that the municipality had notice of a pattern of similar violations; or (2) demonstrate that the need for more or different training was obvious based on a single incident. *Kitchen v. Dall. Cty., Tex.*, 759 F.3d 468, 484 (5th Cir. 2014), *abrogated on other grounds, Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472–73 (2015). Here, Plaintiff offers evidence the City had notice of a pattern of similar violations where Officer Richter questionably used force. *See* Richter's Internal Affairs File at 13–14; Richter Dep. at 54:13–57:19 (noting Officer Richter received comments from his supervisors indicating they wished he would do things differently). But the City failed to provide Officer Richter any supplementary training or discipline. Richter Dep. at 54:13–57:19. Thus, Plaintiff provides enough evidence to create a fact issue on deliberate indifference.

In sum, the Court denies the City's motion for summary judgment concerning the City's § 1983 liability for its remedial training and discipline policies because there is sufficient evidence to support a reasonable verdict in favor of Plaintiff. However, to be clear, the question for trial is limited to whether the City's policies on supplemental training and discipline in light of Officer Richter's repeated uses of arguably excessive force were inadequate and caused Plaintiff's alleged constitutional injuries. The jury will review Officer Richter's prior uses of force and evaluate (1) whether the City's remedial training and discipline policies were inadequate, (2) whether such policies caused Plaintiff's alleged constitutional violations, and (3) whether the City was deliberately indifferent in adopting such policies.

**c. 180–Day Rule**

  

Plaintiff also asserts the City's application of Texas's 180–Day Rule was a moving force for the violation of Plaintiff's rights. However, at most, Plaintiff shows the City's application of 180–Day Rule caused Officer Richter to be inadequately disciplined for his treatment of Plaintiff. *See* Resp. City's Mot. Summ. J. [#44] at 16. There is no evidence the 180–Day Rule was implicated in attempted discipline surrounding prior uses of force. Plaintiff makes no showing the City's prior application of the 180–Day Rule was the moving force for or had any role in causing the alleged violation of Plaintiff's constitutional rights. *Id.* Thus, the Court grants the City's motion for summary judgment regarding the City's application of Texas's 180–Day Rule.

**d. Ratification**

In responding to the City's motion for summary judgment, Plaintiff argues the City "ratified [Officer] Richter's conduct by failing to adequately discipline him in this case." Resp. City's Mot. Summ. J. [#44] at 13–14.

Under a ratification theory, a plaintiff may show an official custom or policy where policymakers ratified the alleged violation of the plaintiff's constitutional rights by failing to discipline those involved. *Fuentes v. Nueces Cty., Tex.*, 689 Fed.Appx. 775, 779 (5th Cir. 2017). But the Fifth Circuit has limited ratification to cases where the underlying incident is an "extreme factual situation" of the type reflected in *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161 (5th Cir. 1985). *Id.* (alteration omitted). In *Grandstaff* officers mistook an innocent bystander for a minor traffic violation suspect and "poured their gunfire at the truck without awaiting any hostile act or sounds, ultimately killing the bystander." *Id.* (quoting *Grandstaff*, 767 F.2d at 165, 168 (internal quotation marks omitted) ). The *Grandstaff* court held the conduct of the officers involved in the incident and the failure to discipline or discharge any of those officers was sufficient to infer a de facto policy of reckless disregard for human life. *Id.* (citing *Grandstaff*, 767 F.2d at 171–72).

***11** The traffic stop in this case does not present an extreme factual situation from which a reasonable jury is entitled to infer the City had a policy of condoning constitutional rights violations. *See Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 848 (5th Cir. 2009) (finding ratification liability foreclosed where officers dragged a non-resisting plaintiff out of a vehicle, slammed him into the ground and into his vehicle, cuffed him, and beat him while he was in cuffs). Thus, the Court grants the City's motion for summary judgment on Plaintiff's allegation of ratification.

**e. Custom of Racial Discrimination**

Finally, Plaintiff raises a fact issue on whether the City had a custom of racial discrimination—especially in using force—that was the moving force for her alleged constitutional violations.

In a single paragraph in its motion for summary judgment, the City argues Plaintiff has no evidence of a custom of racial discrimination and cites APD's policy prohibiting racial profiling. *See* City's Mot. Summ. J. [#39] at 14–15. In response, Plaintiff offers the following evidence to support her allegation: (1) video of her interaction with Officer Richter, Richter Dash Camera Video at 1:21–4:20; (2) Officer Spradlin's comments suggesting officers perceive black people as having "violent tendencies," Spradlin Seat Camera Video at 49:16–50:11; (3) Chief Acevedo's comments suggesting racial animus motivated Officer Richter's use of force against Plaintiff, Acevedo Radio Interview at 10; and (4) a Center for Policing Equity Report analyzing APD data and finding APD officers disproportionately used force and more severe force against blacks in 2014, Resp. City's Mot. Summ. J. [#44–7] Ex. G (CPE Report) at 11–14. In reply, the City merely categorized Plaintiff's evidence as "circumstantial" and asserted such evidence was insufficient to support Plaintiff's custom of racial discrimination claim. Reply [#46] at 8–9. The City cites no authority for its assertion. *Id.*

The City has not shown it is entitled to judgment as a matter of law. Plaintiff has provided sufficient evidence to substantiate her claim the City is liable under § 1983 for maintaining a custom of racial discrimination. The Court therefore denies summary judgment on this claim.

**Conclusion**

In sum, the Court denies Officer Richter's motion for summary judgment. Fact issues prevent a determination of whether Officer Richter is entitled to qualified immunity on Plaintiff's excessive force claim. Viewing all facts in the light most favorable to Plaintiff, the Court finds Plaintiff can show Officer Richter violated her right

  

to be free of excessive force, a right clearly established at the time of Officer Richter's alleged misconduct. The Court also declines to grant summary judgment for Officer Richter on Plaintiff's § 1981 claim and will carry it to trial.

Furthermore, the Court grants in part and denies in part the City's motion for summary judgment. The City is entitled to judgment as a matter of law on Plaintiff's claims the City is liable under § 1983 for its hiring policies, application of the 180–Day Rule, and ratification of Officer Richter's treatment of Plaintiff. However, Plaintiff provided sufficient evidence to hold the City liable under § 1983 for inadequate training and discipline policies as well as a custom of racial discrimination.

Accordingly,

IT IS THEREFORE ORDERED that Defendant Brian Richter's Motion to Exclude the Expert Testimony of Kevin Cokley [#36] is DISMISSED without prejudice to re-urging at trial;

***12** IT IS FURTHER ORDERED that Officer Bryan Richter's Motion for Summary Judgment [#37] is DENIED; and

IT IS FINALLY ORDERED that the City of Austin Motion for Summary Judgment [#39] is GRANTED IN PART and DENIED IN PART as described in this opinion.

**All Citations**

Slip Copy, 2018 WL 2027748

Footnotes

1 The exact racial identity of individuals against whom Officer Richter previously used force is unspecified and unclear from the videos.

2 Although it is unclear from the video footage, it appears Officer Richter may have spanked the female passenger before sweeping her feet out from under her. June 30, 2013 Incident Video at 17:53–57.

3 Officer Richter did not move for summary judgment on Plaintiff's claim Officer Richter racially discriminated against her in violation of the Fourteenth Amendment. *See* Richter's Mot. Summ. J. [#37]. Therefore, the Court does not examine this claim here.

4 A factual dispute exists whether Plaintiff attempted to grab an item from underneath the passenger seat when Officer Richter ordered her to stand up and whether Plaintiff resisted Officer Richter. Compare Richter's Mot. Summ. J. [#37] at 3, *with* Resp. Richter's Mot. Summ. J. [#43] at 4.

5 Additionally, there is no indication § 1981 provides a remedy not available under Plaintiff's § 1983 claims.

6 Neither party addresses any § 1981 claim against the City in its summary judgment briefing. To extent Plaintiff makes any such claim, the Court does not address it here.

7 The City does not argue Plaintiff has insufficient evidence of the underlying violations of her constitutional rights to be free of excessive force and racial discrimination. *See* City's Mot. Summ. J. [#39]. Therefore, the Court assumes Plaintiff can establish these violations in evaluating the City's motion for summary judgment.