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POLICE UNION CONTRACTS

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ABSTRACT

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

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

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

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

TABLE OF CONTENTS

INTRODUCTION

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

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

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

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

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

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

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

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

7. *Id*.

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

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

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

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

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

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

12. *Id.*

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

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

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

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

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

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

16. *See infra* Part I.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. *See infra* Part II.

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

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

31. *See infra* Part IV.A

32. *See infra* Part IV.B.

33. *See infra* Part IV.C.

34. *See infra* Part IV.D.

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

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

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

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

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

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

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

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

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

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

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

I. POLICE LABOR AND EMPLOYMENT PROTECTIONS

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

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

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

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

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

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

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

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

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

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

46. *See infra* Part IV.

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

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

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

A. Collective Bargaining

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

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

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

49. *See infra* Part I.C.

50. *See infra* Part I.B.

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

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

53. *See id.* at 25.

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

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

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

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

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54. *See id.*

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

56. *Id*. at 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 255–56.

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

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

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

B. Civil Service Protections

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

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

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

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

71. *Id.* at 102.

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

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

74. *Id.*

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

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

C. Law Enforcement Officers' Bills of Rights

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

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

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

77. *Id*. at 797.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

97. *Id*. at 1212.

98. *Id*.

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

100. Hager, *supra* note 99.

101. *Id*.

highly protective and potentially problematic provisions in state LEOBRs.

D. Other Police Protections

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

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

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

103. *Id*.

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

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

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

II. EXISTING RESEARCH

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. METHODOLOGY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Figure 1: Coding Scheme

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

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

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

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

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

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

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

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

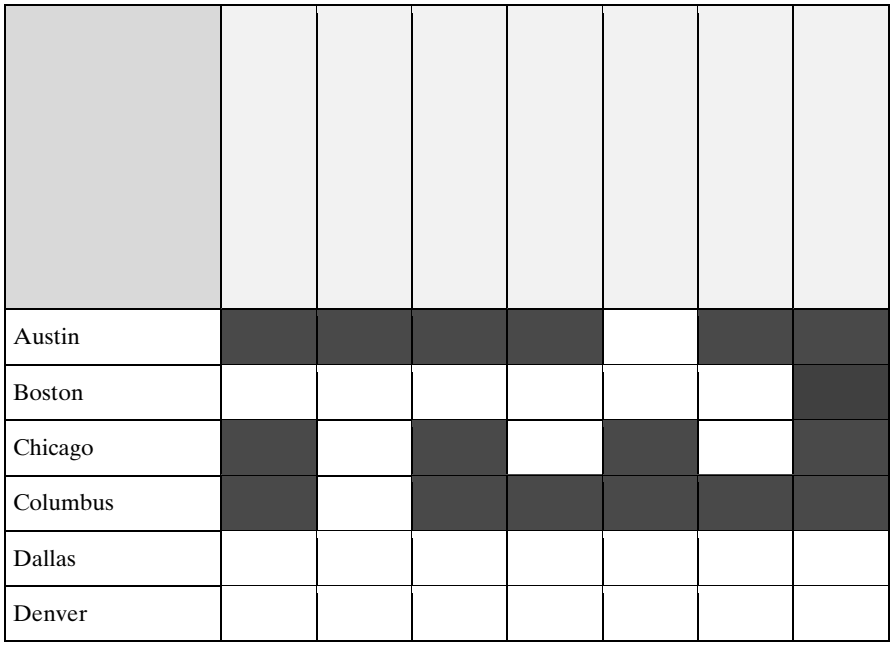
134. *See, e.g.*, *id*. at 24; CITY OF TOPEKA, AGREEMENT BETWEEN CITY OF TOPEKA AND FRATERNAL ORDER OF POLICE LODGE NO. 3, at 75 (2016) (on file with the *Duke Law Journal*) ("Topeka Police Officers shall not have their lockers or other space for storage that is assigned to the officer searched, except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

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

IV. HOW MANY POLICE UNION CONTRACTS LIMIT ACCOUNTABILITY

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

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



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

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

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

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

A. Officer Interrogations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Disciplinary Records

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

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

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

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

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

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

170. *Id.*

171. *Id.*

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

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

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

174. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

190. *Id*.

191. *Id*.

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

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

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

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

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

C. Civilian Oversight

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

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

Id. (emphasis omitted).

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

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

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

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

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

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

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

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

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

200. *Id*.

201. *Id*.

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

203. *Id*.

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Investigation of Complaints

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

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

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

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

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

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

222. *See infra* Appendix B.

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

223. *See infra* Appendix B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Arbitration

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

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

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

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

242. *Id*.

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

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

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

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

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

V. IMPLICATIONS AND AVENUES FOR REFORM

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

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

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

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

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

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

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

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

A. Implications for Police-Reform Efforts

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

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251. *Id.* at 147.

252. *See supra* note 40.

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

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

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

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

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

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

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

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

understand the relationship between collective bargaining and internal disciplinary procedures.

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

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

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

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

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

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

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

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

B. Reforming Police Labor Laws

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

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

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

264. *Id*.

265. *Id*.

266. *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

272. *Id*. at 14.

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

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

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

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

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

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

275. *Id*.

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

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

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

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

C. Limitations on Reform

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

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

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

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

280. *Id.*

281. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

287. Douthat, *supra* note 123.

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

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

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

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

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

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

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

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

292. *See supra* Part I.B.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A: PROFILE OF MUNICIPALITIES STUDIED[305]

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

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

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

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

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

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

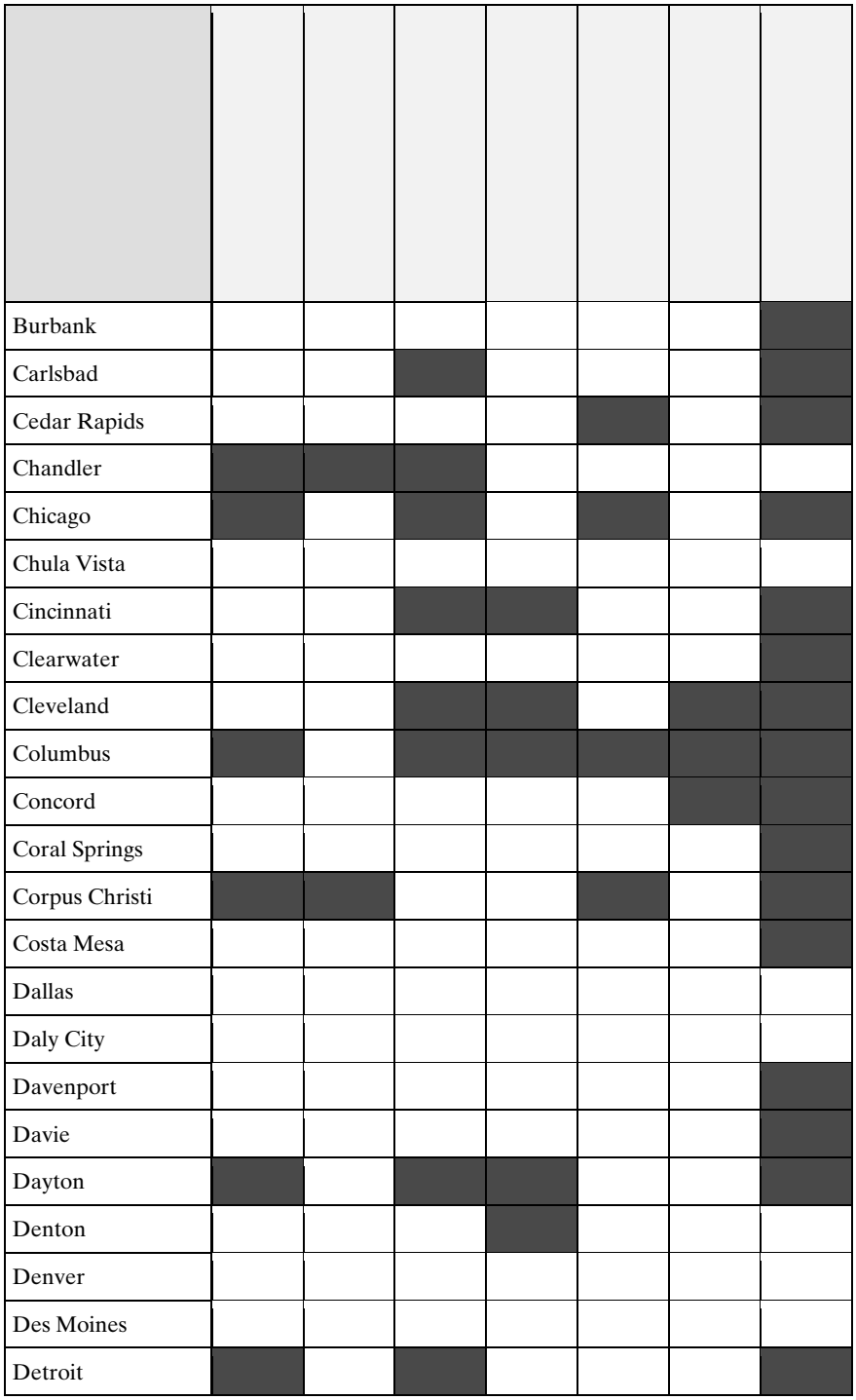
Name of Agency	Sworn Officers
Richmond, CA	180
Riverside	364
Rochester	713
Rockford	280
Roseville	119
Sacramento	623
Salem	181
Salinas	135
Salt Lake City	428
San Antonio	2,388
San Diego	1,876
San Francisco	2,137
San Jose	966
San Leando	136
San Mateo	140
Santa Ana	264
Santa Clara	141
Santa Rosa	166
Seattle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

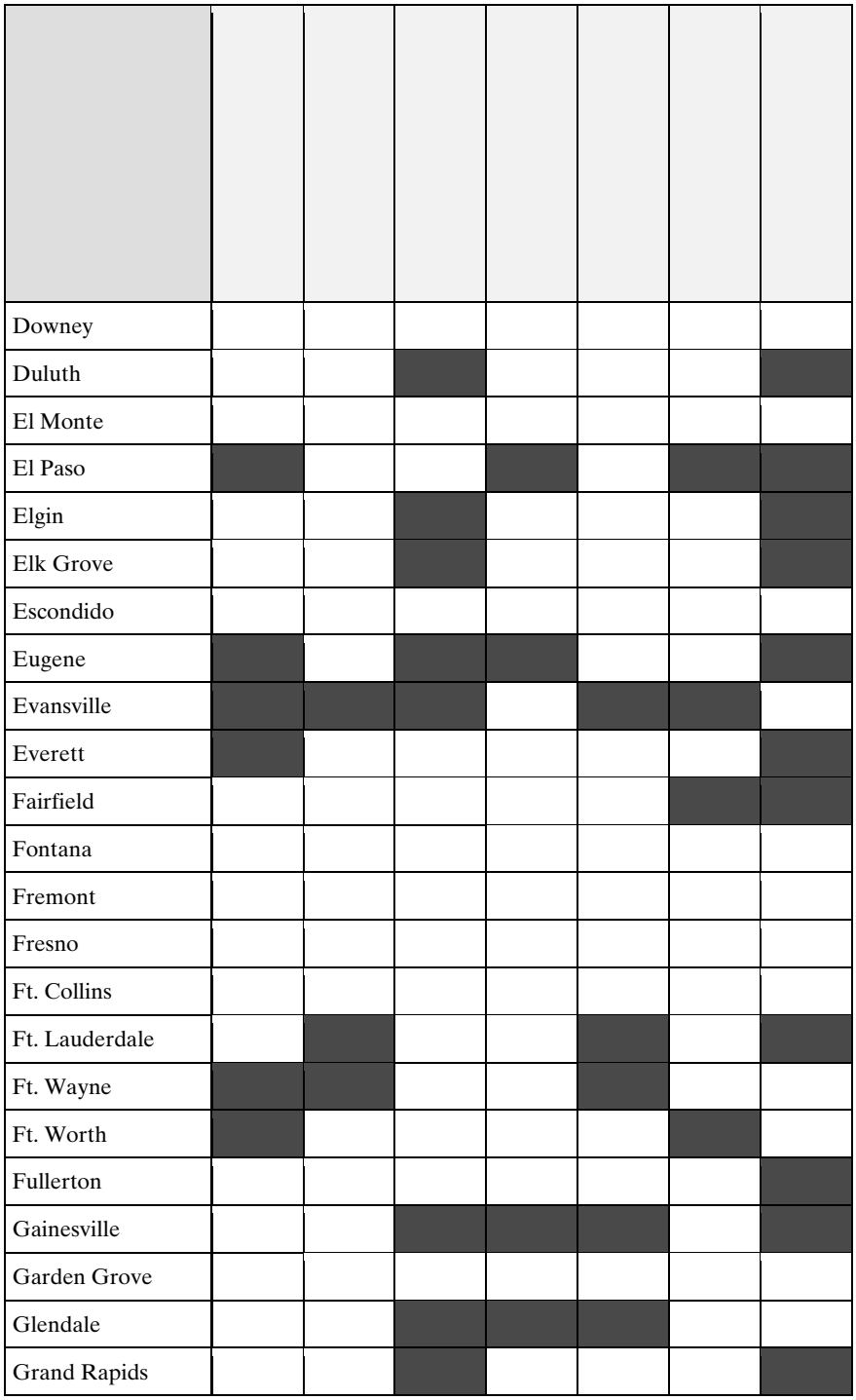
Name of Agency	Sworn Officers
Hartford	420
Hayward	175
Henderson	329
Hialeah	300
Hillsboro	130
Hollywood	311
Honolulu	2,093
Houston	5,252
Huntington Beach	207
Indianapolis	1,536
Inglewood	162
Irvine	200
Jacksonville	1,576
Jersey City	790
Joliet	257
Kansas City	1,398
Kent	136
Lansing	192
Laredo	442
Las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

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

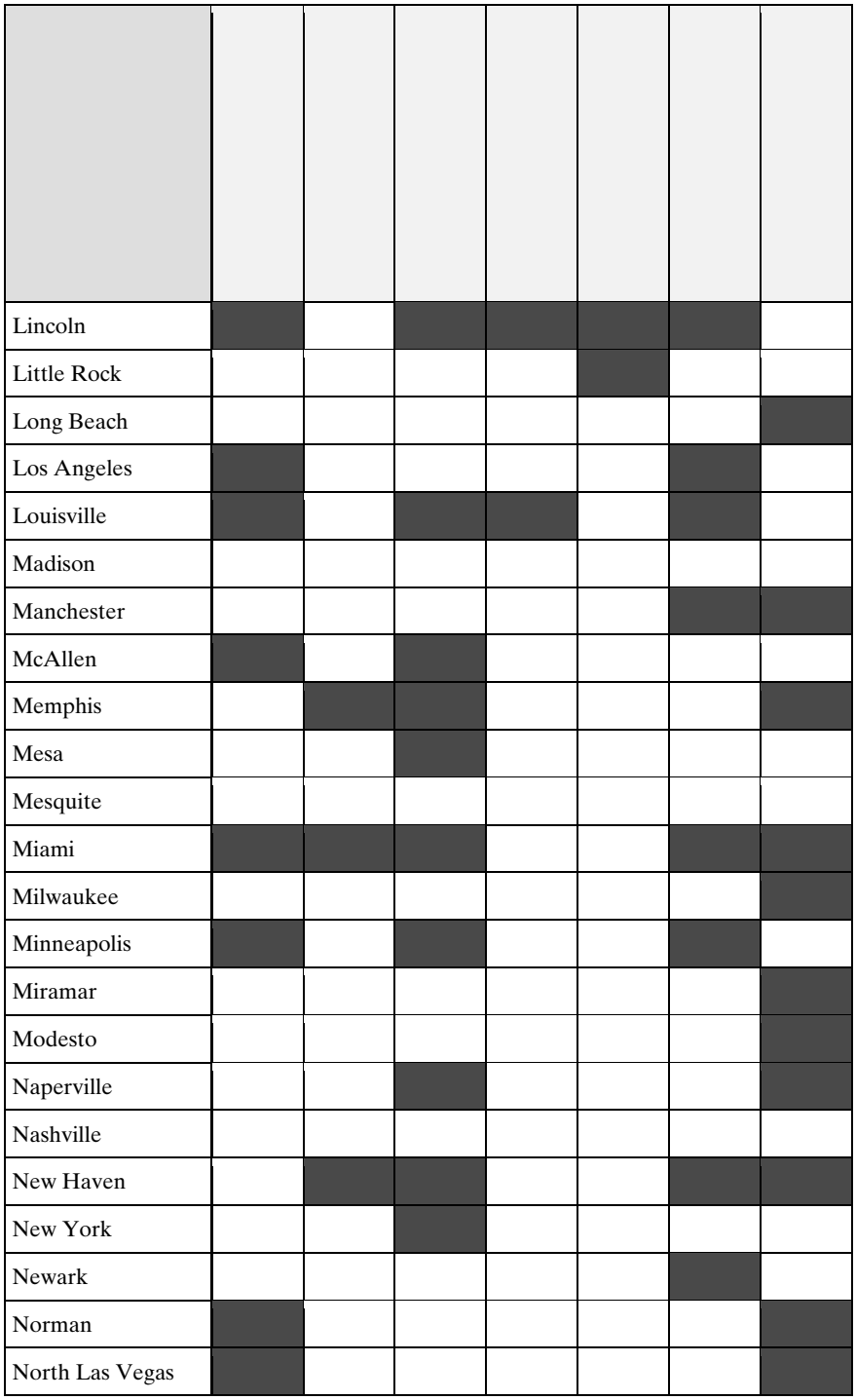
APPENDIX B: CONTENT OF COLLECTIVE BARGAINING AGREEMENTS

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



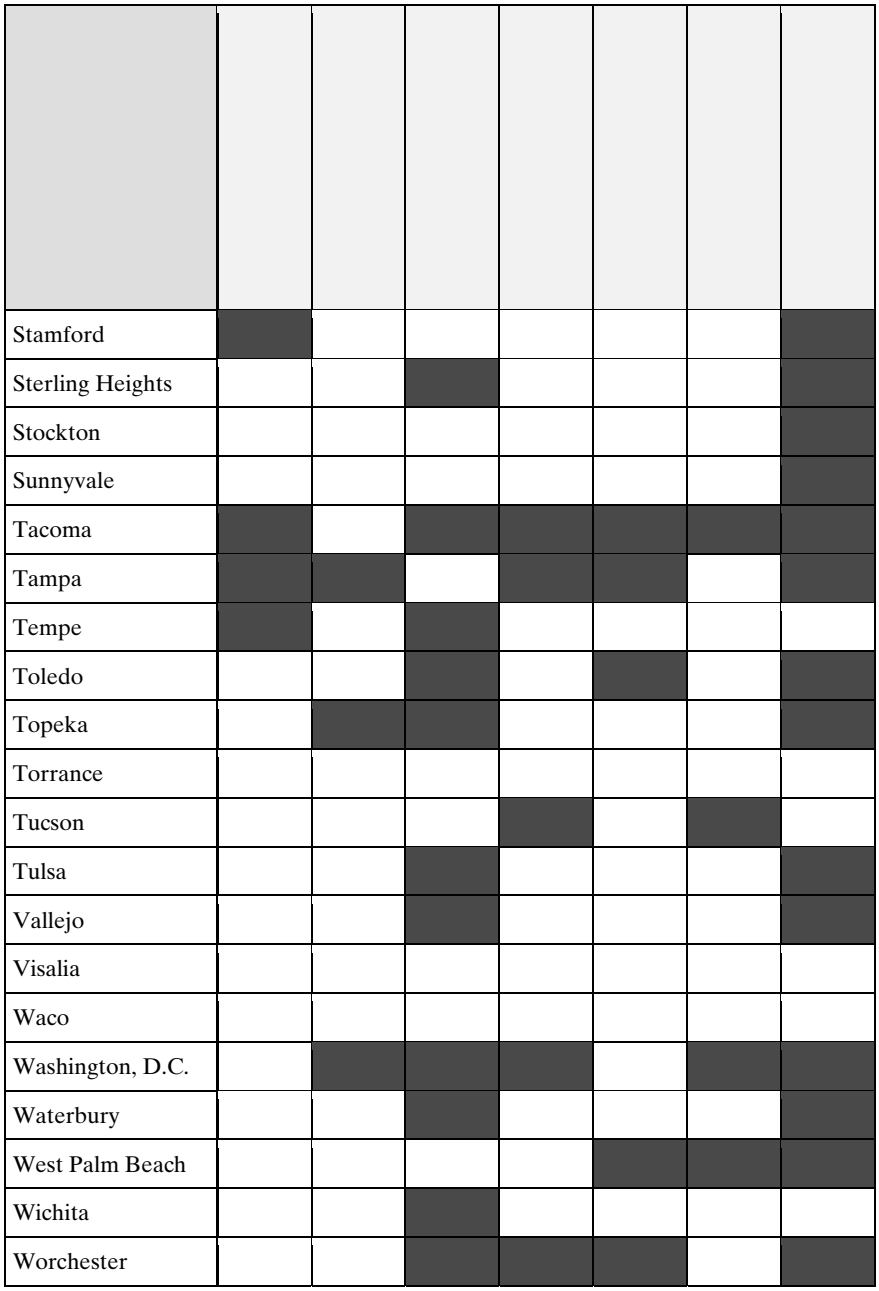

Downey
Duluth
El Monte
El Paso
Elgin
Elk Grove
Escondido
Eugene
Evansville
Everett
Fairfield
Fontana
Fremont
Fresno
Ft. Collins
Ft. Lauderdale
Ft. Wayne
Ft. Worth
Fullerton
Gainesville
Garden Grove
Glendale
Grand Rapids

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


Lincoln
Little Rock
Long Beach
Los Angeles
Louisville
Madison
Manchester
McAllen
Memphis
Mesa
Mesquite
Miami
Milwaukee
Minneapolis
Miramar
Modesto
Naperville
Nashville
New Haven
New York
Newark
Norman
North Las Vegas

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


Rochester
Rockford
Roseville
Sacramento
Salem
Salinas
Salt Lake City
San Antonio
San Diego
San Francisco
San Jose
San Leandro
San Mateo
Santa Ana
Santa Clara
Santa Rosa
Seattle
Sioux City
Spokane
Springfield, MO
St. Louis
St. Paul
St. Petersburg



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

Arizona		■		■			
California							
Delaware						■	
Florida		■		■		■	
Illinois					■		
Iowa	■	■					
Kentucky	■			■			
Louisiana	■		■				
Maryland	■		■	■	■		
Minnesota						■	
Nevada	■						
New Mexico	■				■		
Rhode Island				■	■		
Virginia	■						
West Virginia							
Wisconsin							

APPENDIX D: METHODOLOGICAL DISCUSSION

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

I. CODING SCHEME

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

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

307. Joseph, *supra* note 124.

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

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

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

A. Prior Research

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

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

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

311. *Id*.

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

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

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

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

313. Joseph, *supra* note 124.

314. *Id*.

315. *Id*.

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

317. *Id*. at 212–14.

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

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

320. *Id*. at 236–37.

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

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

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

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

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

323. *Id*. at 241.

324. *Id*.

325. Levinson, *supra* note 309.

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

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

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

B. Choice of Variables for Study

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

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

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

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

329. *Id*. at 2–7.

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

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

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

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

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

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

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

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

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

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

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

336. Levinson, *supra* note 309.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

348. *Id.* at 225–26.

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

350. Joseph, *supra* note 124.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

361. *Id.*

362. *Id.*

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

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

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

II. DATASET

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

363. *Id*. at 241.

364. *Id*.

365. Joseph, *supra* note 124.

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

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

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

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

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

III. DATA PRESENTATION

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

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

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

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

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

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

372. *Id*.

373. *Id*.

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

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

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

374. Joseph, *supra* note 124.

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

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

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

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

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

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

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

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

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

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

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

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

IV. CLOSING THOUGHTS

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

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

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

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

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