

POLICE ACCOUNTABILITY

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Police Unions, Law Enforcement Agencies, and Cities

The 2023 Report featured internal and external mechanisms for police accountability. This year's Report seeks to discuss additional influences on police accountability and highlight two of these influences, specifically police unions and qualified immunity.

I. Structure and Functions of Police Unions

A. History of Police Unions

Police began organizing in the late 1800s to secure pensions and insurance programs for their profession.¹ By 1919, nearly 40 certified unions existed across the country.² Unions successfully organized in large cities to improve working conditions and increase compensation.³ At that time, officers rarely received raises, purchased their own uniforms, and worked long hours.⁴ During the post-WWI labor movement, police went on strike in several large cities, including Boston in 1919. In the Boston 1919 strike, over a thousand officers walked off the job, asking for higher pay and better working hours.⁵ Consequently, with nearly two thirds of the police force missing, the city experienced riots, several fatalities, and significant property damage.⁶ The 1919 strike had the intended effect, resulting in substantial improvements in employment conditions in Boston and across the country.⁷ However, it hindered officers' ability to organize for decades.⁸ Police unions were considered inherently dangerous because of the fear

¹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2 (citing Walker, *Labor's enduring divide: The distinct path of public sector unions in the united states* (2014) Studies in American Political Development 28 (2), 175–200).

² Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2 (citing Kearney and Carnevale, *Labor relations in the public sector* (2001)).

³ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2.

⁴ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2 (citing Kearney and Carnevale, *Labor relations in the public sector* (2001); Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 712)

⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1203.

⁶ Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1203. (citing Stoughton, *The Incidental Regulation of Policing* (2014) 98 Minn. L. Rev. 2179, 2206); see also Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2.

⁷ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2.

⁸ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, Cunningham (2020) p. 2; Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 183 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX].

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of losing police services during a strike.⁹ Police were subjected to local labor laws that were hostile to public sector organizing.¹⁰ Many police union charters were no longer recognized and public sector employees received fewer protections than private sector employees.¹¹

Police unionism increased in the 1960s in response to the Civil Rights Movement and Supreme Court decisions issued under Chief Justice Earl Warren.¹² Due to wartime migration of Southern Blacks to urban areas, the racial composition in urban areas changed drastically, and all-White law enforcement often found themselves in hostile environments as police-community relations rose to the forefront of the Civil Rights Movement.¹³ Police actions sparked uprisings in American cities; the uprisings were met with additional police violence in response.¹⁴ Uprisings in Black communities in response to aggressive police actions led to calls for police oversight and accountability.¹⁵ The Warren Court endeavored to place legal limits on what police could do to citizens—restrictions on how police could search, seize, and interrogate individuals and exert power over people.¹⁶ Police officers viewed their working environment as more volatile and dangerous, driving union membership.¹⁷ Rank-in-file police officers joined unions to improve

⁹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 2; Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 183 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX].

¹⁰ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 2.

¹¹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, Cunningham (2020) p. 2-3 (citing Walker, *Labor’s enduring divide: The distinct path of public sector unions in the united states* (2014) Studies in American Political Development 28 (2), 175–200); Public sector employees were excluded from federal protections under the Wagner Act of 1935, *id.* at 3, which gave employees the right to organize and obligated employers to collectively bargain, *1935 Passage of the Wagner Act*, NLRB National Labor <<https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-of-the-wagner-act#:~:text=In%20February%201935%2C%20Wagner%20introduced,rather%20than%20to%20mediate%20disputes>> [as of XXX].

¹² Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 281 (hereinafter “Double Due Process”); Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 3, 6.

¹³ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, Cunningham (2020) p. 3.

¹⁴ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 281 (hereinafter “Double Due Process”)

¹⁵ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 3.

¹⁶ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 281; Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109, 121 (hereinafter “Let the Sunshine In”); see Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 4.

¹⁷ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 4.

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their work environment and assure protections in employment from police leadership and outside influences.¹⁸ Today, police, along with teachers and core public sector workers, have the highest union membership levels in the United States, with roughly 75 percent of law enforcement officers being union members.¹⁹

B. Officer Concerns Requiring Unionization

Being a police officer can be a dangerous job,²⁰ and, as a result need special protections due to aspects inherent to their positions.²¹ During calls for service, officers can encounter individuals in a violent, aggressive, or unstable state.²² Their rate of illness and nonfatal injury is also higher than for other workers.²³ Additional job protections are reasonable for officers required to make snap judgments in tense situations.²⁴ Otherwise, some might be reluctant to act for fear that their job would be on the line, thereby putting public safety at risk.²⁵ The absence of clear procedures with few protections could negatively affect recruiting officers of good character and ability to do the job.²⁶ Additionally, officers need protection to guard against public corruption.²⁷ Law enforcement cannot work when an officer can be forced to act or refrain from acting because of concern of unwarranted or unlawful retaliation from superiors, politicians, or those with

¹⁸ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights (2020) p. 4.

¹⁹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights (2020) p. 4.

²⁰ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53; Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform enhancing accountability, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX] (hereinafter "Enhancing Accountability"); Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 192.

²¹ See McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter "Our Uneasiness with Police Unions").

²² Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform enhancing accountability, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX]; Keenan and Walker, p. 192

²³ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (citing Maloney, Bureau of Labor Statistics, U.S. Department of Labor, Nonfatal Injuries and Illnesses Among State and Local Government Workers 9 (2014) (reporting 11.3 cases per 100 police workers)).

²⁴ Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

²⁵ Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

²⁶ Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

²⁷ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter "Our Uneasiness with Police Unions").

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politically connected economic interests.²⁸ Also, if an officer is too easily disciplined, disciplinary processes could be strategically invoked to frustrate enforcement as part of a defense.²⁹ Another reason officers may need protection is because those dismissed mid-career often find that their skills are not easily transferrable to other professions.³⁰ For police officers with only a high school diploma, losing their job can effectively kick them out of the middle class.³¹

Police officers are no different than other workers — they have the right to fair terms of employment³² and have legitimate labor concerns.³³ Like any other group of employees, management may mistreat officers in a variety of ways: arbitrary punishment, punitive reassignment, or grueling and unsustainable working hours.³⁴ There is also a real potential for good faith mistakes, misunderstandings, or mishaps beyond the control of individual officers as they carry out their duties.³⁵ Simultaneously, public trust in the police is of utmost importance, and police must be held accountable for misconduct.³⁶ Law enforcement agencies are tasked with managing social control with a general mandate to control crime, maintain order, and provide miscellaneous services to the public.³⁷ Officers are required by law to treat all citizens fairly and equally.³⁸ Thus, the general public has a vital interest in police accountability.³⁹ While officers work in a job that can be dangerous, they are also authorized to use force against individuals – a

²⁸ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”) (citing Stenning, *The Idea of the Political ‘Independence’ of the Police: International Interpretations and Experiences*, p. 188).

²⁹ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”).

³⁰ Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 5 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

³¹ Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 5 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

³² Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, Cunningham (2020) p. 11.

³³ Place, *Double Due Process*, p. 286; McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”); see Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109, 116-17 (police officers have an interest in “job security, fair pay, safe working conditions, and fair and appropriate treatment by their employers.”)

³⁴ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 286.

³⁵ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 286.

³⁶ Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights* (2020) p. 11.

³⁷ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

³⁸ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

³⁹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

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responsibility unique to law enforcement.⁴⁰ “When society grants police the power to use force against civilians to coerce desired behavior, and even kill, it has an unquestionably strong interest regulating that use of power.”⁴¹ Society has a strong interest in disciplining officers who use excessive or unnecessary force to prevent future unnecessary uses of force by that officer and to deter other officers from engaging in similar conduct.⁴² Thus, officers deserve the protections discussed above, and society requires limits on officers’ uses of force and other misconduct.

C. Police Union Collective Bargaining

A major function of police unions is collective bargaining.⁴³ Officers do not need collective bargaining rights to be able to influence the governing body to improve their wages, benefits, or working conditions.⁴⁴ Officers can unionize without collective bargaining rights.⁴⁵ However, police union influence fundamentally grew due to collective bargaining, because the unionization of police officers often occurred only after state laws required jurisdictions to bargain with employee representatives.⁴⁶ Unions often focus bargaining and contract enforcement efforts on protecting officers from discipline and arbitrary work assignments, fighting for fair compensation, and ensuring compliance with seniority rules.⁴⁷

⁴⁰ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 276.

⁴¹ Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 276.

⁴² Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 201.

⁴³ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 187 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX]. Collective bargaining refers to the negotiation of contracts governing the terms of employment with respect to wages, benefits, working conditions, and worker rights for a particular group of employees. When an employer has a “duty to bargain,” it is required to negotiate with employee representatives. *Ibid.*

⁴⁴ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. 40 <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

⁴⁵ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. 40 <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

⁴⁶ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 187 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX]. (Ichniowski, *Public Sector Union Growth and Bargaining Laws: A Proportional Hazards Approach With Time-Varying Treatments* (1988) pp. 19–40).

⁴⁷ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 727 <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

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Collective bargaining on behalf of law enforcement is often a confidential process between elected officials, unions, and police management.⁴⁸ A confidential negotiation “provides a forum for rational discussion and accommodation of competing interests.”⁴⁹ Closed negotiations allow for robust discussion and for a weighing of the advantages and disadvantages of alternative options until parties reach an agreement.⁵⁰ Elected officials decide whether to ratify a negotiated labor contract, thus offering an opportunity for an exchange of ideas and vocalized support or criticism by the public.⁵¹ On the other hand, Walter Katz, a criminal justice advocate, argues, “[t]he public, especially the portion that is most impacted by policing practices, is locked out of the negotiation process and relies on elected officials to look out for its interests in having an accountable police force that treats members in predominantly racial minority neighborhoods fairly.... The lack of meaningful public accessibility to the negotiation process has contributed to officials agreeing to police labor contract that undermine accountability and run counter to the interests of residents who are already estranged from the political process.”⁵²

⁴⁸ See Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 433; Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1199 (citing Abraham, *Opening the Curtain on Government Unions* (2015) 5–8

<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).); Rad, *Police Unionism*, p 190 (citing Katz 2021, Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 2017); Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422; see SF BAR, pg. 13 (“[Human Resources’ meet-and-confer process with SFPOA occurs behind closed doors.]”)

⁴⁹ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436 (quoting Summers, *Public Employee Bargaining: A Political Perspective* (1974) 83 Yale L.J. 1156, 1200).

⁵⁰ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436 (citing Mark Fenster, *The Opacity of Transparency* (2006) 91 IOWA L. REV. 885, 908)

⁵¹ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436.

⁵² Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422-23; see Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 433; Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1199 (citing Abraham, *Opening the Curtain on Government Unions* (2015) 5–8

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[<https://perma.cc/H9Z5-7PHM>] (providing links to various state statutes that limit public participation and transparency in collective bargaining negotiations).); Rad, *Police Unionism*, p 190 (citing Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419; Rushin, *Police Union Contracts* (2017) 66 Duke. L. J.); see San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 13 <<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%2022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX] (“[Human Resources’ meet-and-confer process with SFPOA occurs behind closed doors.]”)

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California law does not require meet-and-confer discussions to occur behind closed doors.⁵³ The Meyers Miliias Brown Act, the law that requires public employers to meet and confer with employees in good faith,⁵⁴ does not explicitly prohibit the disclosure of communications between bargaining parties.⁵⁵ Meet and confer correspondence between parties (i.e., opening bargaining offers, counter, and any other communications between parties) may be released to the public and stakeholders.⁵⁶ The Brown Act also expressly permits release of information legislative bodies acquire during closed sessions, so legislative bodies may release “salaries, salary schedules or compensation paid in the form of fringe benefits of its represented and unrepresented employees” and “any other matter statutorily provided within the scope of representation.”⁵⁷ Thus, bargaining sessions are not confidential and summaries of discussions may be disclosed to the public and stakeholders.⁵⁸

II. Police Unions’ Effects on Agency Reforms and Accountability

⁵³ San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%202022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX] (citing 61 Ops. Cal. Atty. Gen. 1, 2-3 (Jan. 4, 1978) (California Attorney General legal opinion noting that the Meyers Miliias Brown Act “is silent as to whether ‘meet and confer’ sessions may be private, or must be open to the public.”))

⁵⁴ Berkeley Office of the City Attorney, letter to the Police Accountability Board, Oct. 13, 2021

<https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/2021-10-13-SuppMaterial.PAB_PublicSummaryofMeet.and_Confer.Rules%283of4%29.pdf> [as of XXX].

⁵⁵ San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 16

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%202022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

⁵⁶ San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 16

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%202022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

⁵⁷ The Brown allows legislative bodies, such as city councils, to hold closed sessions with designated representatives regarding the “salaries, salary schedules or compensation paid in the form of fringe benefits of its represented and unrepresented employees” as well as “any other matter statutorily provided within the scope of representation.” San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%202022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

⁵⁸ San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%202022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

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As a party at the collective bargaining table, unions have influence. Unions use their influence in several ways, including ways that influence accountability and reform. In California, unions supported the creation of the Public Safety Officers Procedural Bill of Rights, a set of statutory protections specifically for law enforcement officers.⁵⁹ Within bargaining agreements, unions negotiate terms affecting interrogations of officers suspected of misconduct, retention of disciplinary records, civilian oversight of discipline, complaint investigations, and arbitration for discipline decisions. Unions' relationships with police management and role in an agency's internal culture also influence reform and accountability

A. Peace Officer Bill of Rights

Police unions lobbied to support the development of Peace Officer Bills of Rights (POBOR). A In California, POBOR⁶⁰ is a set of rights, codified in law, that is related to disciplinary action and supersedes police union contracts.⁶¹ In other jurisdictions, a POBOR may be statutory or contractually negotiated by police unions into collective bargaining agreements on the local level.⁶²

1. Need for a Bill of Rights

POBORs arose in response to demands for greater police accountability during the Civil Rights Movement.⁶³ As discussed above, during the 1960s, officers were involved in incidents of misconduct, such as brutality, unjustified shootings, and discrimination in enforcement, which led the populace to riot.⁶⁴ Civil rights advocates demanded reform, including citizen review

⁵⁹ Barrata, The Creation of the Peace Officer Bill of Rights & PORAC, PORAC <[https://porac.org/2020/08/17/the-creation-of-the-peace-officer-bill-of-rights-porac/#:~:text=AB%20301%3A%20The%20Peace%20Officers'%20Bill%20of%20Rights&text=In%201973%20a%20bill%20\(AB.Policemans'%20Bill%20of%20Rights.%E2%80%9D](https://porac.org/2020/08/17/the-creation-of-the-peace-officer-bill-of-rights-porac/#:~:text=AB%20301%3A%20The%20Peace%20Officers'%20Bill%20of%20Rights&text=In%201973%20a%20bill%20(AB.Policemans'%20Bill%20of%20Rights.%E2%80%9D)> [as of XXX].

⁶⁰ California's POBOR is statutory, codified in Government Code Sections 3300-3312, and is called "Public Safety Officers Procedural Bill of Rights."

⁶¹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, (2020) p. 9.

⁶² Place, *Double Due Process: How Police Unions and Law Enforcement "Bills of Rights" Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 277.

⁶³ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 194; Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109, 125.

⁶⁴ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 195.

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boards, to serve as independent checks on police misconduct.⁶⁵ Law enforcement responded to the greater demand for accountability by seeking greater due process protections for themselves in misconduct investigations.⁶⁶ The Fraternal Order of Police, a national federation of police unions, argues a POBOR is necessary because law enforcement agencies sometimes subject officers to “abusive and improper procedures and conduct” and that officers “have no procedural or administrative protections whatsoever” in some jurisdictions.⁶⁷ POBOR is required “to create a uniform minimal level of procedural due process for officers” and to codify Supreme Court decisions that ruled officers have the right not to self-incriminate themselves under the Fifth Amendment and cannot be fired for exercising those rights.⁶⁸

Other arguments unions make to justify a POBOR, which may or may not be justified, include the following: (1) officers need special protections, because officers are forced to answer questions or be fired;⁶⁹ (2) lack of due process rights leads to loss of officer confidence in the disciplinary process and loss of morale;⁷⁰ (3) treating officers unfairly may deter or prevent officers from carrying out their duties effectively and fairly;⁷¹ (4) the perception or reality of unfair treatment may negatively affect recruitment and retention;⁷² (5) effective policing depends

⁶⁵ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 195.

⁶⁶ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 194.

⁶⁷ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 198 (citing Press Release, Police Benevolent Association, Due Process for Police Officers Introduced in Senate (May 9, 2009) <<http://www.grandlodgefop.org/press/pr010509.html>>).

⁶⁸ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 198 (citing Press Release, Police Benevolent Association, Due Process for Police Officers Introduced in Senate (May 9, 2009) <<http://www.grandlodgefop.org/press/pr010509.html>>);

Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 9. In *Garrity v. New Jersey*, the Supreme Court ruled that law enforcement officers and other public employees have the right to not self-incriminate themselves under the 5th amendment. In *Gardner v. Broderick*, the U.S. Supreme Court further protected police officers ruling that police management cannot terminate officers for exercising their 5th Amendment right. Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 9.

⁶⁹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing Rashbaum, *Police Officials Hope Ruling Will Help End 48-Hour Rule* (May 10, 2002) N.Y. TIMES). This allegation has not been supported by empirical evidence. *Id.* at fn. 87.

⁷⁰ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(2) (2001)).

⁷¹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(3) (2001)).

⁷² Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(4) (2001)).

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on stable employer-employee relations, which POBOR promotes;⁷³ and (6) POBOR provides more uniform fairness among and between different departments that have different protections.⁷⁴

2. California's Peace Officer Bill of Rights

California's POBOR provides the following protections and limitations on interrogations of police officers for misconduct.⁷⁵ Interrogations must be conducted at a reasonable hour.⁷⁶ Preferably, officers are to be interrogated when an officer is on duty or during normal waking hours.⁷⁷ If the interrogation occurs when the officer is off-duty, the officer shall be compensated.⁷⁸ An officer shall be interrogated by no more than two people at once and the officer will be provided the names of the interviewers.⁷⁹ The officer shall be informed of the nature of the interrogation before it occurs.⁸⁰ The interrogation shall also be limited to a reasonable time.⁸¹

California's POBOR also provides protections and limitations regarding discipline and personnel records. If an agency wishes to discipline an officer for misconduct, then the agency must complete its investigation of the misconduct and notify the officer of the discipline within one year of discovery of the misconduct.⁸² An agency cannot include a comment adverse to an officer's interests in the officer's personnel file without allowing the officer to review the comment.⁸³ An officer has 30 days to respond in writing to the adverse comment, and the response must be included in the personnel file.⁸⁴ An agency cannot take punitive action against

⁷³ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing Gov. Code, § 3301 (2001); N.M. STAT. ANN. § 29-14-2 (Michie 2001)).

⁷⁴ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199.

⁷⁵ Gov. Code, § 3303.

⁷⁶ Gov. Code, § 3303(a).

⁷⁷ Gov. Code, § 3303(a).

⁷⁸ Gov. Code, § 3303(a).

⁷⁹ Gov. Code, § 3303(b).

⁸⁰ Gov. Code, § 3303(c).

⁸¹ Gov. Code, § 3303(d). Additional interrogation protections are as follows. POBOR limits the language that may be used during an interrogation such that the officer is not subjected to offensive language or threatened with punitive action. Gov. Code § 3303(e). POBOR also limits the use of the officer's statements in civil actions, if they are made under duress, coercion, or threat of punitive action. Gov. Code 3303(f). The interrogation may be recorded, but the officer must have access to the recording and have the option to record with his or her own device. Gov. Code, § 3303(g).

⁸² Gov. Code, § 3304(d).

⁸³ Gov. Code, § 3305.

⁸⁴ Gov. Code, § 3306.

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an officer because he or she is on a *Brady* list,⁸⁵ which is a list usually compiled by a prosecutor's office of officers that may have credibility issues, such as records of untruthfulness, integrity violations, or allegations of moral turpitude.⁸⁶

3. Impediments Caused by POBOR

California's POBOR covers chiefs and supervisors in addition to rank-and-file officers.⁸⁷ Some policy obligations and pressures exist for police chiefs that do not exist for rank-and-file officers. Public officials may call a police chief to account for basic law enforcement policy (e.g., adoption of community policing, failure to reduce crime, etc.).⁸⁸ Public officials may also replace chiefs as political pressures demand.⁸⁹ Similarly, chiefs should have the flexibility in choosing and replacing commanders based on policy goals and basic job performance.⁹⁰ POBOR rights should not attach in such decisions.⁹¹

California's POBOR prevents reassignment of officers if the "department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances."⁹² Punitive reassignments that violate standards of fairness should not occur.⁹³ However, reassignment as a response to performance deficiencies is valuable.⁹⁴ In general, departments have not reassigned "problem officers" with performance problems away from sensitive assignments.⁹⁵ For example, departments often leave patrol officers who have many

⁸⁵ Gov. Code, § 3305.5. Placement on a *Brady* list has serious implications. A prosecutor may be wary of a *Brady* officer's account of an incident, if it is not corroborated by other evidence, thereby casting doubt on a case. A prosecutor may also be wary of allowing an officer to testify under penalty of perjury if the officer has credibility issues, thus limiting one of the vital functions an officer plays in the prosecution of a case.

⁸⁶ <https://porac.org/article/am-i-going-to-get-a-brady-letter>

⁸⁷ Gov. Code, § 3301; Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, p. 204.

⁸⁸ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁸⁹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁹⁰ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁹¹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁹² Gov. Code, § 3303(j).

⁹³ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236.

⁹⁴ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236.

⁹⁵ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236.

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citizen complaints or who too frequently use force in their assignments, even though departments could transfer them to assignments that have minimal contact with the public.⁹⁶

POBOR limits the reformation of procedures disciplining officers.⁹⁷ Because no more than two interrogators may question an officer at once,⁹⁸ POBOR may constrain a civilian review board from holding a hearing with the officer or may prevent an auditor from joining and asking questions during an interview.⁹⁹ Additionally, a citizen review board's disciplinary recommendation may trigger an officer's administrative appeal rights¹⁰⁰ if the recommendation may be used for discipline or other personnel decisions.¹⁰¹ For example, a civilian oversight committee's advisory recommendation for discipline constitutes punitive action, if a department may consider the advisory recommendation when disciplining the officer.¹⁰² Thus, an officer's right to administrative appeal of the advisory recommendation is triggered.¹⁰³

B. Collective Bargaining Agreements

As previously discussed, collective bargaining is a major function of police unions. While unions bargain for salary and related compensatory benefits, they also bargain about management rights.¹⁰⁴ These rights may influence discipline and investigation of misconduct, which in turn affects accountability.¹⁰⁵ Scholar Stephen Rushin identified seven categories of provisions in police contracts that limit accountability:¹⁰⁶ (1) delays of interrogation or interview of officers

⁹⁶ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005) 14 Public Interest L.J. 186, 236. Reassignments may be subject to collective bargaining agreements. *Ibid.*

⁹⁷ League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3> [as of XXX].

⁹⁸ Gov. Code, § 3303(b).

⁹⁹ League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3> [as of XXX] (citing *Berkeley Police Assn. v. City of Berkeley* (2007) 167 Cal.App.4th 385, 410).

¹⁰⁰ Gov. Code, § 3304(b).

¹⁰¹ League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3> [as of XXX] (citing *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223; *Hopson v. City of Los Angeles*, 139 Cal.App.3d 347 (1983)).

¹⁰² See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222-23.

¹⁰³ *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222.

¹⁰⁴ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 185 (citing hardway, Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610).

¹⁰⁵ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 185 (citing hardway, Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610).

¹⁰⁶ Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights*, (2020) p. 6; see also Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev.

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suspected of misconduct; (2) providing officers access to evidence of alleged misconduct prior to interrogation; (3) limiting consideration of disciplinary records by excluding records for future employments or destroying disciplinary records from files after a set period;¹⁰⁷ (4) limiting the length of time during which an investigation must conclude, or disciplinary action can occur; (5) limiting anonymous complaints; (6) limiting civilian oversight; and (7) permitting or requiring arbitration of disputes related to disciplinary actions.

1. Interrogations

Employers must maintain the workplace. Employers who suspect employees of misconduct, criminal behavior, or violations of internal policy, may conduct an internal investigation and question the employee.¹⁰⁸ As discussed in the Board's 2023 Report, an internal affairs department administratively investigates these issues for a police department.¹⁰⁹ Internal Affairs departments use administrative interrogations to judge the veracity of civilian complaints, collect facts after uses of force, and investigate officer misconduct.¹¹⁰ While criminal suspects cannot be compelled to answer questions and may invoke their right to silence, investigators can and do compel officers to answer questions during administrative disciplinary interrogations.¹¹¹ An officer may be terminated for cause if they refuse to answer questions in the administrative review.¹¹² Thus, police union contracts or collective bargaining agreements often regulate disciplinary interrogations.¹¹³ Stephen Rushin's analysis of 657 police union contracts, 140 of which were from California municipalities,¹¹⁴ suggests that contracts have insulated officers from accountability by preventing investigators from using effective interrogation techniques against officers during internal disciplinary investigations.¹¹⁵

Criminology 183, 191 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191).

¹⁰⁷ See also Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1230-32

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁰⁸ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

¹⁰⁹ Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 143-44

<<https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>> [as of XXX].

¹¹⁰ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

¹¹¹ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656. Compelled questioning raises Fifth Amendment concerns, especially the right to silence, when an officer suspected of criminal conduct that may serve as the basis of internal disciplinary action and criminal prosecution. The Supreme court has held that the government may not use an officer's compelled statement as evidence against him or her in a criminal prosecution. *Ibid.*

¹¹² Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

¹¹³ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 657.

¹¹⁴ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 657. police union contracts from 40 states and the District of Columbia that govern the internal disciplinary procedures. 140 contracts were from California municipalities. *Id.* at 662-63, 694-96.

¹¹⁵ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 684.

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Some union contracts or collective bargaining agreements impose a time period before an officer may be interviewed, thereby delaying the interrogation.¹¹⁶ Rushin’s analysis revealed that of the contracts that allowed for an interrogation delay, the typical police department gives officers two days or more of notice before a department may interrogate an officer based on alleged misconduct.¹¹⁷ Providing an officer with a reasonable period to obtain representation does not present accountability issues.¹¹⁸ An officer is entitled to an attorney, like any other criminal suspect, if he or she is going to be interrogated about criminal behavior.¹¹⁹ However, a 48-hour waiting period raises accountability concerns. Rushin surveyed police leaders about the effects of a waiting period on the integrity of an investigation (without specifying that the investigation was of an officer).¹²⁰ All those who responded to the survey agreed that interrogation delays burden investigations.¹²¹ These police leaders stated that a 48-hour waiting period provides an opportunity to “line up an alibi,” “strategize about how to conceal the truth,” “destroy [or] hide evidence not already in police possession,” “tamper with witnesses,” or otherwise give “any advantage.”¹²² Others suggested “[the] first 48 hours of an investigation are critical.”¹²³ Rushin argued that excessively delaying interrogations of officers after alleged misconduct allows officers to coordinate stories in a way that deflects responsibility for wrongful behavior.¹²⁴

Some contracts or collective bargaining agreements also require internal investigators to turn over potentially incriminating evidence to an officer prior to interrogation.¹²⁵ In Rushin’s analysis, the most common types of evidence provided are a copy of a civilian complaint and the names of complainants.¹²⁶ Fewer jurisdictions give officers access to video or photographic evidence, such as body worn camera footage, or locational data, such as GPS.¹²⁷ Surveyed police leaders expressed concern that these protections would impair the ability of investigators to uncover the truth.¹²⁸ One police chief described this as “showing all of your cards in a poker

¹¹⁶ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 672.

¹¹⁷ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 672. The majority of contracts did not provide a delay period. However, a substantial number of police departments provide two hours or less, with many of the remaining agencies giving police officers a substantially longer delay before facing questions from internal investigators—generally between 24 and 72 hours. *Id.* at 673-74. 664

¹¹⁸ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 664.

¹¹⁹ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 664.

¹²⁰ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 677.

¹²¹ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

¹²² Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

¹²³ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

¹²⁴ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1240.

¹²⁵ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 674; Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1227, Appendix C (second column entitled “Access to Evidence Before Interview”).

¹²⁶ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 674.

¹²⁷ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 675.

¹²⁸ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

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game.”¹²⁹ Another claimed it allows for “tailor[ing] their lies to fit the evidence.”¹³⁰ Some argued that the purpose of an interrogation is to “determine if the suspect is being truthful.” Thus, providing evidence in advance of an interrogation “would greatly limit this position,” and “would give “time to fabricate a better lie.”¹³¹ One respondent worried about inadvertently publicizing the evidence, thereby calling into question the integrity of the investigation.”¹³² Virtually no police chief believed these protections were useful in reducing the rate of false confessions.¹³³

2. Disciplinary Records

During the regular course of business, employers keep personnel files for employees that often contain discipline records and evaluations, among other materials.¹³⁴ These files assist with the regular functions of the business or agencies; for example, discipline records may formulate the basis to terminate an employee or an evaluation may support a promotion.¹³⁵ Thus, the contents of a personnel file have influence on an individual’s employment. Many police contracts require destruction of disciplinary records from officer personnel files after a set period or prevent supervisors from considering an officer’s previous discipline history when making personnel decisions.¹³⁶ Some prevent police chiefs from fully using disciplinary records.¹³⁷ In another study, Rushin analyzed 178 police contracts, at least 37 of which are from California municipalities,¹³⁸ and found that approximately half require removal of personnel records at some point in the future.¹³⁹ There are compelling policy reasons to remove minor mistakes from records after a period of time¹⁴⁰ and evidence of wrongdoing may lose relevance or predictive

¹²⁹ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹³⁰ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹³¹ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹³² Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹³³ Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

¹³⁴ Jesani, The Importance of Employee Records and Files (Feb. 22, 2016) LinkedIn

<<https://www.linkedin.com/pulse/importance-employee-records-files-neil-jesani>> [as of XXX].

¹³⁵ Jesani, The Importance of Employee Records and Files (Feb. 22, 2016) LinkedIn

<<https://www.linkedin.com/pulse/importance-employee-records-files-neil-jesani>> [as of XXX].

¹³⁶ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1228

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹³⁷ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1228

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹³⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1218, Appendix A

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹³⁹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴⁰ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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value.¹⁴¹ For example, tardiness from five years prior likely has little to no bearing on an officer's fitness as an officer in present day.¹⁴² However, a pattern of more serious complaints over decades – even if the complaints are rarely sustained¹⁴³ – is often demonstrative of an issue that requires management's intervention.¹⁴⁴ Destruction of disciplinary records makes it more difficult for supervisors to identify officers engaged in a pattern of misconduct.¹⁴⁵

3. Civilian Oversight

Community members and advocates recognize the importance of civilian oversight of police.¹⁴⁶ Civilian review boards are common across the country.¹⁴⁷ Civilian review boards allow the community to monitor police behavior, which can empower vulnerable communities.¹⁴⁸ Such oversight builds community trust, ensures transparency, and increases citizen's willingness to report complaints against police.¹⁴⁹

Despite the growing importance of civilian review boards, unions have used the bargaining process to block or severely limit boards' ability to oversee police discipline.¹⁵⁰ Some keep civilians from having the final say in discipline.¹⁵¹ Others establish methods for disciplinary

¹⁴¹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴² Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴³ 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. Thus, civilian complaints may not be sustained. Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴⁴ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1240

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴⁶ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1232.

¹⁴⁷ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1233.

¹⁴⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁴⁹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁵⁰ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1233, 1234

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX]; see Fegley, *Police Unions and Officer Privileges* (2020) 25 *The Independent Rev.* 165, 175.

¹⁵¹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191,

1234<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

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determinations that do not leave room for civilian oversight.¹⁵² Limiting an external agency from investigating misconduct places more reliance on police departments to police themselves.¹⁵³

4. Complaint Investigations

As discussed in previous Reports, community members may file complaints against officers alleging misconduct.¹⁵⁴ Civilian complaints are a police accountability mechanism, making their collection and investigation vital.¹⁵⁵ Union contracts may also affect the investigation of civilian complaints, which in turn affects accountability. Some contracts limit investigation of anonymous complaints;¹⁵⁶ others may disqualify investigations after a set period of time.¹⁵⁷ Law enforcement departments have a finite number of resources at their disposal, so there is value in discouraging frivolous complaints and avoiding endless disciplinary investigations.¹⁵⁸

However, provisions limiting civilian complaints have consequences law enforcement agencies should wish to avoid. Bans on anonymous complaints may discourage some individuals from filing complaints, especially if they were victims of police brutality and fear retribution.¹⁵⁹ This would discourage some of the most vulnerable people from seeking redress for officer misconduct and prevent management from discovering patterns of egregious conduct.¹⁶⁰ The Board encourages anonymous complaints, so a union contract that limits the acceptance and investigation of these complaints hampers accountability. While time periods for investigations

¹⁵² Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁵³ Fegley, *Police Unions and Officer Privileges* (2020) 25 *The Independent Rev.* 165, 175.

¹⁵⁴ Racial and Identity Profiling Advisory Board, Annual Report (2019) p. 34

<<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2019.pdf>> [as of XXX]; Racial and Identity Profiling Advisory Board, Annual Report (2020), p. 58-80 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of XXX].

¹⁵⁵ For a more in-depth discussion on civilian complaints, see Racial and Identity Profiling Advisory Board, Annual Report (2020), p. 58-80 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of XXX].

¹⁵⁶ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1235-36

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁵⁷ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1235-36

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX]; see Fegley, *Police Unions and Officer Privileges* (2020) 25 *The Independent Rev.* 165, 177.

¹⁵⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1236

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁵⁹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶⁰ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

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may have their benefits, some particularly egregious incidents of police misconduct may not come to light until years after they have occurred.¹⁶¹

5. Arbitration

Collective bargaining agreements also often contain arbitration clauses to adjudicate discipline appeals.¹⁶² Arbitration is a legally binding form of dispute resolution held outside of formal courts.¹⁶³ It is a common dispute mechanism in public labor.¹⁶⁴ Mandatory arbitration may be beneficial in cases of intractable contractual disputes between police unions and management.¹⁶⁵ However, arbitration in disciplinary appeals raises accountability concerns.¹⁶⁶ It almost exclusively reduces disciplinary penalties for officers guilty of misconduct.¹⁶⁷ It also allows for third parties who may not be from the community to make final disciplinary decisions that overturn police supervisors' decisions or oppose civilian oversight entities.¹⁶⁸ Arbitrators can reinstate fired officers, sometimes with back pay.¹⁶⁹ Police chiefs have claimed to be undermined when arbitrators return officers to duty that have multiple incidents of misconduct.¹⁷⁰ The tendency for arbitrators to side with officers is likely, because police officers and unions often have some level of influence over the selection of arbitrators.¹⁷¹ Even when arbitrators side with

¹⁶¹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶² Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶³ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194

<<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX].

¹⁶⁴ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶⁶ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶⁷ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1239

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

¹⁶⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1239; Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

¹⁶⁹ Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

¹⁷⁰ Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

¹⁷¹ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610)

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police supervisors, their imposition of sanctions may be limited.¹⁷² For example, one memorandum of understanding between a California city and police unions did not specify a limit to the amount an arbitrator may reduce discipline, but imposed limits on how much an arbitrator may increase discipline.¹⁷³

As discussed in this section, law enforcement collective bargaining agreements often contain provisions that directly address discipline and misconduct investigation. Because of this, collective bargaining agreements may significantly affect an agency’s ability to investigate and discipline officers, which are at the heart of police accountability.

C. Unions and Police Management

Given the role police chiefs play as managers of police departments, they must engage with the unions that represent their employees. The primary relationship between the police union and police management generally is limited to collective bargaining, grievances, and arbitration.¹⁷⁴ Police managers often characterize relationships with the union as their most stressful role, while unions frequently characterize the management of their organizations as “impossible to work with.”¹⁷⁵ This may be partly due to the difference in priorities of chiefs and unions. Police unions tend to concentrate on wages, benefits, and working conditions; police management tends to concentrate on control and discipline issues.¹⁷⁶ The Office of Community Oriented Policing Services (COPS) has stated “[r]arely do police unions and police management have a shared vision of the type of department they desire. None seem to have a shared vision of how to make

¹⁷² Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX].

¹⁷³ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191).

¹⁷⁴ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁷⁵ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xix <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁷⁶ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

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the community safer.”¹⁷⁷ Moreover,[t]here have been no methods developed to encourage police unions and police management to work together to make the reduction of crime a part of their relationship.”¹⁷⁸

The complex relationship between unions and police chiefs may also be due to the inherent politics of union leaders’ election to office. To remain in a leadership position, officers need to believe that union leaders are effective, which historically meant a union leader becomes critical of management.¹⁷⁹ Police managers who understand that are not as likely to personalize the conflict.¹⁸⁰ Relatedly, unions risk taking blame for a potentially unpopular police agency policy if they participate in the development of a program or policy in response to issues like racial profiling data collection or implementation of a civilian board.¹⁸¹ Unions may perceive themselves caught between a duty to represent its membership (in both employee rights and economic benefits) and a desire to foster progressive law enforcement.¹⁸² Management and

¹⁷⁷ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁷⁸ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁷⁹ See Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX]. According to the U.S. Department of Justice’s Office of Community Oriented Policing Services, although union leaders do not intend to be destructive or undermine positive working relationships, they must maintain some level of strain to remain in office. If there are no issues with management, union leaders may find themselves no longer needed. *Ibid.*; see Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101 (“[R]egardless of whether a particular issue is subject to negotiations under the local contract, a police chief is ever-mindful of the possibility of a challenge to any new measure – either in the form of a threatened or actual grievance or simply passive resistance. Even a blatantly ludicrous claim by the union that a change is subject to negotiations can stall implementation until the matter is resolved.”)

¹⁸⁰ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁸¹ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xxiv <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁸² Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].xxiv. For example, “[i]mmediately granting management the right to impose flexible scheduling for community resource officers may initially appear to simply be ‘the right thing to do.’ But is such a concession a

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unions can work together to better the agency and community served by the agency.¹⁸³ Management and unions are not precluded from cooperative and productive relationships, but there are limits to the cooperation.¹⁸⁴ A union's healthy skepticism could work to better the agency.¹⁸⁵

Additionally, the composition of the unit has a significant impact on police management.¹⁸⁶ When first line supervisors or middle managers are part of the collective bargaining unit, the relationship to rank-and file officers is complicated, and some would argue compromised.¹⁸⁷ Common sense suggests that it is difficult for a supervisor to review the performance of a subordinate, and discipline them if necessary, when they are both members of a labor organization that may file a grievance against the supervisor and the department.¹⁸⁸ Common sense also suggests it would be difficult to bargain on behalf of both supervisors and rank-and-file officers at the same time, since each party's interest may oppose the other's interests.

D. Unions Affect Police Subculture

Unions are one influence in the multidimensional police subculture.¹⁸⁹ Culture varies between departments, as does the relative influence of a particular union.¹⁹⁰ Subculture affects policing,

problem of opening Pandora's box? How soon will it be before detectives are required to work mornings, go home for 4 hours, and then come back for the evening without additional compensation? How long will it be before flex-hours become extra hours? Should a labor organization support the creation of a hybrid 'patrol problem solver/investigator' role which is an assignment, not a promotion, and not even an extra pay specialist role?" *Ibid*.

¹⁸³ Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁸⁴ Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁸⁵ Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

¹⁸⁶ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101 (hereinafter "Union Neglect")

¹⁸⁷ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101.

¹⁸⁸ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101.

¹⁸⁹ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103; McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

¹⁹⁰ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103

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including overall management practices, accountability and discipline, police officer interactions with citizens, and local politics.¹⁹¹ Unions play some role in shaping the public posture of the rank-and-file. In some departments, union leaders may be publicly antagonistic to management initiatives or reform demands voiced by community groups.¹⁹² This encourages solidarity among officers while discouraging alternative points of view and, thereby, suppresses receptivity to innovation.¹⁹³

E. Conclusion

A union is meant to advocate for and protect its members. Police unions do well in advocating for their members, especially for salary and related compensatory benefits. In advocating, police unions affect police accountability through a variety of mechanisms: lobbying and application of the Peace Officer Bill of Rights; negotiations and implementation of collective bargaining agreements; their relationship with police management; and their influence on police subculture. When lobbying or negotiating, unions often engage with municipalities. Thus, municipalities also play a significant role.

III. Municipality's Role

Public bodies representing cities and counties negotiate with unions to reach collective bargaining agreements.¹⁹⁴ Employers—in the case of police cities, counties, or other municipalities—are required to meet and confer with union representatives if they wish to make changes to wages, hours, or other terms and conditions of employment.¹⁹⁵ The public, especially those marginalized by policing practices, often do not engage in negotiations, so the public relies on its elected officials to represent its interests in negotiations.¹⁹⁶ Local governments are

¹⁹¹ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103; see Disalvo, *The Trouble With Police Unions* (2020) 55 National Affairs <<https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>> [as of XXX] (“[Unions] facilitate a culture that harms police work and community relations while frustrating reform efforts. Union culture, it is said, encourages good officers to defend bad officers by maintaining the ‘blue wall of silence.’”).

¹⁹² Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103.

¹⁹³ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103.

¹⁹⁴ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 419.

¹⁹⁵ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 432.

¹⁹⁶ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74

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obligated to protect the rights and interests of their constituents.¹⁹⁷ Thus, political leaders need to balance the interests of various stakeholders as they bargain.¹⁹⁸ Their goal during negotiations should be to enhance accountability.¹⁹⁹

As a party to bargaining, municipalities have the ability to place bargaining chips on the table.²⁰⁰ Municipalities should do so bearing in mind the various stakeholders municipalities represent and the long-term consequences of placing those chips on the table. Some scholars claim that union contracts may be subject to regulatory capture, which occurs when the regulatory entity responsible for protecting the public interest instead advances the interest of the entity it is supposed to be regulating.²⁰¹ Police unions are politically powerful.²⁰² Budget conscious cities may make management concessions, such as changes in discipline policies and procedures, that will greatly affect accountability in the long run.²⁰³ Municipalities are less likely to bear the costs of concessions in discipline procedure in the immediate future, which makes offering those concessions over increased salaries appealing.²⁰⁴ Those affected by police misconduct are often

SMU L.Rev. 419, 422.

¹⁹⁷ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 434-35 (citing Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 177-78 (2019)).

¹⁹⁸ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435.

¹⁹⁹ Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 7 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX]. Reformers should remove obstacles in the process of receiving civilian complaints, investigating them, rendering a decision, determining penalties, recording the data and remove policies that undermine the authority of police chiefs to hold officers responsible. *Ibid.*

²⁰⁰ See Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435 (finding that city leaders agree to wage and benefit concessions in exchange for discipline policies and procedures). Setting the policies and procedures of the police department is a managerial function of a local government. Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435 (citing Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 177-78 (2019)).

²⁰¹ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX]; Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435.

²⁰² Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

²⁰³ See Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX]; Chase and Heinzmann, *Cops traded away pay for protection in police contracts* (May 20, 2016) Chicago Tribune <<https://www.chicagotribune.com/news/breaking/ct-chicago-police-contracts-fop-20160520-story.html>> [as of XXXXX].

²⁰⁴ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

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part of a relatively small and politically disadvantaged minority of municipal voters,²⁰⁵ meaning they may not be able to advocate against such changes and concessions.

Negotiating parties should exercise great caution in mixing economic demands with those pertaining to working conditions.²⁰⁶ “Unions should be able to trust police management to do no harm in their efforts to win better economic packages. Police managers should be able to trust union officials to do no harm regarding the ability of management to effectively allocate and deploy scarce resources to control crime. If that practice already exists as standard operating procedure, then far fewer issues will arise with regard to community policing, CompStat implementation,²⁰⁷ or other change efforts.”²⁰⁸

IV. Union Support and Input from the Rank-and-File to Advance Reform

To accomplish police reform, reform advocates need support from police unions.²⁰⁹ According to scholars Catherine Fisk and L. Song Richardson, police unions theoretically could be agents of reform in at least two ways.²¹⁰ “First, as representatives of the line officers who have daily contact with the community whom the police are supposed to protect and serve, unions could

²⁰⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

<<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

²⁰⁶ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xxii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

²⁰⁷ Compstat is a performance management system that is used to reduce crime and achieve other police department goals. Compstat emphasizes information-sharing, responsibility and accountability, and improving effectiveness. Bureau of Justice Assistance, *Compstat: Its Origins, Evolution, and Future Law Enforcement Agencies*, p. 2 <<https://bj.a.ojp.gov/sites/g/files/xyckuh186/files/Publications/PERF-Compstat.pdf>> [as of XXX].

²⁰⁸ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xxii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

²⁰⁹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778

<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX]; Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, (2020) p. 12 (citing Rad, (2018) *Police institutions and police abuse: Evidence from the US*. Master’s thesis, University of Oxford, Oxford and McCormick, *Our uneasiness with police unions: Power and voice for the powerful* (2015) Louis U. Pub. L.Rev. 35, 47); see Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103 (“One aspect of the neglect of police unions has been the failure of accountability advocates to involve union leaders in discussions of reform measures.”)

²¹⁰ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 768

<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

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help improve the relationship between police and citizens, and help ensure that force is used wisely and prudently, and that arrests are made and citations issued only when doing so actually improves life for the community. Second, unions could become intermediaries to convey the concerns of line personnel to management in a way that will improve policing.”²¹¹

A. Representatives of Line Officers

Unions can be effective in changing officer behavior. Police officers are highly responsive to internal directives, even when they do not carry specific incentive shifts or higher negative consequences.²¹² Police union directives may strongly influence officer conduct by increasing self-monitoring among officers.²¹³ According to a study by Bocar Ba and Ramon Rivera, a union directive changed officer behavior and resulted in fewer constitutional violation allegations without increasing crime or decreasing arrests.²¹⁴ Thus, unions may help guide officer behavior to improve community policing.

Since unions can affect police culture, they may help develop and implement solutions towards reforming police culture and changing officer behavior.²¹⁵ For example, unions can help connect officers with the communities they police in.²¹⁶ Unions may improve relations with racially and ethnically diverse communities with mindful and measured defenses of officers accused of misconduct, especially excessive use of force, and by supporting policies designed to foster better community-police relations, particularly with racial profiling.²¹⁷ Unions may improve relations with civil rights leaders by supporting, or at a minimum remaining neutral to, civilian

²¹¹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 768

<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²¹² Ba and Rivera, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (2019) p. 31 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship> [as of XXX]; see Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, (2020) p. 7 (“[B]argaining over police protections and compensation may shift officers’ incentives or disincentivize for improper behavior due to a high-pressure political environment that pushes for lower crime rates.”)

²¹³ Ba and Rivera, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (2019) p. 7 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship> [as of XXX].

²¹⁴ Ba and Rivera, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (2019) p. 7 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship> [as of XXX].

²¹⁵ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

²¹⁶ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

²¹⁷ See Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 105-06 (finding unions offend racial and ethnic minorities when unions aggressively defend officers accused of misconduct, especially excessive use of force, and unions often oppose policy changes designed to foster better community-police relations, particularly with racial profiling).

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review boards.²¹⁸ Unions may promote transparency by softening rigid stances against the release of disciplinary records. “Cultivating a true spirit of mutual helpfulness and fraternalism with the community could easily encompass real connections, breaking down us versus them barriers.”²¹⁹ Thus, unions could be powerful partners for reform.

Unions could contribute to accountability. They may protect rank-and-file officers from unfair decisions and enable officers to exercise discretion and judgment, assure fairness in punishing mistakes, and enable officers to make legitimate complaints.²²⁰ Unions may prevent blame from being placed on a single officer when blame for mistreatment of citizens belongs elsewhere.²²¹ They could also work to counter insistence on dangerous policies.²²²

B. Intermediaries Between Management and Line Officers

Line officers play a critical role in the implementation of law enforcement policies and any issues that may arise with the policies, since they operate in the community and have a front row seat to how effective or detrimental a policy may be. Policies may not work as intended, even when officers are doing their best to abide by them.²²³ Accordingly, management and policymakers should consider their opinions and points of view. Including the rank-and-file in the discussion of reform may uncover areas of improvement that activists and civilians are unaware of, as well as give police a personal stake in public safety.²²⁴ If officers do not have a voice, management may not find out about the problems with the policies.²²⁵ Studies of the successes and failures of community policing models have found that participatory management

²¹⁸ See Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 105-06 (finding unions aggressively oppose civilian review boards, which have been a demand from civil rights advocates).

²¹⁹ McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 62 (citing Int’l Ass’n of Chiefs of Police, Iacp National Policy Summit On Community Police Relations: Advancing A Culture of Cohesion and Community Trust 11 (2015)).

²²⁰ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²¹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²² Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²³ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²⁴ Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, (2020) p. 12.

²²⁵ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794
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style correlates with more positive officer attitudes about community policing.²²⁶ “Moreover, it is likely that the insights and creativity of rank-and file officers can revolutionize policing. ‘[L]ine personnel are a powerful and important resource . . . to improve policing [and] the relationship between police and citizens.’”²²⁷

Additionally, officers having a voice is important, because it expresses to officers that their views are significant enough to be considered and avoids officer frustration and overt undermining of policies.²²⁸ If officers do not have a voice or have an illusory voice, this demonstrates their status below managers and deprives them of interactions with power holders that can favorably influence officers’ attitudes.²²⁹ Research about power reveals that certain exercises of authority, like failing to provide a voice, can breed deep resentment among lower-level employees, resulting in resistance to employer-mandated policies and procedures.²³⁰ For example, in one department, officers resented a new policy created without their input.²³¹ While they did not overtly resist the policy, some quietly and covertly undermined the policy on the street.²³² Conversely, in another jurisdiction that included officer input in a new policy, officers worked toward improving it despite questioning the substance of the policy.²³³ Because officers operate primarily out of sight of management, they have many opportunities to covertly resist reform-oriented policies.²³⁴ When resistance is subtle rather than overt, management may not be aware that the policy is not being implemented.²³⁵

Likewise, policymakers should not disregard power dynamics in a department and their effect on line officers.²³⁶ Exercises of authority within departments can influence whether rank-and-file

²²⁶ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 771
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²⁷ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 771 (quoting Kelling and Kliesmet, *Police Unions, Police Culture, and Police Abuse of Force*, in *Police Violence* 191, 210).

²²⁸ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²²⁹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁰ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³¹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³² Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³³ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 774
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁴ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁵ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775
<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁶ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775
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officers view reforms as legitimate and entitled to deference or whether officers attempt to undermine and resist them.²³⁷ When policymakers work solely with the top command levels of police departments, they might unintentionally exacerbate rank-and-file frustrations with existing power arrangements, leading to resistance to any new policies.²³⁸

V. Recommendations

A. Transparency in Negotiations

As discussed in section XXXX, collective bargaining often occurs outside the public's view. This means those most affected by police practices cannot partake in conversations that will affect them. As a remedy, a group of law school professors and legal scholars propose that a public entity must conduct a public hearing on its bargaining proposals with sufficient notice and opportunity for public comment before the entity commences negotiations with a law enforcement union.²³⁹ They argue that the laws that require disclosure of the parties' opening bargaining proposals under the law for other state employees should apply also to proposals made in negotiations for law enforcement contracts under the Meyers-Milias-Brown Act.²⁴⁰ "After a collective bargaining agreement or memorandum of understanding with the law enforcement union is negotiated, the public entity must conduct a public hearing, with sufficient notice and opportunity for public comment, before the agreement is ratified These reforms will enable the public to know the possible or likely terms of a collective bargaining agreement before such an agreement is negotiated or signed. This information will aid the public in holding elected and appointed officials accountable for the police contracts they negotiate. It will also provide the public the opportunity to ensure that the contracts serve the common good."²⁴¹

B. Separate Unions

As mentioned in section XXX, scholars are concerned by unions that simultaneously represent officers and their managers. When a small number of managers and the larger number of officers they supervise are in the same bargaining unit, it can be difficult for a higher-ranking officer to

²³⁷ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775<https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁸ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775 <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship> [as of XXX].

²³⁹ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴⁰ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴¹ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

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effectively discipline a lower-ranking officer.²⁴² To eliminate conflicts of interest, Fisk and her colleagues also propose that law enforcement managers, officers above the rank of sergeant, be in separate bargaining units than officers at the rank of sergeant or below.²⁴³ Thus, managers would have different representatives for bargaining, grievances, or civil service appeals.²⁴⁴ Fisk and her colleagues argue this will allow disciplinary processes to work unimpeded.²⁴⁵

Qualified Immunity

I. Current State of Law

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”²⁴⁶ Qualified immunity shields law enforcement officers “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.”²⁴⁷ The doctrine of qualified immunity as applied to 42 United States Code section 1983 is entirely a creation of the United States Supreme Court and not created by legislators.²⁴⁸ “The protection of qualified immunity applies regardless of whether the government official's error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’”²⁴⁹

The Supreme Court of the United States applied the doctrine of qualified immunity to a cause of action under 42 United States Code section 1983 for the first time in 1967.²⁵⁰ Courts determine whether an officer is entitled to qualified immunity analysis through a three-part test: (1) whether the defendant was performing discretionary functions; (2) if so, whether the law was clearly

²⁴² Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴³ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴⁴ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴⁵ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

²⁴⁶ *Pearson v. Callahan* (2009) 555 U.S. 223, 231.

²⁴⁷ *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 818.

²⁴⁸ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242.

²⁴⁹ *Pearson v. Callahan* (2009) 555 U.S. 223, 231 (quoting *Groh v. Ramirez* (2004) 540 U.S. 551, 567).

²⁵⁰ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1241.

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established; and (3) if so, whether there were extraordinary standards that excuse the officials' ignorance of the law.²⁵¹ Although the individual parts build upon one another, courts seldom give much consideration to either the first or third points.²⁵²

A. Discretionary Function

Officers' duties may be either ministerial or discretionary. A ministerial duty is one that requires an officer to act without using his or her own judgement; it is a legal obligation that must be fulfilled.²⁵³ For example, an officer directing traffic has a ministerial duty to follow established traffic laws.²⁵⁴ The officer does not have the discretion to make their own decisions about how to direct traffic but relies on the laws to inform their direction.²⁵⁵ A duty is discretionary if it requires an officer to exercise their judgement to perform the duty.²⁵⁶ Qualified immunity does not protect an officer from liability if they were performing a ministerial duty, but it may if they were performing a discretionary duty.

The challenge is how to distinguish discretionary functions from ministerial functions.²⁵⁷ The Supreme Court stated that "judgements surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions."²⁵⁸ The Supreme Court has provided little guidance beyond that, leaving lower courts to disagree about what, if any, functions, should be classified as ministerial functions.²⁵⁹ Lower courts generally avoid the

²⁵¹ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 6-7 (citing *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818)

<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁵² Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 7 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]

²⁵³ LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>> [as of XXX].

²⁵⁴ LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>> [as of XXX]

²⁵⁵ LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>.>

²⁵⁶ <https://definitions.uslegal.com/d/discretionary-duty/>> [as of XXX].

²⁵⁷ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 8 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁵⁸ *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 816.

²⁵⁹ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 8<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

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question of discretionary functions in a qualified immunity analysis, most courts conclude that the officer was performing a discretionary function.²⁶⁰

B. Clearly Established Law

Most qualified immunity analyses depend on the second question: is the law clearly established?²⁶¹ If an officer violates a clearly established law, qualified immunity does not protect him or her from suit.²⁶² The Court believes “a reasonably competent public official should know the law governing his conduct.”²⁶³ “[C]learly established” means a right is sufficiently clear to a reasonable officer that he would understand that what he is doing violates that right.²⁶⁴ In other words, an officer is not liable for his “reasonable mistakes.”²⁶⁵ Determining whether a right is clearly established is a case-by-case analysis.²⁶⁶ Under the Court’s current standard, a court should only deny a defendant qualified immunity if every government official in the defendant’s position would know the conduct was illegal.²⁶⁷ In other words, a court has to conclude there is a 50.1% chance a reasonable officer would know the conduct was unconstitutional.²⁶⁸

“[I]t has become increasingly difficult for courts to conclude that the law is clearly established.”²⁶⁹ This is especially true for cases involving the Fourth Amendment,²⁷⁰ which

²⁶⁰ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 8, 11 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]

²⁶¹ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 13 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁶² See *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

²⁶³ *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

²⁶⁴ *Saucier v. Katz* (2001) 533 U.S. 194, 195 (citing *Anderson v. Creighton* (1987) 483 U.S. 635, 640).

²⁶⁵ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242 (citing *Saucier v. Katz* (2001) 533 U.S. 194, 205).

²⁶⁶ *Saucier v. Katz* (2001) 533 U.S. 194, 194 (“[The clearly established] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.”).

²⁶⁷ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁶⁸ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁶⁹ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

²⁷⁰ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

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protects citizens from unreasonable searches and seizure by the police.²⁷¹ In excessive force cases, the Supreme Court notes that the “‘the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”²⁷² The Supreme Court describes the tension of qualified immunity and probable cause, the standard that applies to law enforcement’s searches and seizures of individuals and property, as follows:

Probable cause turns on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules. It is incapable of precise definition or quantification into percentages. Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in the precise situation encountered. Thus, we have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment . . . [A] body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.²⁷³

This standard means that officers would need to be well versed in case law. However, officers are not well versed in case law.²⁷⁴ A study that examined officers’ familiarity with case law found that nine of the ten departments reported that they provided federal judicial decisions to their police officials, but only four named decisions rendered within the last ten years.²⁷⁵ Even if they were well-versed, they would need to recall the facts of individual cases at a time when they

²⁷¹ U.S. Const., 4th Amend.

²⁷² *Kisela v. Hughes* (2018) 138 S. Ct. 1148, 1152–53 (quoting *Mullenix v. Luna* (2015) 136 S. Ct. 305, 309 (per curium)).

²⁷³ *District of Columbia v. Wesby*, (2018) 138 S. Ct. 577, 590 (internal citations omitted). This standard means that officers would need to be well versed in case. However, officers are not well versed in case law. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 (citing Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983) p. 4-5); *see e.g., Elder v. Holloway* (1994) 510 U.S. 510, 513-14 (exemplifying how police officials may be unaware of controlling appellate decisions). A study that examined officers’ familiarity with case law found that nine of the ten departments reported that they provided federal judicial decisions to their police officials, but only four named decisions rendered within the last ten years. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 28 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]; *see Schwartz, Qualified Immunity’s Boldest Lie* (2015) 88 U. Chicago L.R. 605, 649-64.

²⁷⁴ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 (citing Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983) p. 4-5); *see, e.g., Elder v. Holloway*, 510 U.S. 510, 513-14 (1994) (exemplifying how police officials may be unaware of controlling appellate decisions).

²⁷⁵ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 28; *see also Schwartz, Qualified Immunity’s Boldest Lie* (2015) 88 U. Chicago L.R. 605, 649-64.

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may need to make very quick decisions.²⁷⁶ Thus, it is not practical to have officers know the details of case law or think through legal arguments when making an arrest.²⁷⁷ This means the clearly established prong is not satisfied and qualified immunity often applies. Thus, officers are shielded from lawsuits making accountability difficult.

C. Reasonable Officials, Reasonable Reliance and Extraordinary Circumstances

If the officer “claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard” qualified immunity applies.²⁷⁸ Courts’ overall aim is to determine whether it was objectively reasonable for an officer to violate the law under the circumstances.²⁷⁹ Typically, when officers claim “extraordinary circumstances” they argue they relied upon the advice of counsel or some superior official.²⁸⁰

II. Balancing State vs. Individual Citizen Interests

Qualified immunity may simultaneously affect the public’s interests and individual citizens’ interests by affecting police accountability. In discussing the effects of qualified immunity, financial liability and lawsuits are often discussed. Whether an officer is liable may affect his behavior by incentivizing or inhibited depending on the officer and the circumstances.

²⁷⁶ See Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁷⁷ Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁷⁸ *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

²⁷⁹ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 23.

²⁸⁰ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 22; *Lucero v. Hart* (9th Cir. 1990) 915 F.2d 1367, 1371 (granting qualified immunity to defendant who relied on the advice of counsel under *Harlow*’s “clearly established” right analysis); *Dixon v. Wallowa Cnty.* (9th Cir. 2003) 336 F.3d 1013, 1019 (considering whether defendant relied on the advice of counsel when determining “whether a reasonable officer could have believed that his conduct was lawful”).

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A. Effects of Financial Liability

Qualified immunity is meant to shield officers from financial liability.²⁸¹ According to the Supreme Court, exposure to liability damages encourages officials to carry out their duty in a lawful manner and to pay their victims when they do not.²⁸² Thus, liability incentivizes officers to do their jobs appropriately, which is why immunity is qualified and not absolute. Liability discussions become contentious when discussing liability as a necessity to hold officers accountable for excessive force.²⁸³ In some instances, individuals' constitutional rights are violated and those responsible do not pay for the cost.²⁸⁴ Many municipalities indemnify their officers, meaning the city would pay for any settlement, not the officers themselves.²⁸⁵ Qualified immunity scholar Joanna Schwartz found that officers employed by eighty-one jurisdictions, including several of California's largest law enforcement agencies, virtually never contributed to settlements and judgments during the six-year study period.²⁸⁶ When municipalities pay, it means the taxpayers pay.

On the other hand, the threat of liability can also operate to inhibit officers in the proper performance of their duties. When threatened with personal liability for acts taken based on their official duties, officers may act with excess caution that may skew decisions in ways that result in officers not fulfilling their duties based on the criteria with which they should.²⁸⁷ The Supreme Court explained that an officer should not have to choose between dereliction of duty, if he does not arrest someone when there is probable cause or being forced to pay out damages in a lawsuit, if he does.²⁸⁸ Officers must make split-second decisions in stressful circumstances; without

²⁸¹ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1804; see also Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁸² *Forrester v. White* (1988) 484 U.S. 219, 223.

²⁸³ See Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁸⁴ Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885, 885

²⁸⁵ Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885, 885; Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁸⁶ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1805 (summarizing Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885); Based on correspondence with government officials in the course of her research, Schwartz concluded that law enforcement officers almost never pay for defense counsel—instead, counsel is provided by the municipality, the municipal insurer, or the union. *Ibid.*

²⁸⁷ *Forrester v. White* (1988) 484 U.S. 219, 223.

²⁸⁸ *Pierson v. Ray* (1967) 386 U.S. 547, 555.

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qualified immunity, they may be hesitant to act when the public needs it the most.²⁸⁹ Some argue that removing qualified immunity would lead to unwarranted lawsuits in which officers' split-second decisions are second guessed, which would lead to additional costs for cities and officers.²⁹⁰ Additionally, the Court fears that damages actions may "deter[] . . . able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."²⁹¹

B. Effects on Litigation

The Supreme Court has also justified qualified immunity as a protection from burdens of discovery and trial in "insubstantial" cases.²⁹² "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.'"²⁹³ Trials come with financial costs and other costs – distractions from official duties, limiting discretionary actions, and deterrence of able people from law enforcement.²⁹⁴ The public has an interest in avoiding "burdens of broad-reaching discovery," which may lead to interviews of multiple government officials, and "excessive disruption of government."²⁹⁵ In the case of law enforcement, disruptions often entail removing officers from

²⁸⁹ Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX]; International Association of Chiefs of Police, *IACP Statement on Qualified Immunity* <<https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf>> [as of XXX].

²⁹⁰ Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

²⁹¹ Schwartz, *The Case Against Qualified Immunity* (2018) 93 *Notre Dame L.Rev.* 1797, 1803; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 814 (alteration in original) (quoting *Gregoire v. Biddle* (2d Cir. 1949) 177 F.2d 579, 581). Schwartz argues that "to the extent that people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, available evidence suggests the threat of civil liability is not the cause. Instead, departments' difficulty recruiting officers has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits... Finally, assuming for the sake of argument that the threat of liability deters officers, it is far from clear that qualified immunity could mitigate those deterrent effects." Schwartz, *The Case Against Qualified Immunity* (2018) 93 *Notre Dame L.Rev.* 1797, 1813.

²⁹² *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815–17; *Pearson v. Callahan* (2009) 555 U.S. 223, 231 (holding that avoidance of "insubstantial" law suits is a "driving force" in qualified immunity's creation); see Schwartz, *The Case Against Qualified Immunity* (2018) 93 *Notre Dame L.Rev.* 1797, 1808.

²⁹³ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526 (emphasis deleted)).

²⁹⁴ See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 816.

²⁹⁵ See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 817-18.

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their public safety functions such as patrol or investigative work to speak with attorneys or testify in court.

Qualified immunity doctrine may also discourage individuals from bringing cases when their constitutional rights are violated.²⁹⁶ Based on how the law has developed, attorneys who would represent those whose rights have been violated may believe that even if attorney brought lawsuits with egregious facts, the suits may be dismissed on qualified immunities grounds.²⁹⁷ Meanwhile, attorneys representing law enforcement officers would be encouraged to use qualified immunity as a defense and immediately appeal court decisions that say qualified immunity does not apply.²⁹⁸ These dynamics increase the cost, complexity, and delay of lawsuits, which discourages attorneys, and by extension the individuals they represent, from filing the suits.²⁹⁹

III. Conclusion

Qualified immunity is an important topic in discussing police accountability. At a minimum, it requires the balance of two very important considerations: (1) a chilling effect on law enforcement action, especially when a split-second decision is required, that in turn affects public safety; and (2) deterring law enforcement behavior that violates the constitutional rights of citizens, which often arises in excessive use of force cases.

Agency Data Reporting

[content in development]

²⁹⁶ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

²⁹⁷ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818; Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX]. (“The current doctrine, as applied today, leads to hairsplitting - it is often impossible for plaintiffs to meet the burden.” “The doctrine is applied inconsistently and can greatly depend on the judge or judges involved in the case. For example, one judge has argued that “a court can almost always manufacture a factual distinction” when determining whether a previous precedent precludes an officer from getting qualified immunity.”)

²⁹⁸ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

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