Article

ROUGH DRAFT

167 UNIVERSITY OF PENNSYLVANIA LAW REVIEW __ (forthcoming 2018)

Police Disciplinary Appeals

Stephen Rushin[†]

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

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

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

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

[†] Assistant Professor of at Loyola University Chicago School of Law. Ph.D. and J.D., University of California Berkeley.

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

TABLE OF CONTENTS

INTRODUCTION

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

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

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

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

---

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

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

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

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

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

[7] *Id*.

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

[9] *Id*.

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

[18] *Id*.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

[33] *See infra* Part III.

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

I.
THE INTERNAL DISCIPLINARY PROCESS IN AMERICAN POLICE DEPARTMENTS

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

A. Police Union Contracts

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

B. Law Enforcement Officer Bills of Rights

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

---

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

[79] *Id*.

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

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

[82] MD. CODE, PUBLIC SAFETY § 3-104.

[83] *Id*.

[84] LA. REV. STAT. ANN. § 40.2531.

[85] Fl. Stat. Ann. § 112.532.

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

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

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

---

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

[87] 11 Del. Code § 9200.

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

[89] *Id*.

[90] Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. L. FORUM 213, 222 (identifying Arkansas, Arizona, California, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin as states that have LEOBRs on the books).

[91] *See, e.g.,* Eli Hager, *Blue Shield: Did you Know Police Have Their Own Bill of Rights?*, MARSHALL PROJECT (April 27, 2015), http://www.themarshallproject.com/2015/04/27/blue-shield (also noting that "As man as 11 other states are considering similar legislation, and many of the rest have written essentially the same rights and privileges into their contracts with police unions.").

[92] Levine, *supra* note 81, at 1212.

appellate procedures.[93] Instead, they tend to provide limitations on the investigation and initial adjudication of internal disciplinary matters.

C. Civil Service Statutes

Finally, the majority of states and the District of Columbia have given public employees, including police officers, with additional employment protection via civil service laws. [94] These laws emerged, in part, as an attempt to ensure that government jobs were allocated based on merit, rather than political patronage.[95] While these laws initially focused the hiring and discharge of civil servants, they now cover at least 80 percent of state and local government employees, and their focus has expanded today to include "demotions, transfers, layoffs and recalls, discharges, grievances, pay and benefit determinations, and classification of positions."[96]

Because they often apply equally to all large classes of government employees across an entire state, civil service laws operate as a "floor for police officer employment protections, which police unions can raise through collective bargaining," or law enforcement officer bills of rights.[97] It is also common for civil service statutes to establish minimum procedures for disciplinary appeals in police departments.

Outside of police union contracts, LEOBRs, and civil service statutes, departmental regulations and city ordinances also commonly

---

[93] Rushin, *supra* note 29, at 1266 (showing in app. C that no existing LEOBR appears to elaborate procedures for arbitration on appeal).

[94] For some representative examples, *see* ALA. CODE §§ 11-43-180 to 190 (2008) (establishing a civil service system for municipal law enforcement); ARIZ. REV. STAT. §§ 38-1001 to 1007 (1956) (also establishing civil service system for law enforcement officers); ARK. CODE ANN. §§ 14-51-301 to 311 (2013 & Supp. 2015) (civil service system for police and firefighters); COLO. REV. STAT. §§ 31-30-101 to 107 (2016) (civil service system for municipal law enforcement officers); D.C. Code §§ 5-101.01-5.133-21, 5-1302 to 1305 (2001 & Supp. 2016). At least a few states do not appear to have civil service systems that would cover local law enforcement officers.

[95] R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAWS 1-3 (1976). Historians have traced the origins of modern civil service statutes to the assassination of President James Garfield in 1881 by a "disappointed officer seeker" which contributed to the passage of the Pendleton Act two years later. *Id*.

[96] Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95, 101 n.32, 102 (1990).

[97] Rushin, *Police Union Contracts*, *supra* note 58, at 1208.

establish the boundaries of acceptable practices during internal investigations of police officers.[98]

II.
EXISTING RESEARCH ON DISCIPLINARY APPEALS

While some studies have shed important light on how union contracts and LEOBRs establish problematic internal disciplinary procedures, there has been little research evaluating the disciplinary appeals process used in American police departments.[99] And the limited existing research on police disciplinary appeals has been outcome oriented. That is to say, the existing research focuses on the *outcomes* of police disciplinary appeals, not the *procedures* that contributed to those outcomes. This small body of literature suggests that police disciplinary appeals frequently result in the reduction of officer punishment.

For example, Mark Iris conducted two separate empirical examinations of the effect of appellate arbitration on disciplinary outcomes in Houston and Chicago.[100] He found that in Houston between 1994 and 1998, and in Chicago between 1990 and 1993, arbitrators regularly reduced or overturned officer suspensions and firings.[101] Similarly, Tyler Adams recently conducted an important, national study of 92 police arbitrator decisions published by the Bloomberg Law's Labor and Employment Law Resource Center between 2011 and 2015.[102] He coded these arbitration decisions to identify common justifications for arbitrators overturning police discipline on appeal.[103] He found that arbitrators often cited inadequate departmental investigations, a lack of proof about the guilt of discharged officers,

---

[98] This study does not look at these local ordinances or internal departmental policies. This means that, if anything, this study underrepresents the frequency of use of each of the elements described *infra* Part IV.

[99] For example, some of the existing studies have discussed the internal investigation process, or the initial disciplinary decision-making process. All of these are important subjects for scholarly consideration. But they are distinguishable from the disciplinary appeals process. Once study, though, did code for the presence of arbitration clauses in collective bargaining agreements. *See* Rushin, *supra* note 67, at 1238-39 (showing that 115 of 178 contracts examined as part of that study appeared to permit or require binding arbitration in cases of disciplinary appeals).

[100] Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215 (1998); Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132 (2002).

[101] *Id*.

[102] Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?* 32 A.B.A. J. LAB. & EMP. L. 133 (2016).

[103] *Id*. at 133-34 ("Part III identifies the factors most significant in arbitrators' decisions overturning police discharges and notes the particular importance of officers' good character in decision reversing discharges.").

failure by investigators to adhere to procedural requirements during officer investigations, and mitigating factors in an officer's personnel file to justify appellate relief from disciplinary action.[104]

These findings are roughly consistent with a number of examinations conducted by media outlets. For example, Kimbriell Kelly, Wesley Lowery, and Steven Rich of the *Washington Post* found that, of the 1,876 officers fired for officer misconduct in the nation's largest police departments over the last several years, the disciplinary appeals process reinstated the employment of over 450 of these officers.[105] They found that the disciplinary appeals process forced the Philadelphia Police Department to rehire 62% of officers fired for misconduct during this time period.[106] Similarly, the disciplinary appeals process used by the Denver Police Department resulted in the rehiring of 68% of terminated officers.[107] And in San Antonio, the police department had to rehire an astounding 70% of officers it had fired, because of disciplinary appeals.[108] Similarly, Robert Angien and Dan Horn of the *Cincinnati Enquirer* found that between 1997 and 2001, roughly one in every four officer suspensions or terminations were reversed or reduced on appeal.[109]

Combined, the existing literature presents compelling evidence that the disciplinary appeals process may serve as a barrier to officer accountability. Nevertheless, there appears to be a critical gap in the existing literature. No academic study has comprehensively examined and described the procedural process employed in disciplinary appeals across a substantial cross-section of American police departments. More specifically, the existing literature has not provided a descriptive account of how appeals of discipline work across the nation's 18,000 police departments. How many levels of appeal are available to police officers facing disciplinary sanctions? How many police departments allow arbitrators or comparable third parties to have the final say in

---

[104] Based on these findings, Adams challenged the "myth of the untouchable officer." *Id*.

[105] Kelly, Lowery, & Rich, *supra* note 1. I discuss this study in more depth, *infra* Part IV.D.

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] Robert Angien & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to be Reduced*, CINCINNATI ENQUIRER (Oct. 21, 2001), http://enquirer.com/editions/2001/10/21/loc_police_discipline.html. Additionally, reporting out of local news outlets in Philadelphia has also exhibited concern for the ways that disciplinary appeals put problematic officers back on the streets. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILADELPHIA (Feb28, 2013), http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html.

disciplinary appeals? How do communities select the identity of an arbitrator assigned to conduct a disciplinary appeal? And do communities limit the scope of an arbitrator's authority on appeal?

The answers to these questions—that is the procedural process used to adjudicate police disciplinary appeals—likely has a significant effect on the outcome of the appeal. For example, the manner by which police departments select an arbitrator can affect the frequency by which that arbitrator will overturn disciplinary action.[110] Anecdotal evidence suggests that many communities establish a designated list of acceptable arbitrators through union contracts,[111] or employ a system whereby the police union and police supervisors "alternately strike names off [a designed] list; the last name remaining gets the assignment."[112] Such a selection process may contribute to arbitrator decisions that split the difference between supervisor and union demands, since siding too frequently with one side or the other might endanger an arbitrator's selection in future cases through an alternate strike system.[113]

The bottom line is that procedure matters. And there appears to be a descriptive gap in the literature when it comes to the procedures used to adjudicate disciplinary appeals in American police departments.

III.
METHODOLOGY

As discussed above, it is challenging to understand fully the range of disciplinary appeals used across the thousands of decentralized American police departments. To begin understanding the kinds of disciplinary appeals procedures offered to police in the United States, this Article relies on an original dataset of police union contracts collected between 2014 and 2017. [114] Consistent with other recent studies

---

[110] For example, if police supervisors unilaterally selected an arbitrator, then that arbitrator may feel pressure to approve of any punishments handed down by those supervisors. Conversely, if a police union unilaterally selected an arbitrator, then that arbitrator may feel pressure to overturn or reduce punishment against a union member.

[111] Iris found that Chicago is one of the communities that employ such a permanent panel of designated arbitrators. *See* Iris, *Police Discipline in Houston*, supra note 100, at 146.

[112] Iris identified Houston as a city that employed such an alternate strike system. *See id*.

[113] Interestingly, Iris found that the manner by which communities select arbitrators does not seem to predict the ways in which arbitrators later rule. *Id*. at 146-47 ("That the means through which arbitrators are selected in Houston and Chicago are so different yet produce such similar results."). This Article finds more evidence to bolster this anecdotal finding by Iris, as discussed *supra* Part V.

[114] Because of the long process of collecting and coding these contracts, plus the long editing and publication process, some of these contracts may not longer be active by the time this Article comes out in print. Nevertheless, this

of police policies, this dataset focuses on municipal police departments, rather than sheriff's departments, state highway patrols, or other specialized law enforcement agencies.[115] Public records requests, searches of municipal websites, searches of state repositories, and web searches resulted in the collection of police union contracts from 656 municipal agencies serving communities with over 30,000 residents. A complete list of the departments studied as part of this dataset is available in the Appendix. The dataset covers police officers in 42 states that permit police unionization.[116]

---

should not affect the overall claims from this Article. This Article merely claims that a large number of municipalities utilize common disciplinary appeals processes. There is no reason to think that there has been any substantial change over the last several years in disciplinary appeals procedures across a large number of communities. And given the size of the dataset and the overwhelming consistency among jurisdictions, there is no reason to think that this inevitable limitation has skewed the results in any significant way. It is also worth noting that the overwhelming majority of these contracts are available online through public repositories. All contracts analyzed as part of this part of the project are available for download at: https://goo.gl/ZGYjxi.

[115] *See, e.g.,* Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 423-24 (2016) (coding police body camera policies from the largest 100 municipal police departments); Rushin, *supra* note 29, at 1218-1219 (coding police union contracts from municipalities with at least 100,000 residents).

[116] This Article does not code or explore the ways that law enforcement officer bills of rights (LEOBRs) and civil service statutes affect disciplinary appeals. A reporter from the *Marshall Project* identified 14 LEOBRS: California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. *See* Eli Hager, *Blue Shield: Did You Know Police Have Their Own Bill Of Rights?*, MARSHALL PROJECT (Apr. 27, 2015, 12:06 PM), https://www.themarshallproject.org/2015/04/27/blue-shield. In addition, based on analysis by Aziz Huq and Richard McAdams, a handful of other states appear to have statutes on the books that effectively function as LEOBRs, even if they may not be labeled as such. Huq & McAdams, *supra* note 90, at 222. These include Arkansas, Arizona, Iowa, Tennessee, Oregon, and Texas. *See* AR. CODE. ANN § 14-52-303(3); AZ. STAT. § 38-1104(B)(2); IOWA CODE § 80F.1 (2007); OR. REV. STAT. § 236.360; TN. CODE ANN. § 38-8-302; TEX. LOC. GOV'T CODE ANN. § 143.123 (West 1987). In some cases, like in Texas, the more restrictive portions of the LEOBR apply to a particular class of cities based on population, or some other jurisdictional characteristic. Distinguishing between LEOBRs and civil service statutes can be difficult. Some LEOBRs are explicitly articulated separately from civil service statutes. Other times, it can be hard to distinguish between civil service statutes and LEOBRs. Texas is an example of this difficulty. Some have labeled the Texas law as a LEOBR. *See* Huq & McAdams, *supra* note 90, at 222. But this statute is not explicitly labeled as a LEOBR, but instead as a civil service protection. Nevertheless, the portion of the Texas law dealing with cities over 1.5 million residents (which currently only applies to Houston) covers many of the same topics as LEOBRs, including the regulation of officer interrogations and personnel file retention. *See* TX. LOCAL GOVT. § 143.123(f) (providing limitations

This dataset provides a relatively comprehensive understanding of the disciplinary appeals process used in a geographically and demographically diverse cross-section of American police departments. Nevertheless, it is not necessarily generalizable to all police departments, particularly those in small, non-unionized municipalities. While the majority of police officers in the United States are members of unions, there may be reasons to believe that disciplinary appeals procedures differ in unionized and non-unionized agencies. Nevertheless, given the relative ubiquity of police unionization,[117] and given the fact that disciplinary appellate procedures are generally considered appropriate topics for collective bargaining,[118] this dataset provides detailed insight into the disciplinary appellate procedures used across a large segment of unionized police departments.[119]

Before coding the dataset for this Article, I first identified relevant coding variables and definitions. To do this in a manner consistent with prior studies of police policies, I conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability.[120] Through this iterative process, I settled on a five coding variables, which I discuss in more detail in Part IV. Figure 1 summarizes the definitions employed during the coding of the dataset.

---

of disciplinary investigations). It is also worth noting that this study does not look at internal departmental policies, state civil service statues, or local city ordinances. This means that, the findings described *infra* Part IV may actually *underrepresent* the frequency of these problematic appellate procedures in communities that choose not to negotiate about appellate procedures during collective bargaining, but nonetheless provide similar protections to those identified in Figure 1 through civil service statutes, municipal ordinances, or internal departmental policies.

[117] BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), http://bjs.gov/content/pub/pdf/lpd07.pdf (finding that around two-thirds of officers are employed by departments that engage in collective bargaining).

[118] Rushin, *supra* note 29, at 1205-1207.

[119] This dataset, though, does not provide information on the disciplinary appeals procedures in non-unionized departments. In these departments, appellate procedures are generally drawn on municipal ordinances or state civil service statutes.

[120] *See, e.g.,* Fan, *supra* note 115, at 425 (describing the development of the coding book for a similar study of police body camera policies).

Figure 1, Coding Variables and Definitions

VARIABLE	DEFINITION
Appealable to Arbitration or Comparable Procedure	Police officers may appeal disciplinary action to an arbitrator, or a comparable third-party
Significant Review Authority	Arbitrator has *de novo* or comparable authority to rehear factual and/or legal determinations made by police supervisors (e.g. police chief), civilian review boards, or city officials
Control Over Selection of Arbitrator or Comparable	Police union or police officer has significant authority to select the identity of the arbitrator or third party that will hear the appeal (e.g. striking names from panel or demanding new panels)
Arbitrator or Comparable Third Party Makes Final, Binding Decision	The arbitrator or comparable third party has the final say in disciplinary decision, generally disclosing further review or judicial challenges
Levels of Appellate Review	The numerical number of levels of appellate review an officer may utilize before a punishment becomes final

Using the definitions from Figure 1, the dataset underwent two rounds of coding to determine the number of municipalities that fall into each coding category—that is, to determine whether the police union contracts provided for a disciplinary appeal procedure that was consistent with the definition listed in Figure 1. There was substantial agreement in the coding decisions rendered through each of these rounds of coding, suggesting a relatively high level of reliability.[121]

Nevertheless, in a small percentage of cases, these two rounds of coding lead to different decisions as to whether a police union contract satisfied one of the variable definitions listed in Figure 1. In such cases, the union contract underwent a third and final round of coding. Admittedly, in some of these borderline cases, reasonable observers could disagree as to whether a particular municipal policy falls into one of the definitions in Figure 1. Nevertheless, these borderline cases

[121] There was also one single coder used throughout. Thus, there is no reason for concern about the consistency of coding between multiple coders. *See, e.g., id*.

represent less than one percent of the roughly 3350 coding decisions made as part of this study.[122]

Additionally, the goal of this Article is not to analyze the disciplinary appeals procedures of any one police department. Thus, while coding such a large dataset will almost invariably introduce occasional inconsistencies, the methodology used in this Article is designed to provide a comprehensive evaluation of broad trends in disciplinary appeals procedures across a large cross-section of American police departments. A more detailed discussion of the methodology used in this Article is available in Appendix B. As the next Part explains, this coding revealed significant similarity across the disciplinary appeals procedures.

IV.
HOW POLICE DISCIPLINARY APPEALS LIMIT ACCOUNTABILITY

The overwhelming majority of police departments in the dataset employ a similar disciplinary appeals process—one that, I argue, may shield officers from reasonable accountability efforts. Figure 2 breaks down the frequency of each variable in the dataset.

Figure 2, Frequency of Police Disciplinary Appellate Procedures in Dataset of Union Contracts

VARIABLE	FREQUENCY
Appealable to Arbitration or Comparable Procedure	72.7%
Significant Review Authority	70.0%
Control Over Selection of Arbitrator or Comparable	54.3%
Arbitrator or Comparable Third Party Makes Final, Binding Decision	68.8%

In total, just under half (48.0%) of all union contracts included in this dataset provide officers with *all* of the procedural protections discussed in Figure 2—that is, they give officers the chance to appeal to an arbitrator, they give officers or unions some significant power to select the identity of the arbitrator, they provide this arbitrator with

[122] The dataset used in this Article includes around 656 police union contracts. Coding all of these sources across the 5 variables identified in Figure 1 results in around 3,280 coding decisions.

significant power to override earlier factual or legal decisions, and they make the arbitrator's decision final and binding on the police department. And around 71% of cities provide officer with at least three of these procedural protections on appeal.

The median police department in the dataset offers police officers up to four layers of appellate review in disciplinary cases. Some departments provided officers with as few as one layer of appellate review.[123] Others provided officers with as many as six or seven levels of appellate review.[124] The subparts that follow discuss other common procedures offered to police officers appealing disciplinary action.

A. *Binding Arbitration*

Approximately 73% of the police departments use a disciplinary appeals process that involves some sort of outside arbitration. This includes the overwhelming majority of the largest American cities, including Austin,[125] Boston,[126] Chicago,[127] Cincinnati,[128] Cleveland,[129]

---

[123] *See, e.g.,* CITY OF CHINO, MEMORANDUM OF UNDERSTANDING BETWEEN REPRESENTATIVES OF THE CITY OF CHINO AND THE CHINO POLICE OFFICERS ASSOCIATION, EXHIBIT A, at 3-5 (2015) (on file with author) (describing single layer of disciplinary appeals); CITY OF COLTON, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF COLTON AND THE COLTON POLICE OFFICERS ASSOCIATION 3, 5-10 (2017) (on file with author) (similarly describing how appeals of suspensions in excess of 3 days, disciplinary salary reductions, demotions, and discharges automatically proceed to the final step of the grievance procedures—arbitration; also describing how appeals of minor disciplinary action involve a single layer of appeal to a head of department or designee).

[124] *See, e.g.,* CITY OF EDMOND, AGREEMENT BETWEEN CITY OF EDMOND AND THE FRATERNAL ORDER OF POLICE LOCAL 136, at 10, 15-18 (2016) (on file with author) (providing for six layers of appellate review through the grievance procedure); CITY OF KETTERING, AGREEMENT BETWEEN CITY OF KETTERING, OHIO AND FRATERNAL ORDER OF POLICE, KETTERING LODGE NO. 92, PATROL OFFICERS 13-15 (2015) (on file with author) (allowing seven stages of appeal through the city's grievance procedures).

[125] CITY OF AUSTIN, AGREEMENT BETWEEN THE CITY OF AUSTIN AND THE AUSTIN POLICE ASSOCIATION 48 (2013) (on file with author) (establishing procedures for police to appeal disciplinary action to expedited arbitration).

[126] CITY OF BOSTON, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF BOSTON AND BOSTON POLICE PATROLMEN'S ASSOCIATION, INC. 7-10 (2007) (on file with author) (providing ability of police officers to appeal disciplinary action to binding arbitration at Step 5 of the grievance procedures).

[127] CITY OF CHICAGO, *supra* note 68, at 17, 85-85 (2012) (articulating the standard for binding arbitration on appeal).

[128] CITY OF CINCINNATI, LABOR AGREEMENT BY AND BETWEEN QUEEN CITY LODGE NO. 69 FRATERNAL ORDER OF POLICE AND THE CITY OF CINCINNATI, NON-SUPERVISORS 2, 5 (2016) (on file with author) (allowing officers to proceed directly to final arbitration on appeal in cases of suspensions of more than 5 days without pay, discharge, demotion, or termination).

Columbus,[130] Miami,[131] and Omaha,[132] as well as smaller and mid-sized cities like Billings, Montana, [133] Edison, New Jersey, [134] Flint, Michigan,[135] Green Bay, Wisconsin,[136] and Menlo Park, California.[137]

In most jurisdictions, though, police officers appealing disciplinary action do not immediately proceed to arbitration. Instead, officers generally have the ability to seek relief on appeal at various intermediary levels.[138] For example, the union contract in Midwest City,

---

[129] CITY OF CLEVELAND, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CLEVELAND AND CLEVELAND POLICE PATROLMEN'S ASSOCIATION (C.P.P.A.), NON-CIVILIAN PERSONNEL 44 (on file with author) (stating that the arbitration procedures articulated in the grievance procedure shall be "final, conclusive, and binding on the City, the Union, and the members.").

[130] CITY OF COLUMBUS, AGREEMENT BETWEEN CITY OF COLUMBUS AND FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9 41-44 (2014) (on file with author) (also allowing officers to proceed, at step five of the grievance procedure, to arbitration).

[131] CITY OF MIAMI, AGREEMENT BETWEEN CITY OF MIAMI, MIAMI, FLORIDA AND FRATERNAL ORDER OF POLICE, WALTER E. HEADLEY, JR., MIAMI LODGE NO. 20, 13-15 (2015) (2015) (on file with author) (establishing grievance procedures that permit arbitration at step 4).

[132] CITY OF OMAHA, AGREEMENT BETWEEN THE CITY OF OMAHA, NEBRASKA AND THE OMAHA POLICE OFFICERS ASSOCIATION 15-17 (2014) (on file with author) (permitting arbitration on appeal at step 3 of the grievance procedure).

[133] CITY OF BILLINGS, MONTANA, AGREEMENT BETWEEN CITY OF BILLINGS, MONTANA AND MONTANA PUBLIC EMPLOYEES ASSOCIATION, BILLINGS POLICE UNIT 6-9 (2015) (on file with author) (articulating arbitration procedure on appeal).

[134] TOWNSHIP OF EDISON, MEMORANDUM OF UNDERSTANDING BETWEEN THE TOWNSHIP OF EDISON AND POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL NO. 75, INC. 49-51 (2014) (on file with author) (articulating standards for arbitration of grievances).

[135] CITY OF FLINT, AGREEMENT BETWEEN THE CITY OF FLINT AND FLINT POLICE OFFICERS ASSOCIATION 23, 35-39 (2014) (on file with author) (allowing officers to pursue arbitration of disciplinary action).

[136] CITY OF GREEN BAY, AGREEMENT BETWEEN CITY OF GREEN BAY AND GREEN BAY PROFESSIONAL POLICE ASSOCIATION 6-7 (2016) (on file with author) (permitting binding arbitration on appeal).

[137] CITY OF MENLO PARK, MEMORANDUM OF UNDERSTANDING BETWEEN THE MENLO PARK POLICE OFFICERS' ASSOCIATION AND THE CITY OF MENLO PARK 21 (2015) (on file with author) (stating that officers can bring some disciplinary appeals to arbitration).

[138] For example, in Las Cruces, New Mexico, the union contract provides officers with the chance to first bring appeals to their immediate supervisor. *See, e.g.,* THE CITY OF LAS CRUCES, AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND FRATERNAL ORDER OF POLICE, LAS CRUCES POLICE OFFICER'S ASSOCIATION 49-51 (2017) (on file with author) (describing how, at step 1, a grievant must first discuss their objection to disciplinary action with their immediate supervisor, and then with the Chief of Police). If the officer does not receive appellate relief through this initial layer of review, the department then permits an intermediary

Oklahoma provides officers with the chance to first file an appeal with their supervisor.[139] If the employee's grievance remains unresolved after this initial step, they may next file a grievance with the Fraternal Order of Police (FOP) Grievance Committee.[140] Thereafter the FOP Grievance Committee may submit the appeal to the next highest supervisor.[141] Then, the Chief of Police has the ability to respond to the appeal, or the Chief may refer to the matter to the Labor Management Review Board.[142] If the officer fails to get relief on appeal after these initial steps, the appeal goes before the City Manager.[143] And finally, if the grievance remains unresolved after review by the City Manager, the FOP may request binding arbitration.[144] The procedures used in Midwest City, Oklahoma are consistent with those used by a large number of police departments in the dataset. After a lengthy appeals process, most officers have the opportunity to present their appeal to an arbitrator.

In the overwhelming majority of jurisdictions that employ arbitration on appeal, and in 68.8% of all jurisdictions analyzed as part of this study, the decision from this arbitration decision is final and binding on all parties. Nevertheless, some communities like Independence, Missouri[145] and Indio, California[146] do not employ binding arbitration. Instead, these communities make arbitration advisory, or permit additional review of arbitrators' decisions.

---

level of review at the level of the Chief of Police, and then the City Manager. *Id*. at 50.

[139] CITY OF MIDWEST CITY, COLLECTIVE BARGAINING AGREEMENT FOR FISCAL YEAR 2017/2018 BETWEEN THE FRATERNAL ORDER OF POLICE LODGE #127 AND THE CITY OF MIDWEST CITY 10-15 (2017) (on file with author) (laying out the city's procedures for disciplinary appeals).

[140] *Id*. at 12.

[141] *Id*.

[142] *Id*. at 13 (describing this procedure and establishing a time limit for action).

[143] *Id*. (If the Grievance of Disciplinary Appeal is still unresolved after receipt of the answer from the Chief of Police, the Grievance or Disciplinary Appeal may be submitted to the City Manager…").

[144] *Id*. ("If the Grievance or Disciplinary Appeal is unresolved after receipt of the answer from the City Manager, the FOP may request that the matter be submitted to impartial arbitration.").

[145] CITY OF INDEPENDENCE, WORKING AGREEMENT BETWEEN CITY OF INDEPENDENCE, MISSOURI POLICE DEPARTMENT & FRATERNAL ORDER OF POLICE LODGE NO. 1, at 22 (2017) (on file with author) (giving the City Manager the ability to "modify a decision of the Grievance Board or an arbitrator" when the "finding of fact and decision based thereon are clearly contrary to the overwhelming weight of the evidence … together with the legitimate inferences…").

[146] CITY OF INDIO, INDIO POLICE OFFICERS' ASSOCIATION COMPREHENSIVE MEMORANDUM OF UNDERSTANDING 44-46 (2015) (on file with author) (establishing advisory arbitration, rather than binding arbitration).

A number of scholars and media outlets have hypothesized that arbitration as an appellate mechanism may contribute to the frequent reversals of or reductions in internal disciplinary sanctions.[147] According to these hypotheses, arbitration is different from other forms of disciplinary appeals, in part because it limits community observation or participation. On this point, a number of jurisdictions in this study, like Colton, California [148] require that all arbitration proceedings are conducted in private without public observation, while other cities like Corpus Christi, Texas,[149] give officers the option to make arbitration proceedings private.

Even so, arbitration by itself may not be problematic as a tool for adjudicating disciplinary appeals. But when combined with some of the features described in the next two sections, arbitration may become a more problematic method of limiting democratic accountability in American police departments.

B. *Control Over Selection of Arbitrator*

A little over 54% of all departments in the dataset give police officers or the police union significant authority in the selection of the arbitrator that will hear a case on appeal. Major cities including Boston,[150] Chicago,[151] Detroit,[152] El Paso,[153] Fort Worth,[154] Honolulu,[155]

---

[147] *See, e.g.,* Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS L. J. 363, 365 (2016) ("And, even assuming the officer is fired for violating the Constitution or for other reasons, in many jurisdictions, the collective bargaining agreements provide for arbitration of the issue, and it is quite common for the officer to be put back on the job, leading to back pay and reinstatement.").

[148] CITY OF COLTON, *supra* note 123, at 7 ("Grievance arbitration hearings shall be private.").

[149] CITY OF CORPUS CHRISTI, AGREEMENT BETWEEN THE CITY OF CORPUS CHRISTI AND THE CORPUS CHRISTI POLICE OFFICERS' ASSOCIATION 20 (2015) (on file with author) ("All hearings shall be public unless requested by the appealing employee that the hearing shall be closed to the public. In any event, the final decision of the arbitrator shall be public, although public announcement may be reasonably delayed upon request of the parties."). It is worth noting that, even in cities that use a City Manager or other city agent to hear appellate cases, some still allow the officer to bar public observation of the proceeding. *See* CITY OF MURRIETA, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF MURRIETA AND THE MURRIETA POLICE OFFICERS ASSOCIATION 8 (2007) (on file with author)

[150] CITY OF BOSTON, *supra* note 126, at 9 ("The arbitrator shall be selected in a manner mutually agreed upon by the parties from a rotating panel of not less than three (3) and not more than five (5) arbitrators selected by mutual agreement of the parties.").

[151] CITY OF CHICAGO, *supra* note 68, at 84 (establishing panel of agreeable arbitrators between city and police union).

[152] CITY OF DETROIT, MASTER AGREEMENT BETWEEN CITY OF DETROIT AND THE DETROIT POLICE OFFICERS ASSOCIATION 11-12 (2014) (on file with

Jacksonville, [156] Las Vegas, [157] Memphis, [158] Milwaukee, [159] Minneapolis, [160] and Oakland [161] allow officers or their union representatives to have this sort of control over the identity of an arbitrator, as do smaller and medium-sized cities like Akron, Ohio,[162]

---

author) (establishing alternative striking procedure by which the union can remove potential arbitrators).

[153] CITY OF EL PASO, ARTICLES OF AGREEMENT BETWEEN CITY OF EL PASO, TEXAS AND EL PASO MUNICIPAL POLICE OFFICERS' ASSOCIATION 42 (2014) (establishing procedure for union and city to agree on panel of 5 individuals to serve terms as members of the hearing examiner panel).

[154] CITY OF FORT WORTH, MEET AND CONFER LABOR AGREEMENT BETWEEN CITY OF FORT WORTH, TEXAS AND FORT WORTH POLICE OFFICERS ASSOCIATION 23-24 (2017) (on file with author) (giving the union an equal role in selecting the identity of hearing examiners who act in a role equivalent to arbitrators for the appeal of disciplinary actions).

[155] STATE OF HAWAII, AGREEMENT BETWEEN STATE OF HAWAII, CITY AND COUNTY OF HONOLULU AND THE STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS BARGAINING UNIT 12, at 49-50 (2011) (on file with author) (providing for an alternate striking system empowering the union to remove names from panel of potential arbitrators).

[156] CITY OF JACKSONVILLE, AGREEMENT BETWEEN THE CITY OF JACKSONVILLE AND THE FRATERNAL ORDER OF POLICE, POLICE OFFICERS THROUGH SERGEANTS 21 (2011) (on file with author) (requiring mutual agreement between union and city for the appointment of an arbitrator to a rotating list).

[157] CITY OF LAS VEGAS, COLLECTIVE BARGAINING AGREEMENT BETWEEN LAS VEGAS METROPOLITAN POLICE DEPARTMENT & LAS VEGAS POLICE PROTECTIVE ASSOCIATION 19 (2016) (on file with author) (establishing procedure for union to select two of five potential arbitrators, with two additional arbitrators selected by the city, and one selected by mutual agreement).

[158] CITY OF MEMPHIS, AGREEMENT BETWEEN THE MEMPHIS POLICE ASSOCIATION AND THE CITY OF MEMPHIS, TENNESSEE 20 (2016) (on file with author) (establishing the alternate striking method for selecting an arbitrator, thereby giving union equal power as city).

[159] CITY OF MILWAUKEE, AGREEMENT BETWEEN CITY OF MILWAUKEE AND THE MILWAUKEE POLICE ASSOCIATION, LOCAL #21, I.U.P.A., AFL-CIO 12 (2013) (on file with author) (using alternate striking method for selecting arbitrator).

[160] CITY OF MINNEAPOLIS, LABOR AGREEMENT BETWEEN THE CITY OF MINNEAPOLIS AND THE POLICE OFFICERS' FEDERATION OF MINNEAPOLIS, at app. H (2017) (on file with author) (establishing alternate striking methodology for selecting arbitrators).

[161] CITY OF OAKLAND, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OAKLAND AND OAKLAND POLICE OFFICERS' ASSOCIATION 36-37 (2015) (on file with author) (also using alternate striking system for selecting arbitrators).

[162] CITY OF AKRON, AGREEMENT BETWEEN THE CITY OF AKRON AND FRATERNAL ORDER OF POLICE LODGE #7, at 8 (2016) (on file with author) (alternatively striking names from a panel of arbitrators).

Boulder, Colorado,[163] Canton, Ohio,[164] Champaign, Illinois,[165] and Fairbanks, Alaska.[166]

Most of these departments fall into two different categories. First, a handful of agencies explicitly stipulate an acceptable panel of arbitrators in their union contract. For example, in Chicago, the Fraternal Order of Police and the City of Chicago have agreed on a panel of five stipulated arbitrators in the appendix to the police union contract.[167] This means that, in cities like Chicago, the identity of the appellate arbitrators is a topic of negotiation during collective bargaining—a topic where the union can exert a significant influence.

Second, another group of agencies establish alternative striking procedures. For instance, in Corpus Christi, the union contract allows officers to appeal "any disciplinary action" to an arbitrator.[168] To select this arbitrator, the Director of Human Resources requests seven arbitrators from the National Academy of Arbitrators, or other "qualified agencies."[169] Thereafter, the police officer facing discipline and the city alternatively strike names from this panel of seven arbitrators until one name remains.[170]

In theory, these procedures for selecting the identity of an arbitrator somewhat mirror the procedures for selecting jurors in the American justice system. The voir dire process provides both the defense and the plaintiff or prosecution with a limited number of preemptory strikes, as well as an unlimited number of strikes for cause.[171] Much like the procedure described above, a court will usually

---

[163] CITY OF BOULDER, COLLECTIVE BARGAINING AGREEMENT BETWEEN CITY OF BOULDER AND BOULDER POLICE OFFICERS ASSOCIATION 13 (2016) (on file with author) (alternative strike methodology for selecting arbitrator).

[164] CITY OF CANTON, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF CANTON AND CANTON POLICE PATROLMEN'S ASSOCIATION LOCAL 98/I.U.P.A. AFL-CIO 14 (2015) (on file with author) (mutually agreed panel of arbitrator provided in union contract).

[165] CITY OF CHAMPAIGN, AGREEMENT BETWEEN ILLINOIS FOP LABOR COUNCIL AND CITY OF CHAMPAIGN PATROL AND SERGEANT 66 (2015) (on file with author) (alternative striking methodology and confidential proceeding).

[166] CITY OF FAIRBANKS, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF FAIRBANKS AND THE PUBLIC SAFETY EMPLOYEES ASSOCIATION, FAIRBANKS POLICE DEPARTMENT CHAPTER (2011) (on file with author) (alternative striking methodology from pre-agreed list of arbitrators).

[167] CITY OF CHICAGO, *supra* note 68, at 84 (describing in Appendix Q how the city and the police union have agreed on a panel of five arbitrators to be used in expedited arbitrations).

[168] CITY OF CORPUS CHRISTI, *supra* note 149, at 18.

[169] *Id*. at 19.

[170] *Id*.

[171] Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 848-853 (2015) (providing an excellent, preliminary summary of the voir dire process).

impanel the individuals that survive this striking process as the jury.[172] If this procedure is effective at impaneling impartial jurors in the American justice system, why not use a similar procedure to select an arbitrator for an appellate proceeding?

The problem with using such a procedure in internal disciplinary appeals is that it may incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases. Unlike a juror in the American justice system, arbitrators are repeat players.[173] Arbitrators must frequently survive these selection procedures in order to obtain work in the future. An arbitrator that frequently sides with either police management or officers during appellate procedures may be unlikely to survive future selection proceedings.[174] From an accountability perspective, this mindset can be highly problematic if results in arbitrators feeling compelled to frequently reduce the termination of unfit officers to mere suspensions.

C. *De Novo Review*

The majority of communities—around 70%—vest arbitrators with expansive review authority on appeal. That is, these jurisdictions effectively give arbitrators the power to re-review all relevant issues on appeal. This means that arbitration on appeal provides officers with an opportunity to re-litigate disciplinary matters with little or no deference to decisions made by police supervisors, city officials, or civilian review boards. This sort of extensive review is provided in large American cities like Anchorage,[175] the District of Columbia,[176] and Orlando,[177] as well as

---

[172] *Id*.

[173] *See generally* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-104 (1974) (distinguishing between repeat players and one shotters).

[174] *See* Iris, *Police Discipline in Houston*, supra note 100, at 146.

[175] MUNICIPALITY OF ANCHORAGE, COLLECTIVE BARGAINING AGREEMENT BETWEEN ANCHORAGE POLICE DEPARTMENT EMPLOYEES AND MUNICIPALITY OF ANCHORAGE 10-12, 16 (2015) (on file with author) (stating that management may punish officers for just cause, and then giving arbitrator wide latitude to review any apparent violation of the collective bargaining agreement on appeal).

[176] DISTRICT OF COLUMBIA, *supra* note 69, at 11 (stating that employees may appeal adverse action, defined as a fine, suspension, demotion, or termination, to arbitration; further explaining that, during this arbitration, while the arbitrator should rely on the record from the hearing below, the arbitrator may re-review any evidentiary ruling, or other evidence improperly excluded from the earlier proceeding).

[177] CITY OF ORLANDO, AGREEMENT BETWEEN CITY OF ORLANDO AND ORLANDO LODGE #25, FRATERNAL ORDER OF POLICE, INC. 2, 18-21 (2016) (on file with author) (stating that all discharges and punishments must be for just cause, and

smaller communities like Albany, New York,[178] Danville, Illinois,[179] and New Haven, Connecticut.[180]

Thus, even if the internal affairs division of a police department has presented sufficient evidence to convince members of a civilian review board to suspend or terminate an officer for conduct inconsistent with departmental regulations, most jurisdictions provide this officer with an opportunity to circumvent the decision by the civilian review board entirely, and re-litigate the matter anew before an arbitrator. For example, in New Haven, the police union contract permits officers to appeal disciplinary action to an arbitrator, who is tasked with the responsibility of conducting a "de novo hearing" in order to determine "whether said discharge or discipline was for just cause" as required by the contract.[181] The contract further clarifies that an arbitrator is "empowered to receive evidence of alleged misconduct by the employee involved, as well as any defense, denial, or other evidence controverting or concerning such allegation…."[182]

This stands in stark contrast to the limited role of appeals in the American criminal and civil justice system. As Professor Martin B. Louis observed, "[i]n America, appellate courts almost never decide cases de novo."[183] While American appellate courts generally have the authority to re-review legal determinations made at the trial level, appellate courts will typically defer to factual determinations made at the trial level.[184] Thus, the "primary function" of appellate courts is to

---

further providing an arbitrator on appeal with the power to provide any remedy necessary using a wide range of evidence).

[178] CITY OF ALBANY, NEW YORK, AGREEMENT BETWEEN THE CITY OF ALBANY, NEW YORK AND THE ALBANY POLICE OFFICERS UNION LOCAL 2841, LAW ENFORCEMENT OFFICERS UNION COUNCIL 82, AFSCME, AFL-CIO, PATROL UNIT, at 11 (2008) (on file with author) (stating that an arbitrator on appeal has the power to re-adjudicate guilt or innocence, and can re-decide this factual question based on a preponderance of evidence standard, with the burden on the employer).

[179] CITY OF DANVILLE, ILLINOIS, AN AGREEMENT BY AND BETWEEN CITY OF DANVILLE, ILLINOIS AND POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, UNIT #11, at 6, 8-9 (2015) (on file with author) (limiting management to only punishing officers for just cause, and giving arbitrator the power on appeal to re-adjudicate whether just cause existed for punishment through the grievance process).

[180] CITY OF NEW HAVEN, AGREEMENT BETWEEN THE CITY OF NEW HAVEN AND THE NEW HAVEN POLICE UNION LOCAL 530, AND COUNCIL 15, AFSCME, AFL-CIO 4 (2011) (on file with author) (providing for de novo review of appeals to determine whether there was just cause for discharge or discipline).

[181] *Id*.

[182] *Id*.

[183] Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986).

[184] Admittedly, "[t]hese nicely compartmentalized separations of law from fact and trial level functions from appellate functions belie more complex

review for legal errors made at the trial level.[185] Factual determinations are not always outside of the review authority of appellate courts. But appellate courts regularly adopt deferential standards when reviewing pure factual determinations made by a trial judge or jury.[186]

This is not to say that appeals of disciplinary actions ought to mirror appeals in our justice system. In adjudicating disciplinary actions, most police departments do not employ procedures as rigorous as the Constitution demands in both civil and criminal trials. And rarely do these disciplinary hearings employ something akin to a civil or criminal jury as a decision-maker. Thus, police officers may argue that de novo review on appeal provides an important check on unfair, arbitrary, or capricious punishments.

Nevertheless, an expansive or de novo standard of review on appeal may insulate officers from democratic accountability. It diminishes the ability of police supervisors, city officials, and civilian review boards to reform police departments. Such an expansive standard of review on appeal means that most officers will be highly incentivized to appeal any disciplinary sanction to arbitration. And given that most jurisdictions make the arbitrator's determination binding on all parties, it is the final word on certain classes of disciplinary action. This effectively means that any earlier disciplinary action taken against a police officer by a city official, police supervisor, or civilian review board is largely symbolic. The real power sits with the arbitrator on appeal.

D. *Effects of Procedure on Outcomes of Disciplinary Appeals*

Combined, it appears that a large majority of American police departments provide officers with similar procedural protections during disciplinary appeals. When layered on top of one another, these procedural protections may combine to frustrate democratic accountability efforts. Even so, it is important to recognize the limitations of these findings. This Article cannot definitively claim to show that these procedural protections help officers avoid punishment.

Despite this empirical limitation, there is a growing body of evidence to suggest that the disciplinary appeals process described in this Article may frequently impede police accountability. As discussed briefly in Part II, Kelly, Lowery, and Rich at the *Washington Post* have conducted the most comprehensive empirical analysis of the effects of

---

distinctions." So-called "ultimate facts," where a trial court applies "historical facts found" at trial to "relevant general legal principles" combine law and fact and do not fit nicely into this dichotomy. *Id*. at 994.

[185] *Id*. at 993.

[186] *Id*. at 995; *see also*, Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 (1944).

disciplinary appeals on officer termination and rehiring practices.[187] Recall that these reporters acquired data on the number of officers rehired on appeal after termination for misconduct across 36 large American law enforcement agencies.[188] They found that 450 of the 1,876 police officers fired by these agencies between 2006 and 2017 were ultimately ordered rehired on appeal, normally by arbitrators.[189] Figure 3 reproduces the data from the *Washington Post* study, showing the number of total officers fired and rehired during this time period.[190]

Figure 3, Frequency of Disciplinary Appeals Resulting in the Rehiring of Terminated Officers, 2006-2017

Department	Total Fired	Total Rehired	Percent Rehired
Atlanta Police Department	87	7	8.05%
Austin Police Department	30	4	13.33%
Boston Police Department	14	4	28.57%
Broward County, FL Sheriff's Office	64	13	20.31%
Charlotte-Mecklenburg Police Department	22	7	31.82%
Chicago Police Department	103	10	9.71%
Columbus Division of Police	23	2	8.70%
D.C. Metropolitan Police Department	86	39	45.35%
Dallas Police Department	120	32	26.67%
Denver Police Department	31	21	67.74%
Detroit Police Department	37	5	13.51%
Fort Worth Police Department	53	6	11.32%
Harris County, TX Sheriff's Office	143	29	20.28%

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

[188] *Id*.

[189] *Id*.

[190] One immediate question that emerges from an analysis of the *Washington Post* data is whether the type of appellate procedures given to officers predicts the frequency of officers being rehired on appeal. A preliminary examination suggests there is no correlation between these two phenomena. This does not, however, suggest that the types of procedures offered to an officer on appeal have no effect on appellate outcomes.

For one thing, we should not assume that police supervisors, civilian review boards, and other initial adjudicators of police discipline exercise their authority evenly across all jurisdictions. It may be that some police departments routinely seek excessive or unjustifiable punishment against officers in cases of alleged misconduct. In such cases, we would *want* officers to receive frequent relief on appeal. So for example, the fact that 70.45% of terminated police officers in San Antonio are rehired on appeal may be the result of the procedures used on appeal, or it may be because the City of San Antonio has a history of excessively seeking officer terminations when a lesser punishment is more justifiable. There is simply no way to know from the available data.

Department	Total Fired	Total Rehired	Percent Rehired
Honolulu Police Department	33	19	57.58%
Houston Police Department	107	24	22.43%
Jacksonville, FL Sheriff's Office	64	2	3.13%
Las Vegas Metropolitan Police Department	59	14	23.73%
Memphis Police Department	84	22	26.19%
Metropolitan Nashville Police Department	44	14	31.82%
Miami Police Department	28	8	28.57%
Miami-Dade Police Department	101	38	37.62%
Milwaukee Police Department	57	11	19.30%
Oklahoma City Police Department	15	6	40.00%
Orange County, CA Sheriff's Department	43	6	13.95%
Orange County, FL Sheriff's Office	28	0	0.00%
Palm Beach, FL County Sheriff's Office	31	1	3.23%
Philadelphia Police Department	71	44	61.97%
Phoenix Police Department	37	15	40.54%
Prince George's County, MD Police Department	58	1	1.72%
Riverside County, CA Sheriff's Department	109	7	6.42%
Sacramento County, CA Sheriff's Department	3	0	0.00%
San Antonio Police Department	44	31	70.45%
San Francisco Police Department	11	0	0.00%
Santa Clara County, CA Sheriff's Department	8	0	0.00%
Seattle Police Department	19	4	21.05%
Suffolk County, NY Police Department	9	4	44.44%

This data provides valuable insight into the outcomes of disciplinary appeals. It suggests that the disciplinary appeals process, as currently constructed, results in the reduction or reversal of disciplinary sanctions in a large number of police departments. Just under a quarter (24%) of all officers terminated for misconduct in large American police departments are eventually rehired because of the disciplinary appeals process. This analysis, though, only focuses on the rehiring of terminated officers. While only around 10% of terminated Chicago police officers were ordered rehired on appeal according to the data obtained by the *Washington Post*, a separate analysis by Jennifer Smith Richards of the *Chicago Tribune* and Jodi S. Cohen of *ProPublica* found that, between 2010 and 2017, the City of Chicago has reduced or reversed sanctions against 85% all police officers during the grievance appeals process.[191] So, if anything, the *Washington Post* data likely *underrepresents* the

[191] Jennifer Smith Richards & Jodi S. Cohen, *Cop Disciplinary System Undercut*, CHI. TRIB., Dec. 14, 2017, at 1.

number of officers that receive some sort of relief during disciplinary appeals.

This, though, raises a difficult normative question. How often *should* we expect police disciplinary decisions to be overturned or reduced on appeal? There is no easy answer to this question. Theoretically, appellate success ought to vary by department. In police departments that are prone to arbitrary, excessive, or unreasonable disciplinary decisions, we may want arbitrators to overturn or reduce disciplinary decisions frequently. As a normative matter, though, it seems independently problematic if the appeals process results in the systematic overturning of just decisions made by democratically accountable actors.

Unfortunately, this Article cannot prove that these procedural protections cause an unreasonable number of police disciplinary cases to be overturned or reduced on appeal. The narrow focus of this Article can only claim to build a descriptive account of the procedural process utilized during disciplinary appeals in a large cross-section of American police departments. In doing so, it shows that American police departments provide officers with a remarkably consistent package of procedural protections during disciplinary appeals. The findings from this study are certainly consistent with the hypothesis that the procedures used during disciplinary appeals may contribute to the high rate of reversals or reductions in punishments. Nevertheless, more research is needed to confirm this hypothesis.[192]

E. *Implications for Police Reform Efforts*

The findings from this Article have significant implications for the study of police reform. First, these findings suggest that arbitrators wield even more authority in internal disciplinary matters than many policing scholars have previously recognized. In fact, arbitrators are the true adjudicators of internal discipline in the majority of police departments in this Article's dataset—even in agencies that employ civilian review apparatuses designed to the increase public participation in police disciplinary matters. A recent study by Udi Ofer found that twenty-four of the nation's largest fifty police departments use civilian

[192] As a preliminary matter, it may be useful to consider the frequency that litigants receive relief on appeal in the court system. Between 2015 and 2016, only 6.1% of all cases, and 17.2% of criminal cases, before the federal circuit courts resulted in reversals or remands. Thus, is seems safe to say that, despite not being nearly as limited by the exclusionary rule, federal rules of evidence, and other procedural hurdles that can contribute to reversals in the federal system, police officers more frequently receive relief than other litigants in the American justice system.

review boards to oversee certain police disciplinary matters.[193] Commentators like Ofer generally point to civilian review boards as examples of communities empowering the public with meaningful oversight of police conduct.

But the findings from this Article suggest that some civilian review boards—even robust ones with full investigative, subpoena, and disciplinary authority—may be more symbolic in their functional importance. Ofer's study identifies Detroit as a community with one of the nation's most unique and powerful civilian review board, referred to as the Detroit Police Commission, compromised of seven members elected from each police district and four members selected by the Mayor with the approval of the City Council.[194] The Detroit Police Commission has the authority to subpoena information during investigations[195] and it has the ability to discipline officers.[196] Detroit is one of the only large cities in the United States that gives a civilian review board such extensive authority, matched only by Chicago, Milwaukee, Newark, San Francisco, and Washington, D.C.[197] It would seem that Detroit is a model of civilian control over police disciplinary investigations.

And yet, Detroit's union contract establishes an appeals process that allows arbitrators on appeal to overrule decisions made by the

---

[193] Udi Ofer, *Getting it Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1041-43 (2016). Ofer also provides an excellent discussion of the history of civilian review boards and makes some important normative recommendations on how communities could improve the structure of civilian review boards to ensure long-term stability and independence. As Ofer explains, Washington, D.C. and New York were two of the earliest adopters of civilian reviews, establishing some sort of civilian oversight boards in 1948 and 1953 respectively. In both cases, though, city officials eventually dismantled these early civilian review boards after "intense lobbying" by police unions. The concept of civilian oversight of police departments would not go mainstream until the 1960s and 1970s, when highly publicized incidents of police brutality, combined with the civil rights movement led to more widespread implementation of civilian oversight structures. *Id*. at 1040-41. Today, there are over 100 civilian review boards across the country. Samuel Walker, *The History of the Citizen oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT AGENCIES 1, 7-8 (Justina Cintron Perino ed., 2006).

[194] Ofer, *supra* note 193, at 1055 (identifying Detroit's characteristics in the appendix).

[195] *Id*. at 1043 ("[T]he only review board that has a leadership structure that is not majority nominated by the mayor and that is empowered with subpoena, disciplinary, and policy review authorities, is Detroit's").

[196] *Id*. ("[S]ome form of disciplinary authority remains relatively rare, with only six civilian review boards having it—Chicago, Washington, D.C., Detroit, Milwaukee, San Francisco, and Newark.").

[197] *Id*. at 1053-1062 (showing that all of these cities have the authority described above).

Detroit Police Commission.[198] The police union has a significant role in selecting the identity of this third-party arbitrator.[199] The arbitrator's decision is final and binding on all parties.[200] And based on the terms of the union contract, it appears that this arbitrator has de novo authority to re-examine whether just cause existed for the punishment.[201] So while the Detroit Police Commission seems to make civilians the primary adjudicators of internal discipline for police officers, this is an illusion. The ultimate power resides with an appellate arbitrator.[202] And Detroit is not unique. This same general pattern holds in other large American cities with seemingly robust civilian review boards, like Chicago[203] and Milwaukee.[204]

Second, if police disciplinary appeals frequently lead to arbitrators overturning termination decisions, this has worrisome downstream effects for police reform efforts, in part because of the U.S.

---

[198] CITY OF DETROIT, *supra* note 152, at 11-16, (establishing the right of the department to punish only for just cause; providing details on the disciplinary process; further describing the appellate process, including expedited arbitration for suspensions of more than three days in length).

[199] *Id*. at 11-12 (permitting two methods for selecting an arbitrator: an existing panel of acceptable arbitrators, or a alternative striking system whereby the union gets an say in the identity of the arbitrator as the city management).

[200] *Id*. at 13 (stating that the arbitrator's decision "shall be final and binding on the Association, all bargaining unit members, and on the Department.").

[201] *Id*. at 11-13 (appearing to provide the arbitrator the general authority to determine if any disciplinary action violates the terms of the collective bargaining agreement, which requires just cause, and seemingly giving the arbitrator wide authority to hear evidence from both sides with little deference to any decisions made by the Police Commission).

[202] To further elaborate on this point, this finding may even suggest that, in most American police departments, up-front disciplinary mechanisms like civilian review boards act more akin to internal prosecutors. They can bring charges against police officers for misconduct, but the final authority on disciplinary actions generally rests with third-party arbitrators. If true, this would upend the traditional narrative of police reform articulated by many scholars, which emphasizes the importance of departmental leadership dedicated to constitutional policing. Further, if we hope to promote constitutional policing, police departments need leadership within a police department that rigorously investigates and responds to alleged officer wrongdoing. But this will, in itself, will often be sufficient. Supervisors within a police department must then navigate a complex disciplinary appeals process that is structured to insulate officers from public accountability.

[203] CITY OF CHICAGO, *supra* note 68, at 17-18, 84-85 (laying out the ground rules of arbitrations of appeals of disciplinary suspensions, including a designated panel of arbitrators selected via the collective bargaining process, making the arbitration procedure "final and binding," and seemingly granting the arbitrator wide authority).

[204] CITY OF MILWAUKEE, *supra* note 159, at 7-14 (describing the appellate procedure, which includes "final and binding arbitration" of disciplinary actions, grants the Association significant authority to select the arbitrator, and gives the arbitrator wide, seemingly de novo authority).

Supreme Court holding in *Brady v. Maryland*. There, the Court held that prosecutors must disclose material evidence that is favorable to defense, including anything known to any member of the prosecution team.[205] As Jonathan Abel has described in detail, evidence of prior misconduct by police officers can be critical pieces of *Brady* material.[206] This is particularly true when the evidence of misconduct suggests that the officer has a history of dishonesty,[207] theft,[208] false police reports,[209] or other wrongdoing that calls into question an officer's credibility as a witness. This has forced police departments to develop *Brady* lists—databases of officers that have previously committed acts of misconduct that must be disclosed to defense counsel in criminal cases to avoid violating the *Brady* decision.[210] Officers placed on such *Brady* lists generally "cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand," because if they do, the defense counsel will have access to records of the officer's prior misconduct for impeachment purposes.[211] Abel says that such officers "would be well advised to start looking for a new profession," because they can no longer perform the basic functions of a law enforcement officer.[212]

But the findings from this Article present a different, and especially problematic possibility. Because of the disciplinary appeals process, many police departments may be unable to terminate the employment of these so-called "*Brady* cops."[213] Instead, departments may be forced to utilize limited resources employing a police officer that cannot engage in any policing function that may lead to testimony before a court. To accomplish this, many police departments have shuffled staff and reassigned re-hired officers, so as to minimize their involvement in criminal cases.[214] This can drive up the cost of public safety services, not

---

[205] 373 U.S. 83 (1963) (establishing this basic requirement on prosecutors); Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (further clarifying *Brady* to make clear that evidence known to the prosecution team must be disclosed).

[206] Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745-747 (2015) (describing this phenomenon).

[207] Fields v. State, 69 A.3d 1104, 110 (Md. 2013).

[208] United States v. Robinson, 627 F.3d 941, 946 (4th Cir. 2010).

[209] Miller v. City of Ithaca, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012).

[210] Abel, *supra* note 206, at 746.

[211] *Id*.

[212] *Id*.

[213] *Id*.

[214] *See, e.g.,* Pauline Repard, *The Secret List That Police Officers Don't Want You to See*, SAN DIEGO TRIB. (Aug. 23, 2017), http://www.sandiegouniontribune.com/news/public-safety/sd-me-brady-notebook-20170823-story.html (describing the use of *Brady* lists for officers still on the force in San Diego after serious incidents of misconduct); Craig Cheatham, Dan Monk, Joe Rosemeyer, & Brian Niesz, *Can Police Officers Still Serve After They're*

to mention limit the ability of a police chief to bring about real reform within an agency.

Third, this Article's finding bolster the hypothesis the police union contract negotiations may be susceptible to regulatory capture. In the past, I have observed that police union contract negotiations typically happen outside of public view.[215] Police unions are powerful political constituencies.[216] Communities often have little in the way of resources to satisfy union demands for higher salaries and more generous benefits.[217] And virtually all municipalities negotiate salaries, benefits, and disciplinary procedures as part of the same private negotiation.[218] Under these conditions, I have hypothesized that municipal leaders may be incentivized to offer police unions concessions on disciplinary procedures in exchange for lower officer salaries.[219] A number of anecdotal cases suggest that such trade-offs are commonplace.[220] This Article provides further evidence that collective bargaining agreements can serve as a barrier to officer accountability—this time through the elaboration of extensive appellate protections for officers found guilty of misconduct.

Caught Being Dishonest?, WCPO CINCINNATI (Oct. 31, 2017), https://www.wcpo.com/longform/i-team-investigation-can-officers-still-serve-after-theyre-caught-being-dishonest (providing data on the number of officers serving in Cincinnati after apparent dishonesty).

[215] Rushin, *Police Union Contracts*, *supra* note 29, at 1213 ("…there are thousands of decentralized police departments in the United States, and each negotiates its own collective bargaining agreements, largely outside public view.").

[216] *See, e.g.,* Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT (Apr. 28, 2015, 9:42 AM), https://theintercept.com/2015/04/28/baltimore-freddie-gray-prosecute (detailing how police unions effectively blocked various reforms in Maryland); Michael Tracey, *The Pernicious Power of the Police Lobby*, VICE (Dec. 4, 2014, 9:42 AM), http://www.vice.com/read/the-pernicious-power-of-police-unions (describing the political power of police unions).

[217] John Chase & David Heinzmann, *Cops Traded Away Pay for Protections in Police Contracts*, CHI. TRIB. (May 20, 2016, 8:36 AM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop- 20160520-story.html (describing how, in Chicago, the city traded off lower salaries for more generous disciplinary protections).

[218] Rushin, *Police Union Contracts*, *supra* note 29, at 1245 ("As currently structured, most municipalities negotiate with police unions about disciplinary procedures alongside salaries, benefits, vacation time, promotion procedures, and more.").

[219] *Id*. at 1245-46.

[220] *See, e.g.,* Chase & Heinzmann, *supra* note 217.

V.
REFORMING POLICE DISCIPLINARY APPEALS

Police need basic procedural protections against arbitrary and capricious punishment. This includes the ability to appeal disciplinary action. At the same time, these appellate procedures should not allow officers to completely circumvent democratic oversight. The disciplinary appellate procedures currently used by a large number of American police departments transfer oversight authority to arbitrators. Virtually all departments give officers multiple layers of appellate review, culminating in binding appellate arbitration. In most cases, the police union has some substantial role in selecting the identity of the arbitrator. And in most of these cases, the arbitrator is given expansive authority to re-litigate all decisions made by police supervisors, city officials, and civilian review boards.

While each of these appellate procedures may be individually defensible, they can combine to create a formidable barrier to democratic accountability in American police departments. With a lack of democratic oversight, it should come no surprise that the media has uncovered so many problematic officers rehired through such disciplinary appeals procedures. This is especially problematic since "democratic deliberation around policing is imperative," as it ensures that officers are accountable to the serve the people.[221]

Thus, this Part considers how the states and localities could reform the disciplinary appeals process in American police departments in a manner that balances officers' need for procedural protections against arbitrary punishment against the communities need for democratic accountability.

A. Democratizing Disciplinary Appeals

As I have argued elsewhere, communities should promote democratic participation and transparency in internal disciplinary matters.[222] One of the most effective ways that communities could accomplish this is by entirely eliminating arbitration of disciplinary appeals. In its place, communities could vest appellate review authority in more democratically accountable actors, like city councils, mayors, city managers, or civilian review boards. A number of communities

---

[221] Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837, 1907 (2015). As a general rule, Professor Friedman and Ponomarenko found that democratic accountability is generally lacking, often without sufficient justification in the world of policing. *Id*. at 1843-1845.

[222] Rushin, *Police Union Contracts*, *supra* note 29 (arguing in favor of more public involvement in the development of police union contracts in hopes of preventing regulatory capture).

already do this, like Fountain Valley, California[223] or Lincoln, Nebraska.[224] This may allow internal disciplinary responses by local police departments to reflect community values more accurately.

As an alternative, communities could make appellate arbitrations advisory, or at least provide an opportunity for city leaders to overturn particularly egregious decisions by arbitrators. A large number of cities provide such procedures on appeal. These include Peoria, Arizona,[225] as well as a large number of cities in California, including Buena Park,[226] Burbank,[227] Cathedral City,[228] Costa Mesa,[229] Delano,[230] Fullerton,[231]

---

[223] CITY OF FOUNTAIN VALLEY, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF FOUNTAIN VALLEY AND THE FOUNTAIN VALLEY POLICE OFFICERS' ASSOCIATION 36-37 (2014) (on file with author) (providing officers the right to appeal disciplinary action to the police chief and then the city manager; providing a limited option under municipal code for officers to challenge city manager's final decision to city council under certain exceptional circumstances).

[224] CITY OF LINCOLN, NEBRASKA, AGREEMENT BETWEEN LINCOLN POLICE UNION AND THE CITY OF LINCOLN NEBRASKA 16 (2016) (on file with author) (permitting appeal to city's Personnel Board).

[225] CITY OF PEORIA, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF PEORIA AND PEORIA POLICE OFFICER ASSOCIATION, COVERING POLICE OFFICERS UNIT 23-24 (2013) (on file with author) (providing officers with the chance to bring a disciplinary grievance before an arbitrator as the third step in the grievance process, but then allowing the police department to appeal an arbitrator's grievance to the City Manager at Step 4).

[226] CITY OF BUENA PARK, CALIFORNIA, MEMORANDUM OF UNDERSTANDING BETWEEN BUENA PARK, CALIFORNIA AND BUENA PARK POLICE ASSOCIATION 39-41, 57-59 (2016) (on file with author) (stipulating that arbitration on appeal is merely advisory).

[227] CITY OF BURBANK, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF BURBANK AND THE BURBANK POLICE OFFICERS' ASSOCIATION 54-61 (2016) (on file with author) (establishing procedures for arbitration of disciplinary appeals, and providing that "The decision of the arbitrator shall be solely advisory in nature.").

[228] CITY OF CATHEDRAL CITY, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF CATHEDRAL CITY AND CATHEDRAL CITY POLICE OFFICER'S ASSOCIATION (CPPOA) 16-20 (2016) (on file with author) (explaining the procedures for hearing officers to consider appeals by officers to disciplinary action, but stating explicitly that the hearing officer's decision is not binding; instead the "City Manager or designee mutually agreeable to the City and the employee shall review the Hearing Officer's recommendation, but shall not be bound thereby").

[229] CITY OF COSTA MESA, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF COSTA MESA AND THE REPRESENTATIVES OF THE COSTA MESA POLICE ASSOCIATION 17-24 (2014) (on file with author) (establishing arbitration procedures, but vesting final decision-making authority with the Chief Executive Officer).

[230] CITY OF DELANO, AGREEMENT BETWEEN CITY OF DELANO AND THE DELANO POLICE OFFICERS ASSOCIATION 6-8 (2017) (on file with author) (authorizing advisory arbitration of disciplinary action).

Indio,[232] Ontario,[233] Oxnard,[234] and Pasadena.[235] Officers may find this option more procedurally just, as it would give them an opportunity to make their case before a third party that is separate from city leadership. And city leaders would maintain the flexibility to depart from decisions made by an arbitrator when it appears to run counter to the public's interest.

Or, if communities still want to use binding appellate arbitration in some disciplinary cases, they could follow the model of Oceanside, California. There, the city's police union contract permits officers to appeal relatively minor disciplinary action to binding arbitration.[236] But the contract makes arbitration decisions merely advisory for serious misconduct resulting in suspensions and terminations.[237] Such a compromise would allow cities to maintain the use of arbitration so as to avoid unfair punishments in some cases, while maintaining the ability of city officials to protect the public interest in police accountability in cases of serious misconduct where the continued employment of the officer could pose a public safety risk.

Each of these options would give the public a greater role in overseeing police disciplinary decisions. And each of these options would give police and city leaders greater latitude to circumvent some of the harmful, downstream effects of disciplinary appeals procedures that currently insulate officers from punishment.

---

[231] CITY OF FULLERTON, *supra* note 45, at 44 (placing the authority to review an arbitrator's decision in the hands of the city council).

[232] CITY OF INDIO, COMPREHENSIVE MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF INDIO AND INDIO POLICE OFFICERS' ASSOCIATION (IPOA) 42-46 (2015) (on file with author) (allowing appellate arbitration, but vesting final authority in hands of city manager).

[233] CITY OF ONTARIO, MEMORANDUM OF UNDERSTANDING BETWEEN ONTARIO POLICE OFFICERS ASSOCIATION AND CITY OF ONTARIO 30 (2014) (on file with author) (making arbitration awards subject to review by city council).

[234] CITY OF OXNARD, MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OXNARD AND OXNARD PEACE OFFICERS' ASSOCIATION 22 (2016) (on file with author) (permitting advisory arbitration).

[235] CITY OF PASADENA, MEMORANDUM OF UNDERSTANDING BETWEEN PASADENA POLICE OFFICERS ASSOCIATION AND CITY OF PASADENA 41 (2017) (on file with author) (giving the Municipal Employee Relations Officer the authority to accept, modify, or reject hearing decision on appeal).

[236] CITY OF OCEANSIDE, MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF OCEANSIDE AND THE OCEANSIDE POLICE OFFICERS' ASSOCIATION 30-35 (2017) (on file with author) (stating that appeals of non-suspensions and non-termination go to binding adjudication by "third party neutral," but in other appeals, decisions by third party neutrals will be "advisory).

[237] *Id*.

B. Limiting the Scope of Appellate Review

Police may understandably object to replacing arbitration with oversight by democratic actors during the disciplinary appeals process. Theoretically, arbitrators are neutral, third parties who should not be indebted to either party during an appellate procedure. This makes an arbitrator a natural choice to settle disputes between police unions and city leadership on appeal. Indeed, this Article does not take issue with the concept of arbitration. As I have already argued, many of the procedures described in this Article are individually defensible. Instead, it is their combination that can create appellate procedures that systematically benefit officers at the expense of the community.

Thus, an alternative way that communities could improve the disciplinary appeals process is by narrowing the scope of an arbitrator's scope of review. As discussed *supra* Part IV.D, most communities allow arbitrators to re-hear cases effectively de novo. This means that they need not defer to any decisions made by civilian review boards, police leaders, or city leadership. But not all cities use this model. Some cities explicitly limit the authority of arbitration on appeal.

For example, Fullerton, California permits advisory arbitration on appeal, but bars an arbitrator from overruling or modifying punishment handed down against an officer unless the arbitrator finds the punishment to be "arbitrary, capricious, discriminatory, or otherwise unreasonable."[238] This standard of review on appeal is far more favorable to city leaders than that used in a majority of the cities in this dataset. Fullerton's standard of review is similar to that used by Bloomington, Illinois, which states that suspensions should "be upheld unless it is arbitrary, unreasonable[,] or unrelated to the needs of the service."[239] Eugene, Oregon similarly limits the authority of the arbitrator to review disciplinary matter de novo by only empowering them to determine whether the city's actions were "reasonably consistent with City and departmental guidelines."[240]

Alternatively, communities could limit arbitrators from altering punishment in cases where the facts support a finding of guilt. This is the case in Grand Rapids, Michigan, where an arbitrator on appeal can overturn a decision made by the city, but cannot reduce punishment in cases where there is evidence to support the allegation of misconduct.[241] Similarly, the policy in Ocala, Florida states that an arbitrator on appeal

---

[238] CITY OF FULLERTON, *supra* note 45, at 45.

[239] CITY OF BLOOMINGTON, ILLINOIS, AGREEMENT BETWEEN CITY OF BLOOMINGTON, ILLINOIS AND POLICE BENEVOLENT AND PROTECTIVE ASSOCIATION, Unit No. 21, at 15 (2014) (on file with author).

[240] THE CITY OF EUGENE, CONTRACT BETWEEN THE CITY OF EUGENE AND THE EUGENE POLICE EMPLOYEES' ASSOCIATION 45 (2016) (on file with author).

[241] CITY OF GRAND RAPIDS, *supra* note 44, at 6.

cannot question the city's judgment on the proper amount of punishment, provided that the department has demonstrated "good cause for discipline."[242]

By enacting similar limitations on the scope of review on appeal, state and localities could maintain the use of arbitration while preventing these appellate procedures from entirely displacing the role of police leaders, city leaders, and civilian review boards. This would represent a positive step in promoting democratic accountability in the police disciplinary appeals.

C. *Possible Drawbacks*

Police officers and unions may object to increasing democratic accountability in disciplinary appeals for several reasons. First, police officers and police unions may argue that the proposals in this Article would give police officers less procedural protections during appeal than some other public servants. Admittedly, other civil servants like fire fighters or teachers may have similar appellate protections from disciplinary action. So why should we treat police differently than other civil servants?

While understandable, this argument ignores the fact that police work is fundamentally different than the work by most public servants. For example, "unlike other public employees, police officers generally carry firearms, make investigatory stops, conduct arrests, and use lethal force when needed."[243] Officers also encounter "people when they are most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, and when they are ashamed."[244] We necessarily give police officers considerable discretion in carrying out their job. With this discretion, there is a heightened risk that officers will engage in misconduct. And unlike other fields, misconduct by police officers "can leave [a] victim dead or permanently damaged, and under the right circumstances one cop's bad call—or a group of cops' habitual [bad behavior]—can be the spark that leaves a city like Baltimore I flames."[245] Given these realities of modern American policing, it is critical to ensure that police disciplinary procedures reflect not just a

---

[242] CITY OF OCALA, FLORIDA, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF OCALA, FLORIDA AND FLORIDA STATE LODGE, FRATERNAL ORDER OF POLICE 15 (2016) (on file with author).

[243] Rushin, *Police Union Contracts*, *supra* note 29, at 1248.

[244] PRESIDENTS COMMISSION ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[245] Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html.

respect for due process, but also a respect for the opinions of the public that the police department serves.

Second, and relatedly, the removal or curtailing of arbitration provisions in police disciplinary appeals may result in significant pushback by frontline officers. Some officers may understandably argue that this would reduce job security and hurt officer morale, making police work less appealing. There is at least some empirical evidence to suggest that efforts to increase oversight and accountability among police officers can result in union opposition, reduced street-level enforcement of the law, and ultimately de-policing.[246] While this is a serious concern, it should not deter communities from establishing a disciplinary appeals process that emphasizes democratic accountability. Virtually any policing regulation can inspire some pushback from frontline officers. Nevertheless, there is reason to believe that such pushback and negative side effects are generally temporary in nature. Take, for example, the pushback from police officers during cases of federal intervention pursuant to 42 U.S.C. § 14141.[247] The Department of Justice (DOJ), mostly under Democratic presidents,[248] has used this statute to force local police departments into negotiated settlements to address patterns of unconstitutional or unlawful misconduct.[249] In many

---

[246] *See, e.g.,* Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721 (2017) (finding that the introduction of federal intervention into American police departments to reduce patterns of misconduct was associated with a statistically significant uptick in property crime rates; also noting that this uptick in crime was frontloaded in the years immediately after federal intervention); *but c.f.* Joshua Chanin & Brittany Sheats, *Depolicing as Dissent Shirking: Examining the Effects of Pattern or Practice Misconduct Reform on Police Behavior*, CRIM. JUSTICE REV. 1 (2017) (finding that federal intervention did not result in reductions in arrests across a sample of test agencies).

[247] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified as 42 U.S.C. § 14141 (2006)).

[248] Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3232 (2014) (showing in Figure 3 how the use of § 14141 has varied by presidential administration); Joshua M. Chanin, Negotiated Justice? The Legal, Administrative, and Policy Implications of "Pattern or Practice" Police Misconduct Reform 335 (July 6, 2011) (unpublished Ph.D dissertation, American University), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf (describing some structural changes during the President George W. Bush administration that contributed to changes in vigorousness of enforcement of § 14141); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 21 (2009) (attributing the weakness in the enforcement of § 14141 to lack of political commitment, particularly during the administration of President George W. Bush).

[249] *See generally* STEPHEN RUSHIN, FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS (2017) (providing a complete historical description of how the DOJ has enforced § 14141 over time, listing the departments subject to DOJ reform since the statute's passage in 1994, and making recommendations for its improvement); Ivana Dukanovic, *Reforming High-Stakes Police Departments:*

of these negotiated settlements, the DOJ has pressured police departments to improve disciplinary oversight of officers.[250] In response, surveys have found that officers frequently complained about how these new disciplinary measures caused them to be less proactive "because of [the] fear of being unfairly disciplined."[251]

Yet, empirical research has found that this sort of pushback and reduction in morale did not have any long-term, statistically significant effect on arrest or crime rates.[252] Additionally, even if the introduction of democratic accountability in disciplinary appeals does have some negative effects on officer morale, this may be a necessary cost to ensure that police departments reflect the values of their constituents. Democratic accountability is an independently important goal in policing, as demonstrated by the widespread support for community policing initiatives, even if it "may sometimes require compromise."[253]

And third, some may argue that the disciplinary appeals process in American police departments is exhaustive and undemocratic out of necessity. For example, Professor Kate Levine's important new work describes the current state of internal discipline in American police departments as "uneven, arbitrary, and entirely discretionary."[254] As evidence for this proposition, Professor Levine compares the way that two different police departments—the Chicago Police Department and the Philadelphia Police Department—reacted to officers claiming to

---

How Federal Civil Rights Will Rebuild Constitutional Policing in America, 43 HASTINGS CONST. L.Q. 911 (2016) (providing in part a summary of existing DOJ work under § 14141 and the mechanisms strengths and weaknesses); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015) (providing a summary of how the DOJ has used § 14141 over time to bring about reform in problematic police departments).

[250] Rushin, *Structural Reform Litigation in American Police Departments*, *supra* note 249, at 1378-88 (providing a summary of the various portions of these negotiated settlements, including regulations of use of force, early intervention and risk management systems, overhauls of complaint and investigation procedures, new training procedures, measures to address bias in policing, and programs emphasizing community policing).

[251] *See, e.g,* CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 19 (2009), http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf (finding that 89% of officers believed that "because of fear of being unfairly disciplined, many LAPD officers are not proactive in doing their jobs.").

[252] *See* Rushin & Edwards, *supra* note 246 (finding that, if federal intervention did result in any de-policing effect, it was mostly in terms of property crime rates, and this effect was frontloaded); Chanin & Sheats, *supra* note 246 (finding no effect of federal intervention on arrest rates).

[253] Rushin & Edwards, *supra* note 246, at 776.

[254] Kate Levine, *Discipline and Policing*, at 4 (unpublished manuscript, on file with author).

exercise their free speech rights while on duty.[255] In Chicago, two black officers received reprimands for taking a photograph with a civilian while kneeling in support of Colin Kaepernick's protest against police brutality.[256] But in Philadelphia, a white officer received no such punishment or reprimand for displaying a tattoo of an eagle symbol allegedly used by the Nazi Party along with the word "Fatherland."[257] Professor Levine cites the seemingly inconsistent treatment of these officers across two major American police departments to demonstrate the unpredictability of modern police discipline.

If we accept Professor Levine's claim, then disciplinary appeals serve a critically important role. The appeals process may protect officers from being unfairly punished, particularly when unfair punishment is politically popular or expedient. Officers may worry that increasing public involvement in disciplinary appeals will put officers at risk of being unfairly fired or disciplined, particularly in communities with bias against police officers.[258]

No doubt, police officers deserve adequate procedure protections during internal disciplinary investigations. But none of the recommendations in this Article would strip police of their due process right to appeal disciplinary action. Instead, they would merely alter the current procedures used in some police departments to ensure a heightened level of democratic engagement in this process. Officers would still have the ability to challenge arbitrary and capricious punishments and incorrect applications of internal regulations. Officers would still have the opportunity to bring such appeals before a different

---

[255] *Id*. at 3-4 (summarizing these two vignettes and explaining that they "reflect the state of internal discipline in police departments across the country").

[256] Tom Porter, *Chicago Police Officers Disiplined for Taking a Kneww in Solidarity with Colin Kaepernick*, NEWSWEEK (Sep. 26, 2017, 5:25 AM GMT), http://www.newsweek.com/chicago-police-officers-discplined-taking-knee-solidarity-colin-kaepernick-670988. The punishment happened after a civilian posted a picture of the event on Instagram. The Chicago Police Spokesman stated that the department reprimanded the officers for violating the city's policy on political speech while in uniform.

[257] John Kopp, *Photos Surface of Philly Police Officer with Nazi Tattoo*, PHILLY VOICE (Sep. 1, 2016), http://www.phillyvoice.com/photos-surface-philly-police-officer-nazi-tattoo/ (describing the public outrage to the tattoo and showing a picture of the officer "posing with fellow Nazi reenactors"); John Kopp, *Internal Affairs Investigation Clears Philly Police Officer with Apparent Nazi Tattoo*, PHILLY VOICE (January 31, 2017), http://www.phillyvoice.com/internal-affairs-investigation-clears-philly-police-officer-apparent-nazi-tattoo (describing how an Internal Affairs investigation concluded that the officer did not violate any departmental policy by having the tattoo).

[258] *See generally* HEATHER MAC DONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016) (controversially claiming that the current anti-police political environment causes police to reduce aggressiveness, resulting in effects on crime rates).

oversight body than that which levied the original disciplinary decision, ensuring that no officer could face severe punishment without multiple layers of oversight. And a number of police departments across the country already employ many of the recommendations in this Article. At minimum, this demonstrates that these procedures represent a feasible path forward.

CONCLUSION

Few stories better illustrate the importance of police disciplinary appeals than that of Florida police officer Sergeant German Bosque. An investigation by the *Miami Herald* found that, over his nineteen year career, Sergeant Bosque faced misconduct accusations for allegedly "cracking the head of a handcuffed suspect, beating juveniles, hiding drugs in his police car, stealing from suspects, defying direct orders, and lying and falsifying police reports."[259] At one point, he allegedly called in sick to take a vacation to Cancún.[260] He engaged in a series of police chases that violated departmental policy, killing four civilians in the process.[261] He has been arrested and jailed multiple times.[262] And his employer has attempted to suspend and fire him more than any other officer in the state.[263] Despite all of this, each attempt to fire Sergeant Bosque has failed, thanks in part to the disciplinary appeals process.

All police officers, including Sergeant Bosque, deserve adequate procedural protections during internal disciplinary investigations. This should to include the right to appeal disciplinary action. But these disciplinary appeals procedures should not insulate officers from basic accountability at the expense of the broader community. This is admittedly a tough balance to strike. The findings from this Article, though, suggest that some communities may be failing to strike a reasonable balance between these two competing goals.

Many communities have established appeals procedures that may hamper reform efforts, contribute to officer misconduct, and limit public oversight of police departments. Most agencies permit officers to appeal disciplinary action to binding arbitration. Many agencies allow the police union or the aggrieved officer to have a substantial role in selecting the arbitrator. And agencies often give this arbitrator expansive review authority that offers no deference to decisions made by other disciplinary

---

[259] Julie K. Brown, *The South Florida Cop Who Won't Stay Fired*, MIAMI HERALD (Sep. 8, 2014), http://www.miamiherald.com/latest-news/article1940924.html.

[260] *Id*.

[261] *Id*. (describing how he "has engaged in a rash of unauthorized police chases, including one in which four people were killed.").

[262] *Id*.

[263] *Id*. (explaining that they department has attempted to fire him 6 times).

agents, like civilian review boards, police chiefs, or city officials. Each of these procedural protections may be individually defensible. But they may combine to create a formidable barrier to democratic oversight of police officers.

Police departments need not eliminate all of these appellate protections. But curtailing some of them, or transferring additional deference and authority to democratically accountable accounts, would represent an incremental step in ensuring that police officers are accountable to the communities they serve.

APPENDIX A: AGENCIES STUDIED

City	State
Anchorage	AK
Fairbanks	AK
Juneau	AK
Little Rock	AR
Chandler	AZ
Glendale	AZ
Goodyear	AZ
Lake Havasu	AZ
Mesa	AZ
Peoria	AZ
Phoenix	AZ
Tempe	AZ
Tucson	AZ
Alameda	CA
Anaheim	CA
Antioch	CA
Arcadia	CA
Azusa	CA
Bakersfield	CA
Baldwin Park	CA
Berkeley	CA
Brea	CA
Brentwood	CA
Buena Park	CA
Burbank	CA
Carlsbad	CA
Cathedral City	CA
Ceres	CA
Chico	CA
Chino	CA
Chula Vista	CA
Citrus Heights	CA
Clovis	CA
Colton	CA
Concord	CA
Corona	CA
Costa Mesa	CA
Culver City	CA

City	State
Cypress	CA
Daly City	CA
Davis	CA
Delano	CA
Downey	CA
El Cajon	CA
El Monte	CA
Elk Grove	CA
Escondido	CA
Fairfield	CA
Folsom	CA
Fontana	CA
Fountain Valley	CA
Fremont	CA
Fresno	CA
Fullerton	CA
Garden Grove	CA
Gardena	CA
Gilroy	CA
Glendale	CA
Glendora	CA
Hanford	CA
Hawthorne	CA
Hayward	CA
Hemet	CA
Huntington Beach	CA
Huntington Park	CA
Indio	CA
Inglewood	CA
Irvine	CA
La Habra	CA
La Mesa	CA
Lincoln	CA
Livermore	CA
Lodi	CA
Long Beach	CA
Los Angeles	CA
Madera	CA

City	State
Manhattan Beach	CA
Manteca	CA
Menlo Park	CA
Merced	CA
Milpitas	CA
Modesto	CA
Monterey Park	CA
Mountain View	CA
Murrieta	CA
Napa	CA
National City	CA
Newport Beach	CA
Novato	CA
Oakland	CA
Oceanside	CA
Ontario	CA
Orange	CA
Oxnard	CA
Palm Springs	CA
Palo Alto	CA
Pasadena	CA
Petaluma	CA
Pittsburg	CA
Placentia	CA
Pleasanton	CA
Pomona	CA
Redding	CA
Redlands	CA
Redondo Beach	CA
Redwood City	CA
Rialto	CA
Richmond	CA
Riverside	CA
Rocklin	CA
Roseville	CA
Sacramento	CA
Salinas	CA
San Bernadino	CA
San Diego	CA

City	State
San Francisco	CA
San Jose	CA
San Leandro	CA
San Luis Opisbo	CA
San Mateo	CA
San Rafael	CA
San Ramon	CA
Santa Ana	CA
Santa Barbara	CA
Santa Clara	CA
Santa Cruz	CA
Santa Maria	CA
Santa Monica	CA
Santa Rosa	CA
Simi Valley	CA
South Gate	CA
South San Francisco	CA
Stockton	CA
Sunnyvale	CA
Torrance	CA
Tracy	CA
Tulare	CA
Turlock	CA
Tustin	CA
Union City	CA
Upland	CA
Vacaville	CA
Vallejo	CA
Ventura	CA
Visalia	CA
Walnut Creek	CA
Watsonville	CA
West Covina	CA
West Sacramento	CA
Westminster	CA
Whittier	CA
Woodland	CA
Yuba City	CA
Aurora	CO

City	State
Boulder	CO
Commerce City	CO
Denver	CO
Fort Collins	CO
Greeley	CO
Pueblo	CO
Thornton	CO
Bridgeport	CT
Bristol	CT
Greenwich	CT
Hartford	CT
Manchester	CT
Meriden	CT
Middletown	CT
Milford	CT
Naugatuck	CT
New Haven	CT
Norwalk	CT
Norwich	CT
Stamford	CT
Stratford	CT
Torrington	CT
Waterbury	CT
West Hartford	CT
District of Columbia	DC
Dover	DE
Newark	DE
Wilmington	DE
Aventura	FL
Boca Raton	FL
Boynton Beach	FL
Bradenton	FL
Cape Coral	FL
Clearwater	FL
Coconut Creek	FL
Coral Gables	FL
Coral Springs	FL
Davie	FL
Daytona Beach	FL

City	State
Delray Beach	FL
Doral	FL
Fort Lauderdale	FL
Fort Myers	FL
Fort Pierce	FL
Gainesville	FL
Greenacres	FL
Hallandale	FL
Hialeah	FL
Hollywood	FL
Jacksonville	FL
Jupiter	FL
Kissimmee	FL
Lakeland	FL
Largo	FL
Lauderhill	FL
Margate	FL
Melbourne	FL
Miami	FL
Miami Beach	FL
Miami Gardens	FL
Miramar	FL
North Miami	FL
North Miami Beach	FL
Ocala	FL
Ocoee	FL
Orlando	FL
Ormond Beach	FL
Oviedo	FL
Palm Bay	FL
Palm Beach Gardens	FL
Pembroke Pines	FL
Pensacola	FL
Plantation	FL
Port Orange	FL
Port St. Lucie	FL
Saint Petersburg	FL
Sarasota	FL
Sunrise	FL

City	State
Tampa	FL
Titusville	FL
West Palm Beach	FL
Honolulu	HI
Ames	IA
Ankeny	IA
Bettendorf	IA
Cedar Rapids	IA
Council Bluffs	IA
Davenport	IA
Des Moines	IA
Dubuque	IA
Iowa City	IA
Sioux City	IA
West Des Moines	IA
Boise	ID
Pocatello	ID
Addison	IL
Algonquin	IL
Arlington Heights	IL
Aurora	IL
Bartlett	IL
Belleville	IL
Berwyn	IL
Bloomington	IL
Bolingbrook	IL
Buffalo Grove	IL
Calumet City	IL
Carol Stream	IL
Carpentersville	IL
Champaign	IL
Chicago	IL
Chicago Heights	IL
Cicero	IL
Crystal Lake	IL
Danville	IL
Decatur	IL
DeKalb	IL
Des Plaines	IL

City	State
Downers Grove	IL
Elgin	IL
Elk Grove	IL
Elmhurst	IL
Evanston	IL
Galesburg	IL
Glendale Heights	IL
Glenview	IL
Gurnee	IL
Hanover Park	IL
Hoffman Estates	IL
Joliet	IL
Lombard	IL
Moline	IL
Mount Prospect	IL
Mundelein	IL
Naperville	IL
Normal	IL
North Chicago	IL
Northbrook	IL
Oak Lawn	IL
Oak Park	IL
Orlando Park	IL
Oswego	IL
Palatine	IL
Park Ridge	IL
Pekin	IL
Peoria	IL
Plainfield	IL
Rock Island	IL
Rockford	IL
Romeoville	IL
Saint Charles	IL
Schaumburg	IL
Skokie	IL
Springfield	IL
Tinley Park	IL
Urbana	IL
Waukegan	IL

City	State
Wheaton	IL
Wheeling	IL
Woodridge	IL
Carmel	IN
Evansville	IN
Fort Wayne	IN
Gary	IN
Indianapolis	IN
Lafeyette	IN
Muncie	IN
Noblesville	IN
South Bend	IN
Terre Haute	IN
Kansas City	KS
Lawrence	KS
Topeka	KS
Wichita	KS
Bowling Green	KY
Covington	KY
Lexington	KY
Louisville	KY
Alexandria	LA
Baton Rouge	LA
Boston	MA
Brockton	MA
Cambridge	MA
Chicopee	MA
Fall River	MA
Fitchburg	MA
Framingham	MA
Haverhill	MA
Lowell	MA
Medford	MA
New Bedford	MA
Newton	MA
Peabody	MA
Plymouth	MA
Revere	MA
Somerville	MA

City	State
Taunton	MA
Waltham	MA
Watertown Town	MA
Worcester	MA
Baltimore	MD
Frederick	MD
Lewiston	ME
Portland	ME
Ann Arbor	MI
Battle Creek	MI
Bay City	MI
Dearborn	MI
Detroit	MI
East Lansing	MI
Eastpointe	MI
Farmington Hills	MI
Flint	MI
Grand Rapids	MI
Jackson	MI
Kalamazoo	MI
Lansing	MI
Lincoln Park	MI
Livonia	MI
Madison Heights	MI
Midland	MI
Novi	MI
Portage	MI
Roseville	MI
Saginaw	MI
Southfield	MI
Sterling Heights	MI
Taylor	MI
Troy	MI
Warren	MI
West Bloomfield	MI
Westland	MI
Wyoming	MI
Blaine	MN
Bloomington	MN

City	State
Coon Rapids	MN
Duluth	MN
Mankato	MN
Minneapolis	MN
Moorhead	MN
Rochester	MN
Saint Cloud	MN
Saint Paul	MN
Shakopee	MN
Woodbury	MN
Blue Springs	MO
Columbia	MO
Independence	MO
Kansas City	MO
O'fallon	MO
Saint Charles	MO
Saint Joseph	MO
Saint Louis	MO
Springfield	MO
University City	MO
Billings	MT
Bozeman	MT
Butte	MT
Great Falls	MT
Helena	MT
Missoula	MT
Bellevue	NE
Grand Island	NE
Lincoln	NE
Omaha	NE
Concord	NH
Dover	NH
Manchester	NH
Nashua	NH
Rochester	NH
Atlantic City	NJ
Brick	NJ
Camden	NJ
Clifton	NJ

City	State
East Orange	NJ
Edison	NJ
Elizabeth	NJ
Fair Lawn	NJ
Fort Lee	NJ
Garfield	NJ
Hackensack	NJ
Hamilton	NJ
Hoboken	NJ
Jersey City	NJ
Kearny	NJ
Linden	NJ
Long Branch	NJ
New Brunswick	NJ
Passaic	NJ
Paterson	NJ
Perth Amboy	NJ
Plainfield	NJ
Sayreville	NJ
Trenton	NJ
Union City	NJ
Vineland	NJ
West New York	NJ
Westfield	NJ
Woodbridge	NJ
Albuquerque	NM
Hobbs	NM
Las Cruces	NM
Rio Rancho	NM
Santa Fe	NM
Henderson	NV
Las Vegas	NV
North Las Vegas	NV
Reno	NV
Sparks	NV
Albany	NY
Binghampton	NY
Buffalo	NY
Cheektowaga	NY

City	State
Cicero	NY
Freeport	NY
Hempstead	NY
Irondequoit	NY
Ithaca	NY
Jamestown	NY
Long Beach	NY
Mount Vernon	NY
New Rochelle	NY
New York	NY
Niagra Falls	NY
Oyster Bay	NY
Poughkeepsie (City)	NY
Poughkeepsie (Town)	NY
Riverhead	NY
Rochester	NY
Syracuse	NY
Tonawanda	NY
Troy	NY
Utica	NY
White Plains	NY
Yonkers	NY
Akron	OH
Beavercreek	OH
Boardman	OH
Bowling Green	OH
Brunswick	OH
Canton	OH
Cincinnati	OH
Cleveland	OH
Cleveland Heights	OH
Colerain	OH
Columbus	OH
Cuyahoga Falls	OH
Dayton	OH
Delaware	OH
Dublin	OH
Elyria	OH
Euclid	OH

City	State
Fairborn	OH
Fairfield	OH
Findlay	OH
Gahanna	OH
Grove City	OH
Hamilton	OH
Hilliard	OH
Huber Heights	OH
Kent	OH
Kettering	OH
Lakewood	OH
Lancaster	OH
Lima	OH
Mansfield	OH
Marion	OH
Mason	OH
Massillon	OH
Mentor	OH
Middletown	OH
Newark	OH
North Olmstead	OH
North Ridgeville	OH
North Royalton	OH
Parma	OH
Reynoldsburg	OH
Springfield	OH
Stow	OH
Strongsville	OH
Toledo	OH
Upper Arlington	OH
Warren	OH
Westerville	OH
Westlake	OH
Youngstown	OH
Broken Arrow	OK
Edmond	OK
Lawton	OK
Midwest City	OK
Moore	OK

City	State
Norman	OK
Oklahoma City	OK
Shawnee	OK
Stillwater	OK
Tulsa	OK
Albany	OR
Beaverton	OR
Bend	OR
Corvallis	OR
Eugene	OR
Grants Pass	OR
Gresham	OR
Hillsboro	OR
Keizer	OR
Lake Oswego	OR
McMinnville	OR
Medford	OR
Oregon City	OR
Portland	OR
Salem	OR
Springfield	OR
Tigard	OR
Allentown	PA
Bethlehem	PA
Erie	PA
Philadelphia	PA
Pittsburgh	PA
Reading	PA
Scranton	PA
Cranston	RI
East Providence	RI
Pawtucket	RI
Warwick	RI
Woonsocket	RI
Rapid City	SD
Sioux Falls	SD
Memphis	TN
Nashville	TN
Abilene	TX

City	State
Amarillo	TX
Austin	TX
Baytown	TX
Beaumont	TX
Brownsville	TX
Cedar Park	TX
Corpus Christi	TX
Dallas	TX
Del Rio	TX
Denton	TX
Edinburg	TX
El Paso	TX
Fort Worth	TX
Galveston	TX
Georgetown	TX
Harlingen	TX
Houston	TX
Laredo	TX
Lufkin	TX
McAllen	TX
McKinney	TX
Mesquite	TX
Pharr	TX
Port Arthur	TX
Round Rock	TX
San Angelo	TX
San Antonio	TX
San Marcos	TX
Temple	TX
Waco	TX
Salt Lake City	UT
Burlington	VT
Auburn	WA
Bellevue	WA
Bellingham	WA
Bothell	WA
Bremerton	WA
Des Moines	WA
Everett	WA

City	State
Federal Way	WA
Issaquah	WA
Kennewick	WA
Kent	WA
Lacey	WA
Lake Stevens	WA
Lakewood	WA
Lynwood	WA
Marysville	WA
Puyallup	WA
Redmond	WA
Renton	WA
Richland	WA
Seattle	WA
Spokane	WA
Tacoma	WA
Vancouver	WA

City	State
Walla Walla	WA
Wenatchee	WA
Yakima	WA
Appleton	WI
Brookfield	WI
Fond du Lac	WI
Green Bay	WI
Janesville	WI
Kenosha	WI
Madison	WI
Milwaukee	WI
New Berlin	WI
Oshkosh	WI
Wausau	WI
Wauwatosa	WI
West Allis	WI

APPENDIX B: METHODOLOGICAL DISCUSSION

In the methodology portion of this Article, I described how I went about collecting the police union contracts for the dataset in this Article.[264] I also outlined how I "conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability."[265] For the purposes of brevity and readability, I provided only a brief discussion of the methodological components of this Article. This methodological discussion is intended to build on the earlier methodology section, and to demonstrate the important influences of prior studies on this study's methodology.

I. DATASET AND COLLECTION

The dataset for this Article includes 656 police union contracts. I collected these contracts as part of a broader series of projects designed to examine the ways that internal disciplinary procedures influence police accountability. I published the first examination of a portion of this dataset in 2017, when I looked specifically at broad categories of

[264] *See supra* Part III.
[265] *Id*.

contractual terms that may thwart officer accountability in police union contracts for 178 of the largest municipal departments serving communities with around 100,000 residents or more.[266] That study built off other important and similar work done by previous researchers, including Professor Samuel Walker and Kevin M. Keenan, Campaign Zero, *Reuters*, and the *Guardian*.[267] Based on these findings, that Article hypothesized that internal disciplinary procedures represent an underappreciated barrier to police reform, and that collective bargaining negotiations may be subject to something akin to regulatory capture by politically powerful police unions.[268] Ultimately, that Article offered normative recommendations for how to change the negotiation of police union contracts.[269] This Article similarly draws this same original database to examine one specific component of the internal disciplinary process, as established by police union contracts: police disciplinary appeals. Given the narrower focus and smaller number of variables used in this study, I expand my analysis to include departments serving communities with around 30,000 residents or more. This resulted in a total of 656 police union contracts.

A. *Collection Methodology*

I collected the contracts used in this Article between 2014 and 2017, regularly updating them at various points throughout this time period. When possible, I collected contracts directly from municipal websites, state repositories, and police union websites. Despite assumptions to the contrary, the overwhelming majority of police union contracts are available through this these public locations. Approximately 61% of these contracts come from municipal websites, 18% from state websites, 5% from police association or union websites, and 2% from media reports. Another 3% of these contracts were only available through previous union contract collections by other organizations like Labor Relations Information Systems and Campaign Zero, which make these contracts available online. And I obtained the remaining approximately 11% of contracts through open record requests, as they are not otherwise publicly available. The municipal departments covered in this dataset serve a total population of around 97 million Americans. The median population served by this dataset is around 67,905 residents. Although I believe this is the largest database of police

---

[266] Rushin, *supra* note 29, at 1217-18.

[267] *See, e.g.,* Keenan & Walker, *supra* note 88 (conducting extensive coding on a dataset of 14 law enforcement officer bills of rights); Sinyangwe, Elzie, & Packnett, *supra* note 69 (coding 81 union contracts); Levinson, *supra* note 71 (coding 82 union contracts).

[268] Rushin, *supra* note 29, at 1239-40.

[269] *Id*. at 1243-47.

union contracts used in any academic study, it is important to note that I am not the first to collect union contracts. It is worth noting that other groups have also created databases of union contracts.[270]

B. *Representativeness of Dataset and Generalizability*

There are two potential factors that readers should consider before generalizing from this dataset. First, the dataset focuses only on large and mid-sized police departments. This means that the dataset used in this study is not representative of police departments of all sizes. It also focuses exclusively on municipal police departments, meaning that readers should be cautious in reaching generalizations about the implications of these findings for the appellate procedures available in other types of law enforcement agencies, like federal law enforcement agencies, sheriff's departments, and state highway patrols.

Second, this dataset focuses exclusively on police union contracts rather than other sources of appellate procedures. It does not analyze municipal ordinances, departmental procedures established outside the collective bargaining process, or state laws. Thus, this paper should provide generalizable conclusions about the disciplinary appeals procedures offered in unionized municipal police departments serving large and mid-sized jurisdictions. But readers should be careful in generalizing from this information to smaller and non-unionized departments.

II. IDENTIFICATION AND DEFINITION OF VARIABLES

The defined the variables in this study in a manner consistent with the limited existing literature on police disciplinary appeals. Here, I write to elaborate both on the definition of each variable and the influence of prior studies on the selection of each variable.

A. *Variable Definitions*

First, I included a variable to identify when departments offered arbitration for officers appealing disciplinary action. This posed two methodological challenges. Some union contracts permit arbitration for some, but not all, disciplinary appeals. Others permit the use of hearing

---

[270] *See, e.g., LRIS Public Safety Contract Library*, LAB. REL. INFO. SYS., https://www.lris.com/contracts/index.php (collecting a large number of union contracts, although many are currently out of date); *Contracts*, COMBINED L. ENFORCEMENT ASS'NS TEX. (CLEAT), https://www.cleat.org/contracts (collecting contracts from Texas, although for a somewhat small number of jurisdictions); McKesson, Sinyangwe, Elzie, & Packnett, *supra* note 69 (collecting contracts for 81 jurisdictions); Levinson, *supra* note 71 (collecting 82 union contracts).

officers or other third parties that are the functional equivalent of arbitrators. Given the large number of researchers have identified that arbitration may serve as a barrier to officer accountability as discussed *supra* Part IV.A. I defined this variable broadly as whether officers can appeal any "disciplinary action to an arbitrator, or a comparable third-party."

Second, I included a variable that examined the selection method for arbitrators. The variable definition used in this study look specifically at whether the contract provides the "[p]olice union or police officer" with significant authority to select the identity of the arbitrator or third party that will hear the appeal." In his prior work in this area, Professor Iris noted

> The selection of which will serve as an arbitrator depends upon the willingness of both parties to a dispute (or in this study, series of disputes) to accept that individual as an arbitrator. Those arbitrators whom labor perceives as strongly pro-management, or vice versa, will over time find themselves not being selected to serve as arbitrators.[271]

In Chicago and in Houston, Iris found that arbitrators frequently split the difference between union and management demands during disciplinary appeals, despite the fact that the two cities used somewhat different selection procedures. Houston used an alternative strike system that permitted both labor and management to strike potential arbitrators from a panel, while Chicago used, in part, a panel of arbitrators stipulated in their union contract that gave them "quasi-permanent status."[272] Iris ultimately found that both selection processes were associated with similar rates of arbitrators overturning disciplinary decisions.[273] Thus, I included in my definition of this variable any selection methodology that allowed officers to have a role in selecting an arbitrator that was equal to or greater than management. This would include both Houston and Chicago from Iris's prior studies. I did not, however, include in this definition union contract provisions that defer to the selection process recommended by national associations or arbitrators or mediators—even if those associations recommend a similar approach. It is important to explicitly clarify that this Article does not take the position that these selection methodologies are, in and of themselves, problematic. Rather, it makes a narrower argument, similar to that made by other previous researchers like Professor Iris, that this sort of a selection methodology may theoretically create unintended incentives to compromise on disciplinary action because police

---

[271] Iris, *Police Discipline in Chicago*, *supra* note 100, at 240.
[272] Iris, *Police Discipline in Houston*, *supra* note 100, at 146.
[273] *Id*. at 146-47.

disciplinary arbitrators are repeat players—particularly when this variable is present with other variables considered in this study.

Third, I included a variable to determine whether a police union contract made arbitration decisions binding on the municipality. I coded an arbitration procedure as binding if the contract explicitly said as much, or if it was the final step of an appellate procedure (even if some states may permit limited judicial review of arbitrator's decisions). I also included in this definition circumstances where arbitration was the final step in the appellate process for disciplinary actions. I did not consider whether the state in question permitted labor or management to file judicial challenges to final arbitration decisions. But such situations are relatively rare. Most states make arbitration decisions binding and limit judicial review of arbitration decisions.[274] The Supreme Court has also held that the "refusal of courts to review the merits of an arbitration award is . . . proper," meaning that an arbitrator "can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator's opinion."[275]

Finally, I included a variable to determine the standard of review used by arbitrators on appeal. The vast majority of contracts simply articulated the acceptable conditions under which a police department could discipline an officer (often for "just cause," "legitimate cause," or "good cause"). Most contracts then gave an arbitrator expansive authority to determine whether a police chief, city manager, or civilian review board had such sufficient cause to punish and officer, and to decide whether the punishment was proportional to the alleged offense. I attempted to be as judicious as possible in coding contracts under this variable. If a union contract placed any limit on an arbitrator's authority to re-review factual or legal findings handed down earlier in the disciplinary proceeding, I coded that contract as failing to provide expansive or de novo review authority. Thus, I tried to only capture in this definition those contracts that provide arbitrators with something akin to de novo review authority of disciplinary decisions.

B. *Limitations of Binary Coding Approach*

The binary nature of the coding used in this study sometimes lends itself to difficult choices. I ultimately coded each variable as either (1) for present or (0) for not present in each contract. Nevertheless, as discussing in the methodology section of this Article, not all contracts had provisions that neatly fit into the coding parameters set by this

---

[274] Stoughton, *supra* note 57, at 2210.

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

Article. In these borderline cases, there is certainly room for reasonable disagreement as to the coding decisions I reached. Different coding techniques may have resulted in variations in a small number of coding decisions. Nevertheless, these represented less than one percent of the coding decisions I made in evaluating this dataset, so I do not believe this limitation undermines the central claims of this Article.