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## PLACEHOLDER FOR EXECUTIVE SUMMARY

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## PLACEHOLDER FOR ANALYSIS OF 2022 STOP DATA

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## POLICY FOCUSED DATA ANALYSIS

### 1. Pretextual Stops

#### I. Addressing the Root Causes of Pretextual Stops

##### A. Introduction

Many calls to end pretextual stops have focused on disparities in enforcement and who is stopped or searched by the police. Although it is important to examine the disparities in stop and search rates, they only tell part of the story of individuals subjected to pretextual stops and the impact on their lives. A pretext stop occurs when an officer stops someone for a lawful traffic violation or minor infraction, intending to use the stop to investigate a hunch regarding a different crime that by itself would not amount to reasonable suspicion or probable cause.<sup>1</sup> During pretextual stops, a person may be searched or handcuffed and could have force used against them.

In prior Reports, the Board examined new policies emerging in California and throughout the nation to address pretextual stops and searches. The Reports discussed policies by law enforcement agencies, district attorneys' offices, and states aimed at reducing or eliminating pretextual stops. The Board will now begin to examine the effectiveness of these policies, the impact they are having on racial and identity disparities observed in the data, and any lessons learned from their implementation.

Previous Board Reports have reviewed data regarding the reasons for stop, actions taken during stops, and results of stops. This year, the Board delves deeper into the results of stops, including stops where field interview cards are completed or when the stopped individual is charged with resisting arrest or drug possession. These results of stops show notable disparities, and the data indicates the results may have little to no connection to the original reasons for the stop, such as

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<sup>1</sup> The amended RIPA regulations, which will be effective in 2024, define "reasonable suspicion" as requiring a set of specific facts that would lead a reasonable person to believe that the stopped person is committing a crime, recently committed a crime, or is about to commit a crime. Reasonable suspicion cannot be based solely on a hunch or instinct. "Reasonable suspicion" requires a lesser standard of proof than "probable cause to arrest or search." See proposed Cal. Code Regs., tit. 11, § 999.224, subd. (a)(16)

<<https://oag.ca.gov/system/files/media/RIPA%202022%20Rulemaking%20Final%20Text%20of%20Regulations.pdf>> [as of XXX]. "Probable cause to arrest or search" is defined in the amended RIPA regulations as a set of specific facts that would lead a reasonable person to objectively believe and strongly suspect that a crime was committed by the person to be arrested. "Probable cause to arrest" requires a higher standard of proof than "reasonable suspicion." See proposed Cal. Code Regs., tit. 11, § 999.224, subd. (a)(14)-(15)

<<https://oag.ca.gov/system/files/media/RIPA%202022%20Rulemaking%20Final%20Text%20of%20Regulations.pdf>> [as of XXX]; see also Asirvatham and Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops* (Aug. 2020) Duke L. School Pub. L. & Legal Theory Series No. 2020- 56, p. 5 <<http://dx.doi.org/10.2139/ssrn.3673574>> [as of XXX].

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traffic infractions. This year the Board also takes a first look at officer assignment type and use of force rates. The Board examines the intersection of these two data elements and discusses how the assignment type – such as specialized units – and other specific policing strategies may increase the opportunities for pretextual stops.

## **B. Analysis of Successes and Lessons Learned from New Pretext Policies**

In its examination of policies to address pretextual stops and searches, the Board reviewed two different policy approaches. The Los Angeles Police Department (LAPD) limits all traffic stops unless there is a public safety concern, while Virginia specifically identifies and prohibits stops for several low-level traffic violations. Since many of the policies are still new, the data on their effectiveness is still evolving, but the data may provide some information regarding the potential impact of these policies.

### **1. New Pretext Policies – Two Test Cases: LAPD and Virginia**

LAPD was one of the first law enforcement agencies in California to implement a new policy in 2022 reducing the use of pretextual stops.<sup>2</sup> The LAPD policy states: “[P]retextual stops shall not be conducted unless officers are acting upon articulable information in addition to the traffic violation, which may or may not amount to reasonable suspicion, regarding a serious crime (i.e., a crime with potential for great bodily injury or death).”<sup>3</sup> The policy gives officers discretion to make a traffic stop only if the violation significantly interferes with public safety.<sup>4</sup> Advocates have expressed concerns that because the policy gives officers wide discretion to determine if a stop is for public safety, the policy may not be effective at curbing disparities.<sup>5</sup> Indeed, studies show more discretion can lead to an increased opportunity for bias.<sup>6</sup> LAPD has been collecting

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<sup>2</sup> L.A. Police Dept., Limitation on Use of Pretextual Stops: 1/240.06 (“LAPD Limitation on Pretextual Stops”) (Mar. 2022) p. 1.

<sup>3</sup> L.A. Police Dept., Limitation on Use of Pretextual Stops: 1/240.06 (“LAPD Limitation on Pretextual Stops”) (Mar. 2022) p. 1.

<sup>4</sup> L.A. Police Dept., Limitation on Use of Pretextual Stops: 1/240.06 (“LAPD Limitation on Pretextual Stops”) (Mar. 2022) p. 1.

<sup>5</sup> PushLA Public Comment Letter to Police Commission, Opposition Relative to policy revision regarding pretextual stops (“PushLA Opposition to pretext stop policy revision”) (Feb. 2022) pp. 4-6

<<https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/02/Public-Comment-Regarding-Pretextual-Stops-BOPC-22-023-Part-II.pdf>> [as of XXX].

<sup>6</sup> Ridgeway, *Assessing the Effect of Race Bias in Post-Traffic Stop Outcomes Using Propensity Scores* (2006) 22 J. Quant. Criminol. 1 <<https://www.rand.org/pubs/reprints/RP1252.html>> [as of XXX] (analyzing discretionary actions taken after traffic stops in Oakland, California and finding that police were more likely to subject Black drivers to pat-down searches and probable cause searches, as compared to White drivers); Eberhardt, How racial bias works -- and how to disrupt it (June 2020) TED

<[https://www.ted.com/talks/jennifer\\_l\\_eberhardt\\_how\\_racial\\_bias\\_works\\_and\\_how\\_to\\_disrupt\\_it/transcript?language=en](https://www.ted.com/talks/jennifer_l_eberhardt_how_racial_bias_works_and_how_to_disrupt_it/transcript?language=en)>[as of XXX]; Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer* (2018) 14 Stan. J. C.R. & C.L. 1, 17 <<https://law.stanford.edu/publications/lets-get-real-behavioral-realism-implicit-bias-and-the-reasonable-police-officer/>> [as of XXX] (citing Casey et al., Addressing Implicit Bias in the Courts (2013) 49 Ct. Rev. 64, 67).

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RIPA data since July 1, 2018. Although we only have approximately six months of RIPA data reported in 2022 under the new policy, the Board will take a preliminary look at LAPD's stop data to see if there are any changes in search and yield rates or any reduction in disparities.

In 2020, Virginia was one of the first states to enact a law reducing pretext stops and creating a new traffic enforcement system.<sup>7</sup> The policy established what is known as a primary and secondary traffic enforcement system, where an officer can only stop someone for a primary public safety violation and not solely for a defined secondary violation, such as an expired registration.<sup>8</sup> Virginia's policy identifies six secondary traffic violations, including driving "(i) without a light illuminating a license plate, (ii) with defective and unsafe equipment, (iii) without brake lights or a high mount stop light, (iv) without an exhaust system that prevents excessive or unusual levels of noise, (v) with certain sun-shading materials and tinting films, and (vi) with certain objects suspended in the vehicle."<sup>9</sup> Similar to California, officers in the state of Virginia are required to collect data on their stops and searches under the state's Community Policing Act.<sup>10</sup> Virginia officers began reporting their data in July of 2020 and the new state law became effective in March of 2021, which provides several months of data before and after the new law took effect.

Preliminarily, it appears the policies contributed to an overall reduction in stops and searches,<sup>11</sup> and LAPD data indicates there is a higher likelihood of contraband discovered when searches were conducted.<sup>12</sup> Despite the reduction in stops and searches overall in Virginia, disparities still persist in who is stopped and searched.<sup>13</sup> LAPD data analyzed below shows ... [will add analysis of LAPD data].

The Board provides a brief review of the relevant data and lessons other agencies or states should consider in crafting or amending new policies.

### **i. Reduction in Overall Stops and Searches**

Both policies have seen similar results in reducing the number of overall stops and searches.

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<sup>7</sup> H 5058, Va. Acts of Assembly (2020 Special Sess.)

<sup>8</sup> H 5058, Va. Acts of Assembly (2020 Special Sess.)

<sup>9</sup> H 5058, Va. Acts of Assembly (2020 Special Sess.)

<sup>10</sup> Code of Va. § 52-30.2. Prohibited practices; collection of data.

<sup>11</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX]; Oliver, *Virginia's traffic stops decline, but disparities persist* (Oct. 2022) Axios <<https://www.axios.com/local/richmond/2022/10/12/virginia-traffic-stops-disparities>> [as of XXX].

<sup>12</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>13</sup> Report on Analysis of Traffic Stop Data Collected under Virginia's Community Policing Act (Sept. 2022) Virginia Department of Criminal Justice Services <<https://rga.lis.virginia.gov/Published/2022/RD533/PDF>> [as of XXX].

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*[Will add new RIPA data on LAPD Policies]*

A study conducted by the L.A. Times indicated that initial data from LAPD shows an overall reduction in stops and searches during stops for minor offenses.<sup>14</sup> Prior to the new policy being implemented, 21% of all stops were for minor infractions. Under the new policy, minor infractions accounted for 12% of all traffic and pedestrian stops.<sup>15</sup> There has also been a reduction in consent searches, or searches where an officer requests to search without having an articulable suspicion a crime has been committed (from 30% to 24% of all searches).<sup>16</sup> In Virginia, under the new policies, the overall number of stops was reduced by 7.5% and stops that resulted in a search decreased from 3.8% to 2.4%.<sup>17</sup>

These new policies may be effective at focusing police resources and time on more serious offenses.<sup>18</sup> Indeed, research shows that these pretextual stops or stops for minor infractions more generally are costly to communities.<sup>19</sup> A review of RIPA data demonstrated that officers in 2019 spent nearly 80,000 hours on traffic stops that led to no enforcement action – not even writing a ticket.<sup>20</sup> Of those hours, 28,000 were associated with stops for non-moving violations, such as expired registration.<sup>21</sup> These stops also cost communities and police departments a significant

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<sup>14</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>15</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>16</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>17</sup> Oliver, *Virginia's traffic stops decline, but disparities persist* (Oct. 2022) Axios <<https://www.axios.com/local/richmond/2022/10/12/virginia-traffic-stops-disparities>> [as of XXX].

<sup>18</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing (“Reimagining Community Safety in California”) (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)> [as of XXX].

<sup>19</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing (“Reimagining Community Safety in California”) (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)> [as of XXX].

<sup>20</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing (“Reimagining Community Safety in California”) (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)> [as of XXX].

<sup>21</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing (“Reimagining Community Safety in California”) (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)>

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amount of money.<sup>22</sup> Another review of data estimated that Sacramento County Sheriff's Department spent \$35.5 million and San Diego County Sheriff's Department spent \$43.9 million annually on enforcing traffic violations that resulted in a warning or no action taken.<sup>23</sup>

The Board will continue to monitor the effects of reducing stops for minor infractions and the cost savings to communities. Below the Board begins to examine the effect of these new policies on the recovery of contraband. Both the costs savings and the discovery of contraband may be a way to test the overall effectiveness of these policies.

## ii. Increase in Finding Contraband

*[Will add new RIPA data on LAPD Policies]*

Other researchers working with the RIPA data discovered that stops and searches associated with pretextual stops (such as consent searches) do not often result in the discovery of evidence or contraband, and that reducing stops for minor infractions actually increases the probability that contraband will be found.<sup>24</sup> The Public Policy Institute of California (PPIC) found that searches during traffic stops are less likely to lead to the discovery of contraband rather than stops for reasonable suspicion.<sup>25</sup>

Consistent with this finding, data indicates that under the new policy, LAPD officers are more successful in locating contraband when conducting a search.<sup>26</sup> In a 2022 study of RIPA data, the

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<sup>22</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing ("Reimagining Community Safety in California") (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)> [as of XXX].

<sup>23</sup> Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Wellbeing ("Reimagining Community Safety in California") (Oct. 2022) Catalyst Cal. and ACLU of Southern Cal. <[https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed\\_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf](https://catalyst-ca.cdn.prismic.io/catalyst-ca/756c4775-6bc1-448b-8447-e609133951ed_CATALYST+CA+%26+ACLU+-+REIMAGINING+COMMUNITY+SAFETY+2022.pdf)> [as of XXX].

<sup>24</sup> Lofstrom et al., *Racial Disparities in Law Enforcement Stops* ("Law Enforcement Stops") (Oct. 2021) Public Policy Inst. of Cal. (PPIC) <<https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/>> [as of XXX].

<sup>25</sup> Lofstrom et al., *Racial Disparities in Law Enforcement Stops* ("Law Enforcement Stops") (Oct. 2021) Public Policy Inst. of Cal. (PPIC) <<https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/>> [as of XXX].

<sup>26</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

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L.A. Times showed that officers found illegal contraband in 26% of their searches, which marked a slight increase in the discovery rates.<sup>27</sup>

Researchers have theorized that because officers are more purposeful in who they stop and search, there are higher success rates from those searches.<sup>28</sup> These data may indicate in part that these policies can “strike an effective balance between keeping the public safe and respecting the rights of individuals.”<sup>29</sup> In an interview of an LAPD Sergeant, they noted “What we’re doing is we’re explaining ourselves more and identifying the reasoning behind it, instead of, ‘Well, I Just had a hunch. I saw the guy and he looked like he might have been doing something. He gave me that look.’”<sup>30</sup>

### iii. Addressing Disparities

*[Will add new RIPA data on LAPD Policies]*

Another consideration in assessing the effectiveness of these policies is if there is an impact on disparities observed in stops and searches. The L.A. Times conducted a study of the LAPD data and found a change in policing behavior; however, the data does not give a clear picture of whether overall disparities were reduced as a result of the new policy.<sup>31</sup> The RIPA Board hopes to explore whether the reduction in stops affects the disparities observed in the data.

In Virginia, there is also evidence of a slight decrease in disparities in searches of Black drivers from 5.2% to 2.8%.<sup>32</sup> However, despite the reduction in stops and racial disparities during searches, disparities remained virtually the same in terms of who was stopped.<sup>33</sup> Advocacy

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<sup>27</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX]

<sup>28</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX]

<sup>29</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX]

<sup>30</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>31</sup> Jany and Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians* (Nov. 2022) L.A. Times <<https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change>> [as of XXX].

<sup>32</sup> *Report on Analysis of Traffic Stop Data Collected under Virginia’s Community Policing Act* (Sept. 2022) Virginia Department of Criminal Justice Services <<https://rga.lis.virginia.gov/Published/2022/RD533/PDF>> [as of XXX]; Oliver, *Virginia’s traffic stops decline, but disparities persist* (Oct. 2022) Axios <<https://www.axios.com/local/richmond/2022/10/12/virginia-traffic-stops-disparities>> [as of XXX].

<sup>33</sup> *Report on Analysis of Traffic Stop Data Collected Under Virginia’s Community Policing Act* (Sept. 2022) Virginia Dept. of Crim. Justice Services <Report on Analysis of Traffic Stop Data Collected under Virginia’s Community Policing Act – September 2022> [as of XXX]; Oliver, *Virginia’s traffic stops decline, but disparities*

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organizations in Virginia have argued that additional measures are needed to reduce these disparities, including (1) prohibiting consent searches in traffic stops, (2) creating a civilian traffic enforcement agency, and (3) identifying overly-enforced misdemeanors.<sup>34</sup>

These data ultimately raise questions concerning the additional steps that must be taken to reduce profiling beyond prohibiting certain types of stops and searches. They require us to dig deeper and explore some of the root causes of these stops and the motivation for these stops. The RIPA Board and many leaders throughout the state and country are calling for changes in the law to reduce the types of stops and searches officers can conduct, but also broader policy reforms, such as implementing civilian traffic enforcement programs or ending the use of specialized teams that may rely more heavily on pretext stops.

#### **4. Calls for Additional Measures to Address Pretextual Stops**

In previous Reports, the Board has called upon the Legislature, community leaders, and law enforcement agencies to end the use of pretextual stops, consider using alternative approaches to traffic that do not involve armed peace officers, and to use data as a way to create transparency and establish policies to reduce disparities. Since then, the California Legislature has proposed two new laws to address pretextual stops. Similarly, the U.S. House of Representatives also considered a new bill that would financially support cities in developing a civilian traffic enforcement system.

##### **i. Legislative Efforts**

##### **a. Senate Bill 50 (SB 50)**

California SB 50 was proposed this past year to restrict stops for certain minor traffic infractions. The Board discusses this legislative effort to address pretextual stops since it may inform future legislation. Building on the work of the RIPA Board, SB 50 was proposed to address pretextual stops and searches by (1) restricting officers from conducting stops for specific traffic violations and (2) amending the California Penal Code to allow for the creation of civilian traffic enforcement programs.<sup>35</sup> The bill prohibited stops for certain infractions unless there is a separate, independent basis to initiate the stop.<sup>36</sup> Specifically, the original text of the bill prohibited stops for:

##### **(1) Registration<sup>37</sup>**

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*persist* (Oct. 2022) Axios <<https://www.axios.com/local/richmond/2022/10/12/virginia-traffic-stops-disparities>> [as of XXX].

<sup>34</sup> Oliver, *Virginia's traffic stops decline, but disparities persist* (Oct. 2022) Axios <<https://www.axios.com/local/richmond/2022/10/12/virginia-traffic-stops-disparities>> [as of XXX].

<sup>35</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>36</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>37</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

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- (2) Positioning of a license plate<sup>38</sup>
- (3) Lighting equipment “illuminating, if the violation is limited to a single brake light, headlight, rear license plate, or running light, or a single bulb in a larger light of the same.”<sup>39</sup>
- (5) Bumper equipment<sup>40</sup> and
- (6) Bicycle equipment.<sup>41</sup>

Even though officers were prohibited from making a stop for these violations, the bill would allow an officer to mail a ticket to the registered owner. Finally, the bill would permit “officers or other government employees” to conduct traffic stops.<sup>42</sup> The bill author noted that “research shows that pretext stops do not significantly benefit public safety, yet used valuable resources that could be directed to more effective public safety approaches.”<sup>43</sup>

The Prosecutors Alliance of California, one of the bill’s sponsors, argued that pretext stops fail to meaningfully improve public safety and result in profiling of individuals.<sup>44</sup> They expressed concern that pretext stops are not effective in locating contraband and result in the disparate treatment of individuals.<sup>45</sup>

Those arguing in opposition of the bill expressed concern that by reducing pretextual stops, officers could lose the ability to detain a person to investigate an unrelated hunch and potentially discover contraband.<sup>46</sup> They also pointed to several individual cases where narcotics or weapons were seized.<sup>47</sup> Finally, they expressed concern that notifying a driver of a violation by mail may not address an urgent issue with the vehicle.<sup>48</sup>

In a letter of support for the bill, the RIPA Board encouraged the Legislature to eliminate all pretextual stops and searches rather than just limiting when a person can be stopped for specific traffic infractions.<sup>49</sup> The Board explained:

The issue of pretextual stops is much more pervasive than eliminating enforcement of the Vehicle Code sections identified in SB 50. Without prohibiting the conduct entirely,

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<sup>38</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>39</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>40</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>41</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>42</sup> Sen. Bill No. 50 (2023-2024 Reg. Sess.)

<sup>43</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, p. 5.

<sup>44</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, p. 9.

<sup>45</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, p. 9.

<sup>46</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, pp. 9-10.

<sup>47</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, pp. 9-10.

<sup>48</sup> Sen. Com. On Pub. Safety Analysis of Sen. Bill No. 50 (2023-2024 Reg. Sess.) as amended March 24, 2023, pp. 9-10.

<sup>49</sup> See Appendix XX.

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community members remain vulnerable to pretextual stops; for example, an officer may stop someone for speeding pretextually in order to investigate an unrelated hunch.<sup>50</sup>

The Board hopes the Legislature will consider eliminating all pretextual stops and searches, as well as addressing pretextual stops with multiple approaches in addition to limiting stops for specific traffic codes.<sup>51</sup>

## **b. AB 93**

Another bill proposed in the California Legislature would have ended the use of consent only searches. As introduced, AB 93 was consistent with the Board's prior recommendation to eliminate consent searches. The legislation provided that "[t]he consent of a person given to a peace officer to conduct a search shall not constitute lawful justification for a search. A warrantless search conducted solely on the basis of a person's consent is a violation of that person's rights under this section."<sup>52</sup> Unfortunately, this bill did not advance to the second chamber of the Legislature.

Even so, it is important to discuss the positive aspects of the legislation as it was proposed, because of the importance of eliminating consent searches that can be explicitly or implicitly racially motivated. The author of the bill noted that consent searches are inherently vulnerable to bias because they are not based on objective criteria, and police have full discretion to choose when and whom to search.<sup>53</sup> Citing the RIPA Report 2023, the author noted the RIPA data "reveals that Black individuals were four times as likely and Latino individuals were 2.4 times as likely to be asked for a consent search during a traffic stop than White individuals. During stops where officers perform consent searches, officers are least likely to find contraband in the possession of those who are Black."<sup>54</sup> The author also asserted that "[l]imiting consent searches will help stop unjustifiable police interactions that lead to more intrusive and at worst lethal encounters with communities of color."<sup>55</sup>

Those in opposition to the bill argued: (1) it removes a law enforcement tool; (2) it removes a person's free choice to be searched by an officer; (3) and the bill would stop searches based on reasonable suspicion.<sup>56</sup> However, the text of the bill only addresses consent searches but does not end consensual encounters.<sup>57</sup> Searches would still be permitted if there is another independent legal basis for the search, such as reasonable suspicion.<sup>58</sup>

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<sup>50</sup> See Appendix XX.

<sup>51</sup> See RIPA Report 2023, p. 89.

<sup>52</sup> Assm. Bill No. 93 (2023-2024 Reg. Sess.)

<sup>53</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>54</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>55</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>56</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>57</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>58</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

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In a letter to the Legislature, the RIPA Board expressed its support for the bill. The Board asserted: (1) data show suspicionless searches are a significant source of disparities because there is no objective criteria of who to search and why, making these stops vulnerable to the biases of the officers; and (2) data show that consent searches are not an effective law enforcement tool compared to intelligence-led stops.<sup>59</sup> The Board also explained that the California Highway Patrol (CHP), the largest law enforcement agency in the state, rarely uses consent searches compared to other agencies.<sup>60</sup> Specifically, in 2021 CHP reported asking for consent to search a person or their property during roughly 0.1 percent of stops, whereas the other 57 law enforcement agencies that collected data in 2021 reported asking for consent to perform searches during 7.7 percent of stops.<sup>61</sup> CHP also conducted consent only searches during approximately 0.01 percent of stops, whereas the other collecting agencies reported conducting consent only searches during 2.7 percent of stops.<sup>62</sup> Similarly, in 2022 CHP reported asking for consent to search a person or their property during roughly 0.04 percent of stops, whereas the other 534 enforcement agencies that collected data in 2022 reported asking for consent to perform searches during 8.2 percent of stops. CHP also conducted consent only searches during approximately 0.01 percent of stops, whereas the other collecting agencies reported conducting consent only searches during 3.1 percent of stops.

The Board encouraged the Legislature to take an additional step to eliminate all suspicionless searches, including supervision searches. In support of its position, the Board cited to RIPA data showing (1) Black community members are more likely to be asked if they are on supervision than White community members;<sup>63</sup> (2) supervision searches generally are not as effective at yielding contraband than intelligence-led searches;<sup>64</sup> and (3) there are disparities in who is subjected to these searches.<sup>65,66</sup>

The Board hopes their recommendations eventually will be adopted by the Legislature and agencies in their entirety, including:

- (1) Identifying and taking action to limit enforcement of traffic laws and minor offenses that pose a low risk to public safety and show significant disparities in the rate of enforcement.<sup>67</sup> (Addressed in part in SB 50)

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<sup>59</sup> Assm. Floor Analysis, 3d reading of Assm. Bill No. 93 (2023-2024 Reg. Sess.) Feb. 23, 2023.

<sup>60</sup> See Appendix XX for a copy of the Board's March 16, 2023 letter to the Legislature in support of AB 93.

<sup>61</sup> See Appendix XX for a copy of the Board's March 16, 2023 letter to the Legislature in support of AB 93.

<sup>62</sup> See Appendix XX for a copy of the Board's March 16, 2023 letter to the Legislature in support of AB 93.

<sup>63</sup> See Eberhardt, J. L., Stanford Univ. SPARQ, Strategies for Change: Research Initiatives and Recommendations to Improve Police-Community Relations in Oakland, Calif. (June 2016) p. 17

<<https://stanford.app.box.com/v/Strategies-for-Change>> [as of Mar. 13, 2023]; <sup>63</sup> Oakland Police Dept., Dept. General Order R-02: Searches of Individuals on Probation, Parole, Mandatory Supervision and PRCS (Post-Release Community Supervision) ("Dept. General Order R-02") (Oct. 2019); Berkeley Police Dept., Law Enforcement Services Manual, Policy 311 Search and Seizure ("Policy 311 Search and Seizure") (2021), Section 311.5.

<sup>64</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 73.

<sup>65</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 73.

<sup>66</sup> See Appendix XX for a copy of the Board's March 16, 2023 letter to the Legislature in support of AB 93.

<sup>67</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 89.

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(2) Limit armed law enforcement responses to traffic enforcement by allowing for stops only if there is a concern for public safety, and explore amending the Vehicle Code to move traffic enforcement out of law enforcement's purview (e.g., to a civilian traffic unit).<sup>68</sup> (Addressed in part in SB 50)

(3) Prohibiting certain searches, such as consent searches or supervision searches, during traffic stops and instead requiring probable cause for any search.<sup>69</sup> (Addressed in part in AB 93)

(4) Eliminating all pretextual stops and subsequent searches and ensuring that a stop or search is based on reasonable suspicion or probable cause, respectively.<sup>70</sup> (Not yet addressed by the state Legislature)

This year and in future Reports, the Board will continue to monitor the RIPA data to inform the Legislature and communities of ways to make policing safer and more equitable.

### **c. Federal Legislation**

Another bill proposed this year, H.R. No. 852, the "Investing in Safer Traffic Stops Act," addressed the creation of civilian traffic enforcement programs. This bill would establish a grant program that would aid communities trying to establish a civilian traffic enforcement system.<sup>71</sup> The U.S. Attorney General would be responsible for creating the program and awarding grantees from local, state, or tribal governments to help create them.<sup>72</sup> The grant would award \$100,000,000 for each fiscal year from 2024-2029.<sup>73</sup> The bill also defines civilian for purposes of the program as a person who is not a law enforcement officer.<sup>74</sup>

The bill's author explained the bill was a direct response to the death of Tyre Nichols, who was beaten to death by police officers in 2023 after a stop for a minor traffic violation. The author stated, "What happened to Tyre Nichols could happen to any Black person in America . . . We have the power to prevent traffic stops from taking a deadly turn by putting enforcement where it belongs – in the hands of civilians or cameras."<sup>75</sup>

*[Board is monitoring the progress of this bill]*

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<sup>68</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 89.

<sup>69</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 89.

<sup>70</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 89.

<sup>71</sup> H.R. No. 852, 118th Cong., 1<sup>st</sup> Sess. (2023).

<sup>72</sup> H.R. No. 852, 118th Cong., 1<sup>st</sup> Sess. (2023).

<sup>73</sup> H.R. No. 852, 118th Cong., 1<sup>st</sup> Sess. (2023).

<sup>74</sup> H.R. No. 852, 118th Cong., 1<sup>st</sup> Sess. (2023).

<sup>75</sup> Holder, *Proposal Would Reward Cities That Take Cops Out of Traffic Stops* (Feb. 2023) Bloomberg <<https://www.bloomberg.com/news/articles/2023-02-08/bill-in-congress-rewards-removing-police-from-traffic-stops>> [as of XXX].

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## ii. Additional Calls to End Pretext Stops by Advocates and Victims of Police Violence

In 2023, the killing of Tyre Nichols again brought a national spotlight to the grave consequences of a pretext traffic stop escalating to an officer using deadly force. Tyre Nichols, a young Black man from Memphis, lost his life after being brutally beaten, Tased, and pepper sprayed after a pretextual traffic stop for a minor infraction.<sup>76</sup> Mr. Nichols was driving home after photographing the sunset when he was pulled over for “reckless driving.”<sup>77</sup> It is still unclear why Mr. Nichols was stopped or what conduct led the officers to believe he was driving recklessly, but according to investigators, the stop was pretextual in nature.<sup>78</sup> Investigators examining the case noted they were unable to verify that Mr. Nichols violated any laws prior to the stop being initiated.<sup>79</sup> At some point during the stop, Mr. Nichols fled on foot, pursued by officers.<sup>80</sup>

Mr. Nichols was pursued by multiple deputies who were part of a specialized unit whose focus was on “high-crime neighborhoods” or “hot-spots.”<sup>81</sup> The unit was created to address specific crimes, such as gang offenses or drug trafficking, and had a history of abusing constitutional rights of individuals, including excessive force, illegal searches, and discriminatory policing.<sup>82</sup> These units are associated with aggressive policing tactics, and often use these traffic stops as a

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<sup>76</sup> *What we know about Tyre Nichols’ death and the Memphis officers charged with his murder* (Feb. 2023) CBS News <<https://www.cbsnews.com/news/tyre-nichols-death-investigation-memphis-police-officers-charges-what-we-know/>> [as of XXX].

<sup>77</sup> *What we know about Tyre Nichols’ death and the Memphis officers charged with his murder* (Feb. 2023) CBS News <<https://www.cbsnews.com/news/tyre-nichols-death-investigation-memphis-police-officers-charges-what-we-know/>> [as of XXX].

<sup>78</sup> *What we know about Tyre Nichols’ death and the Memphis officers charged with his murder* (Feb. 2023) CBS News <<https://www.cbsnews.com/news/tyre-nichols-death-investigation-memphis-police-officers-charges-what-we-know/>> [as of XXX].

<sup>79</sup> *What we know about Tyre Nichols’ death and the Memphis officers charged with his murder* (Feb. 2023) CBS News <<https://www.cbsnews.com/news/tyre-nichols-death-investigation-memphis-police-officers-charges-what-we-know/>> [as of XXX].

<sup>80</sup> *What we know about Tyre Nichols’ death and the Memphis officers charged with his murder* (Feb. 2023) CBS News <<https://www.cbsnews.com/news/tyre-nichols-death-investigation-memphis-police-officers-charges-what-we-know/>> [as of XXX].

<sup>81</sup> Lopez, *Policing the Wrong Way: Memphis’s Scorpion is the latest special police unit to come under scrutiny* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/01/briefing/memphis-scorpion-unit-tyre-nichols-death.html>> [as of XXX].

<sup>82</sup> Lopez, *Policing the Wrong Way: Memphis’s Scorpion is the latest special police unit to come under scrutiny* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/01/briefing/memphis-scorpion-unit-tyre-nichols-death.html>> [as of XXX].

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pretext to investigate other crimes.<sup>83</sup> These issues are compounded when hotspot policing is used because they frequently target communities that are already over-policed.<sup>84</sup>

Mr. Nichols' brutal killing raises ongoing questions about law enforcement's involvement in traffic stops, particularly pretextual stops that do not serve a public safety purpose. After his death, Mr. Nichols' family expressed that they wish to: "[I]mprove police-data transparency, end the use of armed officers for traffic enforcement, abandon pretextual stops, and disband all specialty task forces."<sup>85</sup> This year, the Board examines these issues and sheds light on factors that contribute to pretextual stops as well as increased use of force incidents.

## **B. Driving Factors Associated with Pretext Stops: Specific Results of Stop and Assignment Type**

During pretextual stops and searches, officers stop the person with the purpose of investigating an unrelated suspicion or hunch. What are these suspicions or hunches being investigated by officers and how are they driving disparities in policing? The data provides some guidance as to the causes of these pretextual stops. By looking at the results of stop, agencies, municipalities, and communities can examine enforcement actions that result in disparate treatment of individuals and address some of the root causes of pretextual stops. Similarly, assessing the data on use of force rates associated with these outcomes can illuminate the experiences of those stopped and help communities identify the impact of specific types of stops. The data also helps

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<sup>83</sup> Lopez, *Policing the Wrong Way: Memphis's Scorpion is the latest special police unit to come under scrutiny* (Feb. 2023) New York Times <Memphis's Scorpion Unit Is the Latest Special Unit to Come Under Fire - The New York Times (nytimes.com)> [as of XXX]; A report to the Los Angeles Board of Police Commissioners concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal (Nov. 2000) Report of the Rampart Independent Review Panel <<https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-06/OTH%20Rampart%20independent%20review%20panel.pdf>> [as of XXX]; *Christopher Commission: Report of the Independent Commission on Los Angeles Police Department* (1991) <<https://ia600302.us.archive.org/5/items/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD.pdf>> [as of XXX]; Leonard, *Judge Finds Three LAPD Officers 'Factually Innocent' of Filing False Gang Reports* (May 2022) NBC Los Angeles <<https://www.nbclosangeles.com/investigations/lapd-false-gang-innocent-calgang/2902392/>> [as of XXX]; *Baltimore City Police Department, et. al. v. Ivan Potts*, Brief of Amici Curiae Victims of the Baltimore Police Department in Support of Appellee (Dec. 2019) Supreme Court of the United States <<https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/01/Potts-Md.-BGL-Amicus-Brief.pdf>> [as of XXX]; Watkins, *N.Y.P.D. Disbands Plainclothes Units Involved in Many Shootings* (Jun. 2020) New York Times <<https://www.nytimes.com/2020/06/15/nyregion/nypd-plainclothes-cops.html>> [as of XXX].

<sup>84</sup> Barns, *Police-Community Relations: A Study of Racial Disparity and the Effects of Hot Spots Policing Leadership Strategies* (2018) North Carolina A&T State U. <doi:10751787> [as of XXX]; Guariglia, *Police Use of Artificial Intelligence 2021 in Review* (Jan. 2022) EFF <Police Use of Artificial Intelligence: 2021 in Review | Electronic Frontier Foundation (eff.org)> [as of XXX].

<sup>85</sup> Lowery, *Why There Was No Racial Reckoning* (Feb. 2023) The Atlantic <<https://www.theatlantic.com/ideas/archive/2023/02/tyre-nichols-death-memphis-george-floyd-police-reform/672986/>> [as of XXX].

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communities examine the impact of specialized policing teams whose primary focus is on certain stop outcomes, such as gang enforcement or narcotics enforcement.

## **1. Pretextual Policing and the Results of Stop: Resisting Arrest, the Use of Field Interview Cards, and Narcotics Enforcement.**

Disparate treatment related to certain stop outcomes or actions taken during a stop offer opportunities to see how these stops unfold and may provide guidance as to policing strategies that may drive disparities. This year the Board reviews data for three types of stop outcomes: (1) when someone is charged with resisting arrest only; (2) when someone is charged with drug possession; and (3) when a field interview card is completed at the end of a stop.

### **i. Resisting Arrest**

Examining the result of stop where someone is charged with resisting arrest and no other underlying violation may be an indicator of a pretext stop because the individual does not receive a citation for the original reason for stop, such as a broken tail light. This stop outcome is also important to review because it is often linked to use of force incidents. The U.S. DOJ conducted several investigations of law enforcement departments and specifically examined resisting arrest charges.<sup>86</sup> DOJ found racial disparities in who was alleged to be resisting arrest. Data also showed that in these incidents, there was likely no evidence to stop the person in the first place, since they were not arrested or ticketed for the underlying basis for the stop.<sup>87</sup>

In California, resisting arrest can be charged as a misdemeanor or a felony with or without accompanying charges.<sup>88</sup> During a resisting arrest incident, an officer may allege they received an injury during the encounter. In this particular analysis, the Board looks specifically at misdemeanor resisting arrest charges where there is no alleged injury charged as a part of the crime and the sole charge is resisting arrest.

Penal Code section 148, subdivision (a) provides the following elements the prosecution must prove beyond a reasonable doubt to convict a person of a resisting arrest:

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<sup>86</sup> Investigation of the Louisville Metro Police Department and Louisville Metro Government (Mar. 2023) U.S. Dept. of Justice Civil Rights Division; Investigation of the Ferguson Police Department (Mar. 2015) U.S. Dept. of Justice Civil Rights Division; Investigation of the Baltimore Police Department (Aug. 2016) U.S. Dept. of Justice Civil Rights Division.

<sup>87</sup> Investigation of the Louisville Metro Police Department and Louisville Metro Government (Mar. 2023) U.S. Dept. of Justice Civil Rights Division; Investigation of the Ferguson Police Department (Mar. 2015) U.S. Dept. of Justice Civil Rights Division; Investigation of the Baltimore Police Department (Aug. 2016) U.S. Dept. of Justice Civil Rights Division.

<sup>88</sup> Pen. Code § 148(a), 69, Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)).

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(1) The person was a peace officer lawfully performing or attempting to perform their duties as a peace officer;<sup>89</sup>

(2) The person willfully resisted, obstructed, or delayed a peace officer in the performance or attempted performance of those duties;<sup>90</sup> and

(3) When the person acted they knew, or reasonably should have known, that the person was a peace officer performing or attempting to perform their duties.<sup>91</sup>

The law further explains that an officer is not “lawfully performing their duties” if they are unlawfully arresting or detaining someone, including using unreasonable or excessive force.<sup>92</sup>

The reason why the law allows for a person to be charged solely with this offense is because resisting also includes obstructing or delaying an officer in the performance of their duties.<sup>93</sup> For example, if a person is stopped for a traffic violation and refuses to exit their vehicle at the demand of an officer, the person could be charged with delaying or obstructing the officer during the performance of their duties. Below, the Board investigates the link between pretextual policing and resisting arrest, with a specific focus on the type of stop, disparities in enforcement, and use of force rates.

**a. Reason for Stop**

1. Reasons for Stop that Result in Solely Resisting Arrest
2. Top 20 Offense Codes Listed as Reason for Stop

**b. Measuring for Disparities in Enforcement**

1. Percentage of Stops by Identity that Result in Resist Arrest Only – RAE
2. Percentage of Stops by Identity that Result in Resist Arrest Only – Age
3. Percentage of Stops by Identity that Result in Resist Arrest Only – Gender

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<sup>89</sup> Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)).

<sup>90</sup> Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)).

<sup>91</sup> Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)).

<sup>92</sup> Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)); *People v. White* (1980) 101 Cal.App.3d 161, 167.

<sup>93</sup> Pen. Code § 148(a); See also, Cal. Crim. Jury Inst. No. 2656 (2022 edition) Resisting Peace Officer, Public Officer, or EMT (Pen. Code § 148(a)); *People v. White* (1980) 101 Cal.App.3d 161, 167.

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4 Percentage of Stops by Identity that Result in Resist Arrest Only – Disability

5. Percentage of Stops by Identity that Result in Resist Arrest Only – LBGT

**c. Use of Force Rates**

1. Overall UOF All Other Stops vs. Resist Only

2. RAE and UOF during Resist Only

**d. Recommendations**

Several district attorneys’ offices in California have created policies to restrict the use of standalone resisting arrest charges. In 2020, Los Angeles created a policy requiring deputy district attorneys to dismiss standalone resisting arrest charges or charges where resisting arrest is charged in conjunction with trespass, disturbing the peace, driving without a valid license or a suspended license, simple drug possession, minor in possession of alcohol, drinking in public, under the influence of a controlled substance, public intoxication, or loitering.<sup>94</sup> This particular policy reflects some of the findings in the RIPA data – e.g., trespass is one of the most frequently alleged reasons for stop when the result of stop is resisting arrest.

The goal of this policy ultimately is to protect public safety by focusing resources on combating serious crimes and diverting some misdemeanor cases from the criminal legal system to treatment providers.<sup>95</sup> The policy notes the prosecution of low-level offenses should be guided in part by data-driven reforms.<sup>96</sup> Through their own analysis, the L.A. District Attorney found that over 47% of those incarcerated for misdemeanors have a mental health disability, 60% have substance use disorder, and 20% of all arrests involve individuals who are unhoused.<sup>97</sup> The policy also explains that misdemeanor convictions can have serious consequences by creating “difficulties with employment, housing, education, government benefits, and immigration for non-citizens and citizens alike.”<sup>98</sup> Such convictions also are accompanied with heavy fines that force some people to choose between necessities such as rent and paying these fines.<sup>99</sup> The policy concludes: Despite the immense social costs, studies show that prosecution of the offenses driving the bulk of misdemeanor cases have minimal, or even negative, long-term impacts on public safety.<sup>100</sup>

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<sup>94</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>95</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>96</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>97</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>98</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>99</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>100</sup> L.A. District Attorney’s Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

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In Santa Clara, there is also a 2020 policy that restricts district attorneys from filing resisting arrest cases and requires deputies to review body worn camera footage prior to filing any charges.<sup>101</sup> The policy discourages deputies from filing standalone resisting arrest cases unless extraordinary circumstances exist.<sup>102</sup> District attorneys shall also provide feedback to officers on the positive and negative effects of resisting arrest charges. The agency's stated purpose for this policy change is to reduce the use of excessive force, build community trust, and reduce disparities in enforcement.<sup>103</sup> The department notes in the policy the importance of having robust independent review of these charges and reducing excessive use of force incidents and their goal of increasing trust between law enforcement and "all racial and ethnic groups within our community."<sup>104</sup>

Based on these findings, the Board makes several recommendations to agencies, municipalities, district attorneys, and the Legislature.

[Add Board Recommendations]

## ii. Narcotics Enforcement

*You want to know what this [the war on drugs] was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did. ~ John Ehrlichman, Assistant to the President for Domestic Affairs under President Richard Nixon, statement to journalist Dan Baum (1994)<sup>105</sup>*

Pretextual stops are often associated with narcotics enforcement and the war on drugs. Data also show that individuals who are Black or Latine(x) are more likely to be cited for these offenses and experience negative consequences from drug use despite drug use rates being virtually the same across race and ethnicity.<sup>106</sup> The disparities observed can be linked to the structural inequities exhibited in the war on drugs, which encouraged pretextual stops as a means to seize

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<sup>101</sup> Santa Clara District Attorney's Off., Bend the Arc Reforms: Community Initiatives (2020).

<sup>102</sup> Santa Clara District Attorney's Off., Bend the Arc Reforms: Community Initiatives (2020).

<sup>103</sup> Santa Clara District Attorney's Off., Bend the Arc Reforms: Community Initiatives (2020).

<sup>104</sup> Santa Clara District Attorney's Off., Bend the Arc Reforms: Community Initiatives (2020).

<sup>105</sup> Drug War Confessional, Vera Inst. of Justice < <https://www.vera.org/reimagining-prison-webumentary/the-past-is-never-dead/drug-war-confessional> > [as of XXX].

<sup>106</sup> *Racial Inequities in Treatments of Addictive Disorders* (Oct. 2021) Yale School of Medicine < <https://medicine.yale.edu/news-article/racial-inequities-in-treatments-of-addictive-disorders/> > [as of XXX].

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narcotics but focused on certain racial or ethnic groups and communities. These inequities devastated communities as mass incarceration and overdoses skyrocketed across the nation.<sup>107</sup>

We know there is a current health crisis in our country surrounding drug use, overdose, and lack of treatment. The war on drugs only exacerbated the crisis by criminalizing drug use instead of prioritizing access to adequate treatment and harm reduction.<sup>108</sup> According to the CDC, drug overdose deaths increased fivefold over the past two decades.<sup>109</sup> When considering the impact of drug policies and creating new policies to address disparities, it is important to examine how the war on drugs impacted prison populations and how the health crisis inequitably impacted communities.

One explanation for the United States having the highest number of incarcerated people in the entire world is imprisoning people for drug offenses. In fact, 1 in 5 people imprisoned by the government are for drug offenses.<sup>110</sup> Disturbingly, incarcerated Black individuals represent 3 times their share of the population, and these arrests can have lifelong impacts – including poverty and a higher risk of being unhoused.<sup>111</sup> Because Black, Latine(x), and Indigenous individuals are more likely to be punished for drug use, they also are less likely to receive treatment and face more healthcare discrimination.<sup>112</sup>

Those who are Black or Latine(x) are also more likely to be impacted by the health consequences of drug use.<sup>113</sup> Since 2000, one million people have died from drug overdoses, and each week more than 1,500 people die from an opioid overdose.<sup>114</sup> Access to treatment has been a continuing issue; those who are White receive treatment 23.5 percent of the time, while those who are Black receive treatment 18.6 percent of the time and Latine(x) people 17.6 percent of

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<sup>107</sup> *Racial Inequities in Treatments of Addictive Disorders* (Oct. 2021) Yale School of Medicine <<https://medicine.yale.edu/news-article/racial-inequities-in-treatments-of-addictive-disorders/>> [as of XXX].

<sup>108</sup> Cooper, *War on Drugs Policing and Police Brutality* (2015) Nat. Library of Medicine <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4800748/>> [as of XXX].

<sup>109</sup> Spencer, et. al., *Drug Overdose Deaths in the United States, 2001-2021* (Dec. 2022) Nat. Center for Health Statistics <<https://www.cdc.gov/nchs/products/databriefs/db457.htm>> [as of XXX].

<sup>110</sup> *Racial Inequities in Treatments of Addictive Disorders* (Oct. 2021) Yale School of Medicine <<https://medicine.yale.edu/news-article/racial-inequities-in-treatments-of-addictive-disorders/>> [as of XXX].

<sup>111</sup> Bratberg, et. al., *Support, done punish: Drug decriminalization is harm reduction* (Dec. 2022) J. of the American Pharmacists Association <[https://www.japha.org/article/S1544-3191\(22\)00413-7/fulltext](https://www.japha.org/article/S1544-3191(22)00413-7/fulltext)> [as of XXX].

<sup>112</sup> Bratberg, et. al., *Support, done punish: Drug decriminalization is harm reduction* (Dec. 2022) J. of the American Pharmacists Association <[https://www.japha.org/article/S1544-3191\(22\)00413-7/fulltext](https://www.japha.org/article/S1544-3191(22)00413-7/fulltext)> [as of XXX].

<sup>113</sup> *Racial Inequities in Treatments of Addictive Disorders* (Oct. 2021) Yale School of Medicine <<https://medicine.yale.edu/news-article/racial-inequities-in-treatments-of-addictive-disorders/>> [as of XXX].

<sup>114</sup> Klobucista and Martinez, *Fentanyl and the U.S. Opioid Epidemic* (Apr. 2023) Council on Foreign Relations <<https://www.cfr.org/backgrounder/fentanyl-and-us-opioid-epidemic>> [as of XXX].

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the time.<sup>115</sup> Another study showed that 90 percent of Black individuals and 92 percent of Latine(x) individuals did not receive any drug addiction treatment.<sup>116</sup>

The American Pharmacists Association found that “the criminalization of drug use has disproportionately exacerbated these drug-related harms and imposed short- and long-term burdens on already marginalized and vulnerable populations.”<sup>117</sup> They stated:

Communities become less healthy and stagnate in punitive criminalization systems, further reducing opportunities for growth. Decriminalization of drug use and possession is an urgently needed and effective approach to drug use that shifts resources from punishment to public health, thereby reducing the negative impacts of drug use and keeping communities safe and healthy.<sup>118</sup>

The American Journal of Preventative Medicine found “decriminalization may be a promising strategy to reduce exposure to the carceral system, an established risk factor for overdose and other drug-related sequelae and a driver of racial disparities in the U.S.”<sup>119</sup> Notably, United Nations human rights experts also called for the end of this punitive approach to drug use and to instead “promote drug policies that are firmly anchored in human rights.”<sup>120</sup> The commission of experts found that a punitive approach “undermines the health and social wellbeing and wastes

*“Now more than ever, the international community must replace punishment with support and promote policies that respect, protect, and fulfil the rights of all communities.” – United Nations Human Rights Experts, see footnote XXX*

public resources while failing to eradicate the demand for illegal drugs and the illegal drug market.”<sup>121</sup>

This year the Board examines the reasons why individuals are stopped for drug related offenses and if there is any relation to pretextual stops. Based on the data, the Board offers some remedies to address

<sup>115</sup> Grooms and Ortega, *Racial Disparities in Accessing Treatment for Substance Use Highlights Work to be Done* (Apr. 2022) USC Leonard D. Schaeffer Center for Health Policy & Economics <<https://healthpolicy.usc.edu/evidence-base/racial-disparities-in-accessing-treatment-for-substance-use-highlights-work-to-be-done/>> [as of XXX].

<sup>116</sup> *Racial Inequities in Treatments of Addictive Disorders* (Oct. 2021) Yale School of Medicine

<<https://medicine.yale.edu/news-article/racial-inequities-in-treatments-of-addictive-disorders/>> [as of XXX].

<sup>117</sup> Bratberg, et. al., *Support, don’t punish: Drug decriminalization is harm reduction* (2022) J. of the American Pharmacists Association.

<sup>118</sup> Bratberg, et. al., *Support, don’t punish: Drug decriminalization is harm reduction* (2022) J. of the American Pharmacists Association.

<sup>119</sup> Rouhani, et. al. *Racial Disparities in Drug Arrest Before and After De Facto Decriminalization in Baltimore* (Apr. 2023) American J. of Preventative Medicine <[https://www.ajpmonline.org/article/S0749-3797\(23\)00174-5/fulltext](https://www.ajpmonline.org/article/S0749-3797(23)00174-5/fulltext)> [as of XXX].

<sup>120</sup> Santa Clara District Attorney’s Off., *Bend the Arc Reforms: Community Initiatives* (2020).

<sup>121</sup> *End ‘war on drugs’ and promote policies rooted in human rights: UN experts* (Jun. 2022) United Nations Human Rights Office of the High Commissioner <<https://www.ohchr.org/en/statements/2022/06/end-war-drugs-and-promote-policies-rooted-human-rights-un-experts>> [as of XXX].

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profiling of individuals for drug related offenses and the root causes driving these disparities.

**b. RIPA Data Analysis**

1. Stops Involving Drug Offense Codes
2. Top 30 Offense Codes Reason for Stop
3. Percentage of Stops by Identity for Simple Drug Reason for Stop
4. Basis for Search in Drug Result Stops
5. Reason for Stop Narratives of Drug Result Stops

**d. Recommendations**

These disparities in enforcement, including who is stopped for drug related offenses and under what pretext, raise larger policy and societal concerns that go beyond this Report.

Instead of focusing on punitive models to address a health crisis, some states and district attorneys have chosen to decriminalize simple possession of drugs. In addition to limiting other charges, as discussed above, the L.A. District Attorney has also stopped enforcing charges related to simple possession.<sup>122</sup> Specifically, their policy prohibits charges being filed for drug paraphernalia<sup>123</sup> and possession.<sup>124</sup> These changes were made in part to divert individuals to social services that can address substance use, reduce recidivism, and improve the public health and safety of the community.<sup>125</sup> Similarly, the United Nations commission urged leaders to use a restorative justice approach that is community based and inclusive of preventative measures.<sup>126</sup>

The Washtenaw County District Attorney in Michigan similarly will not file possession of contraband charges but took a narrower approach by only prohibiting filing under certain circumstances.<sup>127</sup> They will not file these charges if (1) the search that uncovered the contraband stemmed from an infraction-related stop; and (2) the search was based on the consent of the

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<sup>122</sup> L.A. District Attorney's Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>123</sup> Health & Saf. Code 11350, 11377, 11357

<sup>124</sup> Health & Saf. Code 11364

<sup>125</sup> L.A. District Attorney's Off., Special Directive: Misdemeanor Case Management (Dec. 2020).

<sup>126</sup> *End 'war on drugs' and promote policies rooted in human rights: UN experts* (Jun. 2022) United Nations Human Rights Office of the High Commissioner <<https://www.ohchr.org/en/statements/2022/06/end-war-drugs-and-promote-policies-rooted-human-rights-un-experts>> [as of XXX].

<sup>127</sup> Washtenaw County Off. of the Prosecuting Atty., Policy Directive 2021-09: Policy Regarding Pretext Stops ("Washtenaw Policy Regarding Pretext Stops") <<https://www.washtenaw.org/DocumentCenter/View/19235/Pretext-Stops-Policy>> [as of XXX].

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stopped person and there was no other legal justification for the search, such as probable cause.<sup>128</sup>

These examples may provide models to agencies, municipalities, and states who wish to address inequities related to drug charges in the criminal legal system and divert individuals from the legal system to public health providers.

Oregon is one of the first states to decriminalize the personal possession of drugs and expand treatment services to address this drug crisis.<sup>129</sup> If a person is arrested for a small amount of a controlled substance or simple possession, they are subject to either a \$100 dollar fine or can instead choose to complete a health assessment at an addiction and recovery center.<sup>130</sup> In cases where a person is arrested for a larger amount of drugs, penalties are reduced from a felony to a misdemeanor.<sup>131</sup> Oregon's bill also expanded access to treatment throughout the state by creating a grant program to fund social services to address drug use. The state funded these programs through (1) financial savings from sentence reductions for drug possession including "reduction in arrests, incarceration, and supervision" and (2) from the state's Marijuana Fund or taxes.<sup>132</sup>

Since its enactment in 2021, the Oregon legislature found that taking a health-based approach to addiction and overdose is "more effective, humane, and cost-effective than criminal punishments."<sup>133</sup> The Oregon Criminal Justice Commission argued that a reduction in filing charges and enforcement of drug offenses in turn will address racial inequities caused by the war on drugs.<sup>134</sup> However, there have been challenges with implementation because of the time needed to fund treatment providers, so there is still reduced access to healthcare.<sup>135</sup> In addition, since there is no data collection requirement, it is difficult to measure the successes or gaps in treatment.<sup>136</sup>

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<sup>128</sup> Washtenaw County Off. of the Prosecuting Atty., Policy Directive 2021-09: Policy Regarding Pretext Stops ("Washtenaw Policy Regarding Pretext Stops")

<<https://www.washtenaw.org/DocumentCenter/View/19235/Pretext-Stops-Policy>> [as of XXX].

<sup>129</sup> Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020) Background Brief <[https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf)> [as of XXX].

<sup>130</sup> Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020) Background Brief <[https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf)> [as of XXX]

<sup>131</sup> Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020) Background Brief <[https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf)> [as of XXX]

<sup>132</sup> Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020) Background Brief <[https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf)> [as of XXX]

<sup>133</sup> Harrington, After Fifty Years of the War on Drugs, the Nation Looks West: Why Oregon Required the Drug Addiction Treatment and Recovery Act and What we can Learn from it (2023) Hall U. School of Law.

<sup>134</sup> Harrington, After Fifty Years of the War on Drugs, the Nation Looks West: Why Oregon Required the Drug Addiction Treatment and Recovery Act and What we can Learn from it (2023) Hall U. School of Law.

<sup>135</sup> Selsky *Oregon's drug decriminalization gets poor marks on audit* (Jan. 2023) Associated Press <<https://apnews.com/article/ap-top-news-health-oregon-8629d6e62bff151afb8db3a37c2206ae>> [as of XXX].

<sup>136</sup> Selsky *Oregon's drug decriminalization gets poor marks on audit* (Jan. 2023) Associated Press <<https://apnews.com/article/ap-top-news-health-oregon-8629d6e62bff151afb8db3a37c2206ae>> [as of XXX].

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Based on the RIPA data and these findings, the Board makes several recommendations to agencies, municipalities, district attorneys, and the Legislature.

[Add Board Recommendations]

ii. Field Interview (FI) Cards

Another result of stop that may be connected to pretext stops is when a field interview card is completed by a law enforcement officer. A field interview card is a document law enforcement officers can elect to fill out during a contact with an individual. These cards can contain information on who the person is with, what they are wearing, any social media accounts, or nicknames of the person.

Many of these field interview cards are entered into criminal databases, such as CalGang, which are used by law enforcement to share the data collected in these interviews.<sup>137</sup> The practice of field interviews varies agency by agency, so not every FI card from a police contact is submitted into a database. CalGang is a database created over two decades ago to track police contacts with alleged gang members. However, in a 2015 report, the State Auditor found that the data was not always accurate and the database violated the privacy rights of individuals, making the system ineffective for fighting gang-related crimes.<sup>138</sup> For example, the audit found over 42 individuals who were entered into CalGang who were younger than one year old, and the database indicated 28 of those individuals admitted to being gang members.<sup>139</sup>

In 2017, in response to this report, the state Legislature passed AB 90, which required the California Attorney General's Office to routinely audit the database and issue regulations to help improve accuracy in the database.<sup>140</sup> The new law also required agencies to provide notice to an individual when they are entered into the database.<sup>141</sup> Since its implementation, there have been 6 reports issued by the Department on CalGang.

Even under the new regulations, questions about the accuracy of the information in the database persist, and there are still ongoing concerns about how youth are criminalized by this practice. For example, children as young as 13 years old can still be entered into this database.<sup>142</sup> In 2020, the Department restricted all users of CalGang from using data entered by the LAPD – the largest agency making entries into CalGang – compromising almost 25% of all entries into the

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<sup>137</sup> Attorney General's Annual Report on CalGang (2022) <<https://oag.ca.gov/system/files/media/ag-annual-report-calgang-2021.pdf>> [as of XXX].

<sup>138</sup> Cal. State Auditor Report, The CalGang Criminal Intelligence System: As the result of its week oversight structure it contains questionable information that may violate individuals privacy rights, Report 2015-120.

<sup>139</sup> Cal. State Auditor Report, The CalGang Criminal Intelligence System: As the result of its week oversight structure it contains questionable information that may violate individuals privacy rights, Report 2015-120.

<sup>140</sup> Assm. Bill No. 90 (2017-2018 Reg. Sess.)

<sup>141</sup> Assm. Bill No. 90 (2017-2018 Reg. Sess.)

<sup>142</sup> Attorney General's Annual Report on CalGang (2022) <<https://oag.ca.gov/system/files/media/ag-annual-report-calgang-2021.pdf>> [as of XXX].

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system.<sup>143</sup> These concerns arose after an internal audit revealed significant misuse of the tracking system, including entering false information or information without reasonable suspicion the person was involved in criminal gang-related activity.<sup>144</sup>

Specifically, it was alleged that more than a dozen officers entered false reports into the system labeling innocent drivers or pedestrians as gang members.<sup>145</sup> One of the deputies accused of falsifying reports claimed that the contacts documented on field interview cards were a result of pressure from commanders in LAPD to increase gang contacts and an unwritten policy encouraging officers to meet quotas.<sup>146</sup> Several of the officers faced criminal charges for making these false reports; judges later dismissed the charges, noting, “They were acting under the current state of affairs. And, the dereliction, if there is one, does not lie with them,” the judge said. “It lies higher up in the command structure, perhaps to the highest levels.”<sup>147</sup>

As a result of the internal investigations, LAPD permanently withdrew from the CalGang database.<sup>148</sup> However, RIPA data does indicate LAPD is using field interview cards during contacts. This is concerning because LAPD may avoid legal requirements, such as notice, by not using the CalGang system.<sup>149</sup>

A person has the right to receive notice of their entry into CalGang unless it would compromise an ongoing investigation.<sup>150</sup> A person under the age of 18 and their guardian or attorney must be notified of their entry into CalGang. Similarly, individuals over the age of 18 also must be

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<sup>143</sup> Attorney General Becerra Restricts Access to LAPD-Generated CalGang Records, Issues Cautionary Bulletin to All Law Enforcement, and Encourages Legislature to Reexamine CalGang Program (July 2020) Press Release <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-restricts-access-lapd-generated-calgang-records-issues>> [as of XXX].

<sup>144</sup> Attorney General Becerra Restricts Access to LAPD-Generated CalGang Records, Issues Cautionary Bulletin to All Law Enforcement, and Encourages Legislature to Reexamine CalGang Program (July 2020) Press Release <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-restricts-access-lapd-generated-calgang-records-issues>> [as of XXX].

<sup>145</sup> Leonard, *LAPD Metro Officer Claims Quotas Drove False Gang Reports* (Aug. 2020) NBC L.A. <<https://www.nbclosangeles.com/investigations/lapd-metro-officer-claims-quotas-drove-false-gang-reports/2420186/>> [as of XXX].

<sup>146</sup> Leonard, *LAPD Metro Officer Claims Quotas Drove False Gang Reports* (Aug. 2020) NBC L.A. <<https://www.nbclosangeles.com/investigations/lapd-metro-officer-claims-quotas-drove-false-gang-reports/2420186/>> [as of XXX].

<sup>147</sup> Leonard, *Judge Finds Three LAPD Officers ‘Factually Innocent’ of Filing False Gang Reports* (May 2022) NBC Los Angeles <<https://www.nbclosangeles.com/investigations/lapd-false-gang-innocent-calgang/2902392/>> [as of XXX].

<sup>148</sup> Attorney General Becerra Restricts Access to LAPD-Generated CalGang Records, Issues Cautionary Bulletin to All Law Enforcement, and Encourages Legislature to Reexamine CalGang Program (July 2020) Press Release <<https://oag.ca.gov/news/press-releases/attorney-general-becerra-restricts-access-lapd-generated-calgang-records-issues>> [as of XXX].

<sup>149</sup> LAPD Field Interview (FI) Cards NR21240j1 (“Field Interview Cards”) (Sep. 2021) <<https://www.lapdonline.org/newsroom/lapd-field-interview-fi-cards-nr21240j1/>> [as of XXX].

<sup>150</sup> On only two instances agencies did not provide notice of entry into CalGang. Attorney General’s Annual Report on CalGang (2022) <<https://oag.ca.gov/system/files/media/ag-annual-report-calgang-2021.pdf>> [as of XXX].

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notified of their entry into the database and can request removal.<sup>151</sup> The letter should provide notice to the person that their information was entered into the database and inform them that they can request additional information or removal from the database.<sup>152</sup> Nevertheless, the low number of requests for removal raises some concerns.<sup>153</sup> In 2022, there were a total of 1,001 records added to CalGang, and only 16 requests for removal, or 0.01 percent of new entries. Of those requests, only one removal was granted.<sup>154</sup>

In previous years, the Board began investigating the use of field interview cards with a specific focus on individuals perceived as transgender and youth. This year, the Board builds on this work by examining more broadly the impact of these policing practices and how they may be connected to pretextual policing.

**a. Reason for Stop**

1. Total and percentage of FI cards by Reason for Stop
2. Top 30 Traffic and Suspicion Codes that begin stops that result in Field Interview Cards
3. Reasons for Stop that more frequently result in field interview cards

**b. Measuring for Disparities in Enforcement**

1. Total and percentage of FI cards by RAE & RAE from CalGang Records
2. Total and percentage of FI cards by gender
3. Percentage of Stops Resulting in Field Interview Card for Racial and Ethnic Groups.
4. Percentage of stops within age groups resulting in a field interview card Age of those in CalGang
5. Percentage of stops within racial and ethnic and age groups resulting in a field interview card
6. Request for Removal – audit report

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<sup>151</sup> Pen Code §186.34.

<sup>152</sup> Pen. Code §186.34.

<sup>153</sup> Attorney General's Annual Report on CalGang (2022) <<https://oag.ca.gov/system/files/media/ag-annual-report-calgang-2021.pdf>> [as of XXX].

<sup>154</sup> Attorney General's Annual Report on CalGang (2022) <<https://oag.ca.gov/system/files/media/ag-annual-report-calgang-2021.pdf>> [as of XXX].

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#### **d. Recommendations**

In previous years, the Board made several recommendations regarding the use of field interview cards with a specific focus on youth. Since youth are provided with additional protections in many areas of the law – such as custodial interrogations – the Board recommended that policymakers extend these protections to field interview cards to ensure statements are given voluntarily, given that youth are more susceptible to being influenced by an officer.<sup>155</sup> Field interview cards may have potentially negative consequences to youth, particularly if any statements made by youth could be used against them criminally. After reviewing the data, this year the Board makes broader recommendations regarding the use of field interview cards.

[Add Board Recommendations]

### **2. Assignment Type: Specialized Teams and Hotspot Policing**

In addition to some of the issues raised with specific types of enforcement actions or results of stops, it is also important to examine certain types of specialized teams, such as gang enforcement units. This year, the Board begins to examine the relationship between officer assignment type and disparities in enforcement. The Board also discusses the impacts of “hot spot” policing and predictive policing where specialized units are often deployed, and reviews data on use of force rates.

Breonna Taylor was killed sleeping in her own bed when a specialized team, using a hot spot model of policing, went to serve a no-knock search warrant.<sup>156</sup> Similarly, the unit that beat Tyre Nichols to death was a specialized team focused on gang and drug-related crimes, operating under a hotspot model of policing.<sup>157</sup>

Over the past several years, there has been a growing national conversation about the impact of specialized policing teams and hotspot policing.<sup>158</sup> Specialized teams are developed in police departments to target specific types of alleged criminal activity and are often created to address

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<sup>155</sup> Racial and Identity Profiling Report (2023) pp. 120-123 <<https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>> [as of XXX].

<sup>156</sup> Lopez, *Policing the Wrong Way: Memphis's Scorpion is the latest special police unit to come under scrutiny* (Feb. 2023) New York Times <Memphis's Scorpion Unit Is the Latest Special Unit to Come Under Fire - The New York Times (nytimes.com)> [as of XXX].

<sup>157</sup> Lopez, *Policing the Wrong Way: Memphis's Scorpion is the latest special police unit to come under scrutiny* (Feb. 2023) New York Times <Memphis's Scorpion Unit Is the Latest Special Unit to Come Under Fire - The New York Times (nytimes.com)> [as of XXX].

<sup>158</sup> Arango and Gabler, *Amid Criticism, Elite Crime Teams Dwindled. The Cities Brought Them Back* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/06/us/police-teams-memphis-scorpion-unit.html>> [as of XXX].

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spikes in activities that are criminalized by the state, such as drug crimes.<sup>159</sup> Similarly, hotspot policing concentrates these units in specific areas in communities that are considered high crime.<sup>160</sup> The support of these units appears to ebb and flow based on crime rates, but it is unclear how effective they may be at combating crime.<sup>161</sup>

Historically, specialized policing teams have been marred with allegations of excessive force and corruption. One of the most notorious scandals involved a gang enforcement unit in LAPD called CRASH (Community Resources Against Street Hoodlums).<sup>162</sup> The unit was created to aggressively fight gang-related crimes and data showed a decrease in reported crimes in the Rampart Area where they patrolled. However, “this ‘success’ of CRASH came at a great price.”<sup>163</sup> The unit embraced an “any means necessary” approach that included a war-like mentality against community members.<sup>164</sup> For example, it was discovered that officers had framed individuals to get convictions and cover up excessive force.<sup>165</sup> In addition to framing individuals, the division also used pretextual stops as a means to harass Black and Latine(x) people, “often in expensive or late model cars, or in parts of the city where they might be

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<sup>159</sup> Arango and Gabler, *Amid Criticism, Elite Crime Teams Dwindled. The Cities Brought Them Back* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/06/us/police-teams-memphis-scorpion-unit.html>> [as of XXX].

<sup>160</sup> Arango and Gabler, *Amid Criticism, Elite Crime Teams Dwindled. The Cities Brought Them Back* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/06/us/police-teams-memphis-scorpion-unit.html>> [as of XXX].

<sup>161</sup> Arango and Gabler, *Amid Criticism, Elite Crime Teams Dwindled. The Cities Brought Them Back* (Feb. 2023) The New York Times <<https://www.nytimes.com/2023/02/06/us/police-teams-memphis-scorpion-unit.html>> [as of XXX].

<sup>162</sup> A report to the Los Angeles Board of Police Commissioners concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal (Nov. 2000) Report of the Rampart Independent Review Panel <<https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-06/OTH%20Rampart%20independent%20review%20panel.pdf>> [as of XXX].

<sup>163</sup> A report to the Los Angeles Board of Police Commissioners concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal (Nov. 2000) Report of the Rampart Independent Review Panel <<https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-06/OTH%20Rampart%20independent%20review%20panel.pdf>> [as of XXX].

<sup>164</sup> A report to the Los Angeles Board of Police Commissioners concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal (Nov. 2000) Report of the Rampart Independent Review Panel <<https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-06/OTH%20Rampart%20independent%20review%20panel.pdf>> [as of XXX]; Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County* (2000) Duke U.

<sup>165</sup> A report to the Los Angeles Board of Police Commissioners concerning the operations, policies, and procedures of the Los Angeles Police Department in the wake of the Rampart scandal (Nov. 2000) Report of the Rampart Independent Review Panel <<https://exonerations.newkirkcenter.uci.edu/groups/sites/default/files/2020-06/OTH%20Rampart%20independent%20review%20panel.pdf>> [as of XXX].

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considered out of place, being stopped for no apparent reason or for one that appears on the surface to be a pretext.”<sup>166</sup> An independent investigative commission further found:

Routine stops of young African-American and Latino males, seemingly without “probable cause” or “reasonable suspicion,” may be part and parcel of the LAPD’s aggressive style of policing. The practice, however, breeds resentment and hostility among those who are its targets. Moreover, the practice has created a feeling among many in Los Angeles’ minority communities that certain parts of the City are closed to them or that being detained by the police is the price of traveling in those areas.<sup>167</sup>

Ultimately the CRASH team was disbanded, but other specialized teams cropped up in its place, including crime suppression teams that were found to have falsified field interview cards in 2020, discussed in more detail above.<sup>168</sup> Other agencies have also faced similar issues with specialized teams because of this “any means necessary approach.”<sup>169</sup>

In Baltimore, for example, the Gun Trace Task Force (GTTF) was found to have targeted Black individuals and used unjustified stops, false arrests, and planted evidence to “get perceived bad guys off the streets.”<sup>170</sup> It was further argued that the police department incentivized those strategies to maximize arrest numbers to pursue gun charges without a concern for the means.<sup>171</sup> In New York City, the anti-crime unit’s plainclothes team was disbanded after the department found officers in that unit were involved in some of the most notorious police shootings; consequently, NYPD chose to move away from this crime-fighting strategy and instead use intelligence-gathering technology.<sup>172</sup> And an investigation into the Louisville Metro Police

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<sup>166</sup> *Christopher Commission: Report of the Independent Commission on Los Angeles Police Department* (1991) <<https://ia600302.us.archive.org/5/items/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD.pdf>> [as of XXX].

<sup>167</sup> *Christopher Commission: Report of the Independent Commission on Los Angeles Police Department* (1991) <<https://ia600302.us.archive.org/5/items/ChristopherCommissionLAPD/Christopher%20Commission%20LAPD.pdf>> [as of XXX].

<sup>168</sup> Leonard, *Judge Finds Three LAPD Officers ‘Factually Innocent’ of Filing False Gang Reports* (May 2022) NBC Los Angeles <<https://www.nbclosangeles.com/investigations/lapd-false-gang-innocent-calgang/2902392/>> [as of XXX].

<sup>169</sup> Leonard, *Judge Finds Three LAPD Officers ‘Factually Innocent’ of Filing False Gang Reports* (May 2022) NBC Los Angeles <<https://www.nbclosangeles.com/investigations/lapd-false-gang-innocent-calgang/2902392/>> [as of XXX].

<sup>170</sup> *Baltimore City Police Department, et. al. v. Ivan Potts*, Brief of Amici Curiae Victims of the Baltimore Police Department in Support of Appellee (Dec. 2019) Supreme Court of the United States <<https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/01/Potts-Md.-BGL-Amicus-Brief.pdf>> [as of XXX].

<sup>171</sup> *Baltimore City Police Department, et. al. v. Ivan Potts*, Brief of Amici Curiae Victims of the Baltimore Police Department in Support of Appellee (Dec. 2019) Supreme Court of the United States <<https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/01/Potts-Md.-BGL-Amicus-Brief.pdf>> [as of XXX].

<sup>172</sup> Watkins, *N.Y.P.D. Disbands Plainclothes Units Involved in Many Shootings* (Jun. 2020) New York Times <<https://www.nytimes.com/2020/06/15/nyregion/nypd-plainclothes-cops.html>> [as of XXX].

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Department by the U.S. Department of Justice recommended the department reconsider the role of any specialized street enforcement units that conducted targeted or pretextual traffic and pedestrian stops.<sup>173</sup>

*“If we have racial bias in policing, what that means is that the data that’s going into these algorithms is already inherently biased and will have biased outcomes, so it doesn’t make any sense to try and use technology when the likelihood that it’s going to negatively impact communities of color is apparent.”*  
– Justin Cummings Mayor of Santa Cruz

In addition to concerns about use of force, one factor that may be driving some of these disparities is what is known as hotspot policing – when agencies use data to determine areas to concentrate police forces and often specialized teams. Much of the crime-based data is from neighborhoods law enforcement is already policing, which reinforces the idea that the over-policed areas merit further police surveillance, thus creating a feedback loop of disinformation.<sup>174</sup>

One study found higher racial disparities in traffic stops where there were “hot spots” compared to other areas of cities that were not deemed hotspots.<sup>175</sup>

Another study found similar results that software disproportionately predicts crime will occur in neighborhoods “inhabited by working-class people, people of color, and Black people in particular.”<sup>176</sup> Understanding how proactive policing affects communities will be key for law enforcement leaders to address disparities in their own departments.

## **ii. RIPA Data Analysis**

1. RAE of Individuals Stopped by Assignment Type
2. Assignment Type and Frequency of UOF
3. UOF Rate and Assignment type by RAE

## **iii. Recommendations**

[Add Board Recommendations]

<sup>173</sup> Investigation of the Louisville Metro Police Department and Louisville Metro Government (Mar. 2023) U.S. Dept. of Justice Civil Rights Division.

<sup>174</sup> Guariglia, *Police Use of Artificial Intelligence 2021 in Review* (Jan. 2022) EFF <Police Use of Artificial Intelligence: 2021 in Review | Electronic Frontier Foundation (eff.org)> [as of XXX].

<sup>175</sup> Barns, *Police-Community Relations: A Study of Racial Disparity and the Effects of Hot Spots Policing Leadership Strategies* (2018) North Carolina A&T State U. <doi:10751787> [as of XXX].

<sup>176</sup> Guariglia, *Police Use of Artificial Intelligence 2021 in Review* (Jan. 2022) EFF <Police Use of Artificial Intelligence: 2021 in Review | Electronic Frontier Foundation (eff.org)> [as of XXX].

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## 2. Police Contacts With Youth With Disabilities

### I. Introduction

Youth with disabilities experience a disproportionate number of police interactions compared to youth without disabilities. The quality of those interactions also differ and can have lasting impacts on the development and well-being of youth with disabilities. This section summarizes research and data regarding those differences and impacts. The Board hopes to develop best practices based on this data in future reports.

#### a. Confirmed Phenomena and RIPA Data Analysis

Youth with disabilities face a disproportionate rate of police interactions,<sup>177</sup> and research shows that all individuals with disabilities are at risk for increased use of force against them.<sup>178</sup> While limited data exists on police interactions with youth with disabilities or youth experiencing mental health crises, advocates and researchers warn that these groups are inherently more vulnerable during police stops and at higher risk for intrusive police contact,<sup>179</sup> use of force, or death.<sup>180</sup>

These national trends are reflected in the RIPA data. For example, in 2021, youth and individuals (adults and youth) with a perceived disability were more likely to be searched, detained curbside or in a patrol car, or handcuffed during a stop.<sup>181</sup> Both groups were also more likely to be

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<sup>177</sup> McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender* (Dec. 1, 2017) 107 Am. J. of Public Health 1977, 1978-79 <<https://doi.org/10.2105/AJPH.2017.304095>> [as of May 16, 2023].

<sup>178</sup> A report published by the Ruderman Family Foundation, a disability organization that analyzed incidents of use of force against persons with disabilities from 2013 to 2015, found that at least a third of the persons killed by police have some kind of disability. Perry and Carter-Long, *The Media Whitepaper on Media Coverage of Law Enforcement Use of Force and Disability* (Mar. 2016) <[https://rudermanfoundation.org/white\\_papers/media-coverage-of-law-enforcement-use-of-force-and-disability/](https://rudermanfoundation.org/white_papers/media-coverage-of-law-enforcement-use-of-force-and-disability/)> [as of May 16, 2023].

<sup>179</sup> Geller et al., *Policing Disability: Law Enforcement Contact Among Urban Teens* (pending review) <<https://ffcw.princeton.edu/publications/policing-disability-law-enforcement-contact-among-urban-teens>> [as of Jun. 20, 2023].

<sup>180</sup> As just one tragic example, in 2014, in Half Moon Bay, California, 18-year-old Yanira Serrano-Garcia was shot and killed by a San Mateo sheriff's deputy after Yanira's brother called seeking medical help because Yanira was refusing to take medication prescribed for schizophrenia and was arguing with her parents. The family told the dispatcher that Yanira had taken her medication and calmed down. But when the deputy arrived, Serrano-Garcia burst off the porch and chased him with a kitchen knife. The deputy shot Yanira in her torso, killing her. Emslie and Bale, *Almost Half of Those Killed by SFPD are Mentally Ill*, KQED (Sept. 30, 2014) <<https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill>> [as of May 16, 2023].

<sup>181</sup> Racial and Identity Profiling Advisory Board, *Annual Report* (2023) p. 45-46 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of May 1, 2023].

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stopped for reasonable suspicion, but have no action taken as a result of the stop.<sup>182</sup> People with perceived disabilities were also more likely to be arrested than individuals without a perceived disability.<sup>183</sup>

[Analysis of 2022 RIPA data re: stops of youth with disabilities forthcoming.]

#### b. Impact of Police Interactions on Youth with Disabilities

Generally, youth with disabilities suffer adverse effects from police contact, such as higher rates of arrest, juvenile detention, and long-term mental health consequences.

Psychiatric professionals are concerned that if police misunderstand or misinterpret behavior, police may escalate force.<sup>184</sup> The Substance Abuse and Mental Health Services Administration explains that police officers may have limited or no training on de-escalation with people who have an intellectual or developmental disability which can lead to excessive force or deaths.<sup>185</sup>

A 2017 study from the A.J. Drexel Autism Institute found that one in five teenagers with autism was stopped and questioned by police before age 21, and 5 percent were arrested.<sup>186</sup> Data from the U.S. Department of Education, Office for Civil Rights, show students with disabilities are overrepresented in school arrests and referrals to law enforcement in comparison to their population size. The most recent OCR data show students served under Individuals with Disabilities Education Act (IDEA) make up 26.1 percent of referrals to law enforcement and 25.8 percent of school-related arrests, despite the fact that students with disabilities served by IDEA are only 13.2 percent of the enrolled population.<sup>187</sup>

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<sup>182</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 40-41

<<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of May 1, 2023].

<sup>183</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 50 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of May 1, 2023].

<sup>184</sup> American Psychiatric Association, Position Statement on Police Interactions with Children and Adolescents in Mental Health Crisis (Jul. 2022) <<https://www.psychiatry.org/getattachment/085c5817-87e3-4fd9-8885-ed1d83ec7266/Position-Police-Interactions-with-Children-Adolescents-in-Crisis.pdf>> [as of May 1, 2023] (“Children and adolescents are less able to anticipate consequences and to self-regulate their emotions as compared to adults. As the level of resistance increases, officers use higher levels of force to gain compliance”).

<sup>185</sup> Substance Abuse and Mental Health Services Administration, National Guidelines for Child and Youth Behavioral Health Crisis Care. Publication No. PEP22-01-02-001 (2022) p. 42 <<https://www.samhsa.gov/data/>> [as of June 20, 2023].

<sup>186</sup> Hollow, *When the Police Stop a Teenager With Special Needs* (Feb. 27, 2022) New York Times <<https://www.nytimes.com/2020/02/27/well/family/autism-special-needs-police.html?smid=url-share>> [as of May 23, 2023]; Rava et al., *The Prevalence and Correlates of Involvement in the Criminal Justice System Among Youth on the Autism Spectrum* (Feb. 2017) 47 J. Autism Dev. Disord. 340 <<https://doi.org/10.1007/s10803-016-2958-3>> [as of May 23, 2023].

<sup>187</sup> U.S. Department of Education, Office for Civil Rights, Referrals to Law Enforcement and School-Related Arrests in U.S. Public Schools (Jan. 2020) <[https://ocrdata.ed.gov/assets/downloads/Referrals\\_and\\_Arrests\\_Part5.pdf](https://ocrdata.ed.gov/assets/downloads/Referrals_and_Arrests_Part5.pdf)> [as of May 23, 2023].

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Youth with disabilities are also more likely to be incarcerated than the general population. For example, the National Alliance on Mental Illness (NAMI) estimates 70 percent of youth in juvenile detention facilities have a mental illness diagnosis.<sup>188</sup> The Children’s Hospital of Philadelphia reports that individuals on the autism spectrum are five times more likely to be incarcerated than the general population.<sup>189</sup> At the same time, police may be underestimating and misperceiving the number of youth encountered with a disability. In the 2023 RIPA report, officers perceived *only* 1.2 percent (38,281) of individuals stopped to have one or more disabilities.<sup>190</sup> In contrast, 1 in 4 persons in California has a disability.<sup>191</sup>

These police stops can have an adverse impact on youth, beyond arrest, such as post-traumatic stress disorder or an adverse childhood experience.<sup>192</sup> Additionally, police encounters can undermine children’s and teens’ sense of safety and stability and contribute to the development of stress, anxiety, post-traumatic stress disorder, and depression.<sup>193</sup> [Additional research forthcoming re: mental health impacts of police interactions on youth with disabilities.]

For all of these reasons, advocates and researchers recommend law enforcement approach youth with disabilities and youth experiencing mental health crisis with a care first model, reducing unnecessary criminal justice intervention or law enforcement response entirely in favor of sustained community response. When law enforcement presence is necessary, researchers and advocates support the use of de-escalation and stabilization techniques instead of control and

<sup>188</sup> National Alliance on Mental Illness, *Mental Health by the Numbers*

<[https://nami.org/mhstats?gclid=Cj0KCQiA7bucBhCeARIsAIOwr-mryPgVr3hp8Lz9-iaijtm5GJWQeY\\_Q8IM0faz9DI722oo2Q2TFAaAjFGEALw\\_wcB](https://nami.org/mhstats?gclid=Cj0KCQiA7bucBhCeARIsAIOwr-mryPgVr3hp8Lz9-iaijtm5GJWQeY_Q8IM0faz9DI722oo2Q2TFAaAjFGEALw_wcB)> [as of May 23, 2023].

<sup>189</sup> Hollow, *When the Police Stop a Teenager With Special Needs* (Feb. 27, 2022) New York Times

<<https://www.nytimes.com/2020/02/27/well/family/autism-special-needs-police.html?smid=url-share>>

[as of May 23, 2023]; Children’s Hospital of Philadelphia, *CHOP Researchers Present New Findings at 2019 International Society for Autism Research Annual Meeting* (May 1, 2019)

<<https://www.chop.edu/news/chop-researchers-present-new-findings-2019-international-society-autism-research-annual-meeting>> [as of May 23, 2023] (“Approximately 1 in 5 adolescents with ASD will be

stopped and questioned by a police officer before the age of 21. Individuals with disabilities, including ASD, are five times more likely to be incarcerated, and civilian injuries and fatalities during police interactions are disproportionately common among this population”).

<sup>190</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 37 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

<sup>191</sup> Centers for Disease Control and Prevention, *Disability & Health U.S. State Profile Data for California (Adults 18+ years of age)* <<https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html>> [as of May 23, 2023].

<sup>192</sup> See generally, Jackson et al., *Police Stops Among At-Risk Youth: Repercussions for Mental Health* (Nov. 2019) 65(5) J. of Adolescent Health 627 <<https://doi.org/10.1016/j.jadohealth.2019.05.027>> [as of June 20, 2023].

<sup>193</sup> Geller, *Youth-Police Contact: Burdens and Inequities in an Adverse Childhood Experience, 2014-2017* (“Youth-Police Contact: Burdens and Inequities”) (Jul. 2021) 111(7) Am. J. Public Health 1300, 1302 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8493138/>> [as of May 23, 2023].

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command. Finally, researchers and advocates call for police training on age-appropriate development and the adolescent response.<sup>194</sup>

c. Youth Experiencing a Mental Health Crisis Are Particularly Vulnerable to Police Violence

Youth mental health in California declined during the pandemic, further accelerating the decline in children's mental health care that ranked California as 48th in the nation for children with an unmet mental health needs (30 percent compared to 5 percent nationally).<sup>195</sup> Youth experiencing mental health crisis are also particularly vulnerable to police violence. The American Psychiatric Association (APA) published a position statement calling for national standards to protect children and adolescents against violence from law enforcement response to youth in mental health crisis.<sup>196</sup> The APA further recognizes the use of force against children is incredibly harmful, and can cause "a cascade of psychological sequelae" including "development or worsening of mental illness and can end in traumatization, serious injury, lower educational attainment and future employment, or death."<sup>197</sup>

[Additional research re: vulnerability of youth with mental health conditions and the impact of police encounters on youth with mental health conditions forthcoming.]

For youth experiencing a mental health crisis, most advocates and research support youth-specific Crisis Intervention Teams (CIT) instead of a police response. CIT for Youth programs teach law enforcement officers to connect young people who need help to effective services and support available in their community by training officers about adolescent brain development and how mental health symptoms present in youth. The National Alliance on Mental Illness

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<sup>194</sup> These efforts should also be tethered to an understanding that police officers tend to overestimate the age of youth. For example, a study by the APA found that Black boys as young as ten years old are not viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty and face police violence if accused of a crime. See Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children* (Feb. 14, 2014) 106 J. of Personality and Social Psychology 526 <<https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>> [as of June 20, 2023].

<sup>195</sup> The Children's Partnership, *COVID-19 Intensified Pre-Existing Mental Health Crisis for Children* (Oct. 13, 2021) <<https://childrenspartnership.org/wp-content/uploads/2021/10/Covid-Childrens-Mental-Health-Ver.6-2021.pdf>> [as of May 10, 2023] (nearly 50% of young people have experienced a mental health condition during their lifetime, and more than 10% have a serious condition).

<sup>196</sup> American Psychiatric Association, *Position Statement on Police Interactions with Children and Adolescents in Mental Health Crisis* (Jul. 2022) <<https://www.psychiatry.org/getattachment/085c5817-87e3-4fd9-8885-ed1d83ec7266/Position-Police-Interactions-with-Children-Adolescents-in-Crisis.pdf>> [as of May 1, 2023].

<sup>197</sup> American Psychiatric Association, *Position Statement on Police Interactions with Children and Adolescents in Mental Health Crisis* (Jul. 2022) <<https://www.psychiatry.org/getattachment/085c5817-87e3-4fd9-8885-ed1d83ec7266/Position-Police-Interactions-with-Children-Adolescents-in-Crisis.pdf>> [as of May 1, 2023].

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(NAMI) recommends centering youth CIT programs around building relationships between families, schools, mental health providers and law enforcement.<sup>198</sup> While many cities across the county have developed adult CIT programs, few youth-specific CIT programs are employed. Existing youth-specific CIT programs have been criticized for failure to connect youth to long-term care and sustained treatment following the initial crisis intervention.<sup>199</sup> This step alone is a significant departure from routine police activity.

Additional recommendations from advocates and researchers regarding youth experiencing a mental health crisis include:

- Researchers recommended police officers be trained to understand how disabilities may affect compliance and other behaviors, and likewise how implicit bias and structural racism may affect reactions and actions of officers and the systems they work within in ways that create inequities.<sup>200</sup>
- The Parent Professional Advocacy League states that officer training should include that youth experiencing mental health crises are not inherently dangerous. The PPAL explains that “encouraging self-awareness and addressing stigmatizing attitudes among officers directed towards mental illness is vital to relational policing. Officers should possess an accurate understanding of violence risk cues and strive to ascertain intentions to avoid misinterpretation of behavior.”<sup>201</sup>
- Researchers recommend inclusion of people with mental illness in police mental health training, to dispel the stereotype that people experiencing mental illness are inherently dangerous and to build compassion for lived experience and reduce bias. Researchers have recommended that officers “possess an accurate understanding of violence risk cues and strive to ascertain intentions to avoid misinterpretation of behavior.”<sup>202</sup>

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<sup>198</sup> National Alliance on Mental Illness, *Designing CIT Programs for Youth*

<[https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-\(CIT\)-Programs/Designing-CIT-Programs-for-Youth](https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-(CIT)-Programs/Designing-CIT-Programs-for-Youth)> [as of May 17, 2023].

<sup>199</sup> See generally, Karp, *Lawmaker pushes to scrutinize state program for children in mental health crisis* Chicago Sun Times (Apr. 6, 2023) <<https://chicago.suntimes.com/education/2023/4/6/23673083/mental-health-crisis-suicide-children-support-system-illinois-sass>> [as of May 17, 2023].

<sup>200</sup> McCauley, *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender* (Dec. 1, 2017) 107 Am. J. of Public Health 1977, 1981 <<https://doi.org/10.2105/AJPH.2017.304095>> [as of May 16, 2023].

<sup>201</sup> Parent Professional Advocacy League, *Police Pocket Guide: Responding to Youths with Mental Health Needs* (Jun. 24, 2008) <<https://ppal.net/wp-content/uploads/2011/01/ppg-abbreviated-version-final.pdf>> [as of May 5, 2023].

<sup>202</sup> Lavoie et al., *Developing Community Co-designed Scenario-Based Training for Police Mental Health Crisis Response: a Relational Policing Approach to De-escalation* (2022) 37 J. Criminal Police Psychology 587 <<https://doi.org/10.1007%2Fs11896-022-09500-2>> [as of May 5, 2023] (encouraging

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- The Arc’s National Center on Criminal Justice and Disability recommends police use conversation instead of force, asking questions instead of making commands, employing patience instead of immediate demands.
- The APA recommends: (1) licensed health care and mental health workers serve as first responders when emergency services are requested for children and adolescents in mental health crisis, rather than law enforcement, (2) limits on use of force against children during mental health calls,<sup>203</sup> (3) mandatory training for law enforcement personnel who respond to and/ or interact with youth in mental health crisis on effective developmentally appropriate communication that emphasizes de-escalation techniques and non-punitive trauma-informed interventions, and (4) resource allocation to historically underfunded and underserved communities to break the cycle of poverty and criminalization of racial minority children and adolescents.
- The 2023 RIPA report cites that SFPD has a use of force as last resort policy for children and persons with physical and mental disabilities because such use of force “can undermine public trust and should be used as a last resort, when all other reasonable means have been exhausted.”<sup>204</sup> Advocates have further recommended police use less confrontational tactics during a mental health call. It may be worth training police that Americans with Disabilities Act (ADA) applies to police conduct when arresting people with mental illness, and employing less confrontational tactics should be considered as an accommodation.

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self-awareness and addressing stigmatizing attitudes among officers directed towards mental illness is vital to relational policing).

<sup>203</sup> The 2023 RIPA Report also noted the San Francisco Police Department’s use of force policy includes a last resort policy for interactions with children. Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 118 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of May 1, 2023].

<sup>204</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 118 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of May 1, 2023]. See, e.g., San Francisco Police Department, General Order 5.01 Use of Force Policy and Proper Control of a Person (2022) pp. 2, 12 (stating that “[t]he use of force against vulnerable populations –including children, elderly persons, pregnant women, people with physical and mental disabilities and people with limited English proficiency – can undermine public trust and should be used as a last resort, when all other reasonable means have been exhausted” and prohibiting the use of electronic control weapons or tasers on elderly or children unless the use of deadly force is appropriate); see also The Associated Press, *Tiny wrists in cuffs: How police use force against children* (Oct. 20, 2021) NPR <<https://www.npr.org/2021/10/20/1047618263/tiny-wrists-in-cuffs-how-police-use-force-against-children>> [as of Nov. 29, 2022].

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- Train dispatch to gather information that will help engage an appropriate response and to ensure officers do not use unnecessary force.

## VII. Vision for Future Reports

[Section forthcoming.]

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### 3. Youth Contact With Law Enforcement: Addressing the Profiling of Students

#### 1. Introduction

School-based policing was introduced as a response to school desegregation and Black migration and became a social norm.<sup>205</sup> School policing is closely tied to racial and identity profiling because of the disparate impact of school policing across California's schools where racial segregation persists. In 2019, in a report examining school discipline policies and connections to the school-to-prison pipeline, the U.S. DOJ clarified that eliminating racial discrimination in student discipline is part of establishing a "truly unitary school system."<sup>206</sup> In the same year, in a review of research on school policing to provide guidance to local educational agencies regarding students experiencing homelessness, the U.S. Department of Education found that "the presence of law enforcement or SROs disproportionately criminalizes certain vulnerable student populations, including students of color and students with disabilities, and that inappropriate reliance on school-based law enforcement can actually promote distrust in schools."<sup>207</sup>

The RIPA data shows that the racial disparities in policing are much larger for youth than they are for older age groups.<sup>208</sup> Most youth spend a significant amount of time in school and in recent decades, the presence of law enforcement in schools has increased greatly, thereby increasing youth exposure to law enforcement.<sup>209</sup> However, this exposure has not been equal across racial and ethnic groups, nor have the consequences been equal. In last year's Report, the Board examined the impact of school-based policing on Black and Latine youth and disparities

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<sup>205</sup> Neath and Rau. (2023). *Redesigning Public Safety: K-12 schools*. Center for Policing Equity. P. 4. Available at: <https://www.policingequity.org/school-safety/71-white-paper-school-safety/file>.

<sup>206</sup> U.S. Commission on Civil Rights. (2019). *Beyond Suspensions: Examining school discipline policies and connections to the school-to-prison pipeline for students of color with disabilities*. Available at: [https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.usccr.gov\\_files\\_pubs\\_2019\\_07-2D23-2DBeyond-2DSuspensions.pdf&d=DwMFaQ&c=uASjV29gZuJt5\\_5J5CPRuQ&r=GOPaZTB3yj2obflEwWAdLr-cFC9q5\\_VVSUUXGmUwzLQ&m=Crdo7Qr\\_pwgDJQvtEfz6lzih8bdXx-gMqH1LoFoaB\\_kOuD7a8E\\_pBjhuy7M9A5C5&s=FUQbwC8brwmCnSvsuyPCEDow3dNAe9iWFdxC4EV4V4s&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.usccr.gov_files_pubs_2019_07-2D23-2DBeyond-2DSuspensions.pdf&d=DwMFaQ&c=uASjV29gZuJt5_5J5CPRuQ&r=GOPaZTB3yj2obflEwWAdLr-cFC9q5_VVSUUXGmUwzLQ&m=Crdo7Qr_pwgDJQvtEfz6lzih8bdXx-gMqH1LoFoaB_kOuD7a8E_pBjhuy7M9A5C5&s=FUQbwC8brwmCnSvsuyPCEDow3dNAe9iWFdxC4EV4V4s&e=).

<sup>207</sup> California Department of Education. (2019). *Designating Liaisons for Students Experiencing Homelessness*. pp. 3-4. Available at: <https://www.google.com/url?client=internal-element-cse&cx=007899273231353282595:rooj8qfkg0k&q=https://www.cde.ca.gov/sp/hs/cy/documents/designatingliaisons.docx&sa=U&ved=2ahUKEwjix9j4lqD-AhVYLUQIHdxgAeEQFnoECAkQAQ&usg=AOvVaw2JrRLTzBVLh-ivDsQWdIL->.

<sup>208</sup> Racial and Identity Profiling Advisory Board. (2023). Annual Report 2023. p. 109. Available at: <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>.

<sup>209</sup> Nationally, only one percent of schools had a police officer presence in 1975. By 2018, police officers patrolled approximately 58 percent of schools. Connery, *The Prevalence and the Price of Police in Schools* (2020) U. Conn. Center for Education Public Analysis, p. 1. Available at: [https://cepa.uconn.edu/wp-content/uploads/sites/399/2020/10/Issue-Brief-CEPA\\_C-Connery.pdf](https://cepa.uconn.edu/wp-content/uploads/sites/399/2020/10/Issue-Brief-CEPA_C-Connery.pdf).

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in the referral of students to law enforcement.<sup>210</sup> The impact of school policing on Black and Latine students and students with disabilities conflicts with California’s constitutional guarantee of the right for California’s children to attend public schools that are safe, secure, and peaceful.

Existing law authorizes school districts to establish a school police department under the supervision of a school chief of police.<sup>211</sup> There are 19 school district administered police departments in California.<sup>212</sup> The racial demographics of students enrolled in districts that administer a police department, as displayed in the following chart, cannot be overlooked.

<b>Location of School District Administered Police Departments and District Enrollment by Race/Ethnicity<sup>213</sup></b>			
<b>Northern California</b>	<b>Central California</b>	<b>Southern California</b>	
Stockton Unified School District Police Department (69.6% Hispanic or Latino, 9.2% African American, 8.8% Asian)	Clovis Unified School District Police Department (near Fresno; 40.0% Hispanic or Latino, 33.9% White, 15.5% Asian)	Apple Valley Unified School District Police Department (in San Bernardino County; 56.5% Hispanic or Latino, 30.0% White, 7.4% African American)	Los Angeles School Police Department (74.2% Hispanic or Latino, 4.8% White, 3.8% African American [13.9% not reported])
Twin Rivers Unified School District Police Department (near Sacramento; 37.5% Hispanic or Latino, 30.6% White, 12.7% Asian; 9.6% African American)	San José Unified School District Police Department (54.8% Hispanic or Latino, 20.7% White, 13.3% Asian)	Compton Unified School District Police Department (79.5% Hispanic or Latino, 18.7% African American, 0.5% two or more races, 0.4% Pacific Islander)	Montebello Unified School District Police Department (in Montebello/Los Angeles; 95.3% Hispanic or Latino, 1.2% Asian, 0.5% White [2.4% not reported])
	Kern High School District Police Department (70.1%		

<sup>210</sup> Racial and Identity Profiling Advisory Board. (2023). Annual Report 2023. P. 127. Available at: <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>

<sup>211</sup> Racial and Identity Profiling Advisory Board. (2023). Annual Report 2023. P. 127. Available at: <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>

<sup>212</sup> Agency List by Name (2022) Comm. on Peace Officer Stds. and Training. Available at : [https://post.ca.gov/Portals/0/post\\_docs/hiring/Agency\\_List\\_Reimbursable\\_Info.pdf](https://post.ca.gov/Portals/0/post_docs/hiring/Agency_List_Reimbursable_Info.pdf); Welcome to ERUSD School Police (n/d) El Rancho Unified School District. Available at: [https://www.erusd.org/apps/pages/index.jsp?uREC\\_ID=155468&type=d&pREC\\_ID=1337214](https://www.erusd.org/apps/pages/index.jsp?uREC_ID=155468&type=d&pREC_ID=1337214); School Police Department (n/d) Inglewood Unified School District. Available at: <https://myiusd.net/business-services-division/school-police-department/>.

<sup>213</sup> We have listed the three racial/ethnic groups that represent the largest proportion of student enrollment within each district. *DataQuest: 2022-23 Enrollment by Ethnicity and Grade* (2023) Cal. Dept. of Education <<https://dq.cde.ca.gov/dataquest/dq census/EnrEthGrd.aspx?cds=00&aggllevel=state&year=2022-23>>.

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	Hispanic or Latino, 17.0% White, 5.5% African American)	El Rancho Unified School District Police Department (near Pico Rivera/Los Angeles; 97.3% Hispanic or Latino, 1% White, 0.6% Asian)	San Bernardino Unified School District Police Department (80.6% Hispanic or Latino, 10.3% African American, 4.3% White)
		Fontana Unified School District Police Department (in San Bernardino County; 86.6% Hispanic or Latino, 5.1% African American, 3.9% White)	San Diego City Schools Police Department (47.3% Hispanic or Latino, 22.8% White, 8.7% Asian)
		Hacienda-La Puente Unified School District Police Department (in Los Angeles County; 74.5% Hispanic or Latino, 18.4% Asian, 2.3% White)	Santa Ana Unified School District Police Department (in Orange County; 95.9% Hispanic or Latino, 1.8% Asian, 0.9% White)
		Hesperia Unified School District Police Department (in San Bernardino County; 74.5% Hispanic or Latino, 15.4% White, 6.4% African American)	Snowline Joint Unified School District (in San Bernardino County; 58.4% Hispanic or Latino, 26.5% White, 4.4% African American [6.5% not reported]))
		Inglewood Unified School District Police Department (59.7% Hispanic or Latino, 35.9%	Val Verde Unified School District Police Department (in Riverside County; 79.8% Hispanic or Latino, 11.0% African American, 3.7% White)

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		African American, 1.2% two or more races)	
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However, the most common school-based law enforcement strategy in California is to have an SRO who reports to a local police or sheriff's department, which is in line with the national data suggesting that more than half of SROs work for a local police or sheriff's department.<sup>214</sup> California schools reported the presence of 2,080 school-based law enforcement officers in the U.S. Department of Education's 2015-16 Civil Rights Data Collection.<sup>215</sup> The student-to-school-based law enforcement ratio was 2,989-to-1.<sup>216</sup> California districts reported a larger number of law enforcement officers than social workers and a greater number of security guards than nurses.<sup>217</sup> The student-to-social worker ratio was 6,132-to-1, the student to psychologist ratio was 998-to-1, and the student-to-nurse ratio was 1,482-to-1.<sup>218</sup> The student-to-counselor ratio was 682-to-1; California is the state with the third highest counselor caseload in the country.<sup>219</sup> Standards developed by professional associations recommend at least one counselor and one social worker for every 250 students, one psychologist for every 500-700 students, depending on the comprehensiveness of the services provided, and at least one nurse for every 750 students in healthy student populations.<sup>220</sup>

<sup>214</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education 33, 35; Burke. (June 11, 2020). *Should police officers be in schools? California Education leaders rethink school safety*. EdSource. Available at: <https://edsource.org/2020/should-police-officers-be-in-schools-california-education-leaders-rethink-school-safety/633460>.

<sup>215</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, p. 17 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>.

<sup>216</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, p. 17 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>. This ratio of students to school-based law enforcement was calculated by dividing the number of students (6,217,689) by the number of law enforcement officers (2,989).

<sup>217</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, p. 17 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>.

<sup>218</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, pp. 13-14 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>.

<sup>219</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, p. 12 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>.

<sup>220</sup> Whitaker et al., Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students (2019) American Civil Liberties Union, p. 11 <<https://www.aclunc.org/sites/default/files/030419-acluschooldisciplinereport.pdf>>.

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	California's reporting in 2015-16 U.S. Department of Education's Civil Rights Data Collection	Recommended ratios in standards developed by professional associations
<b>Student-to-school-based law enforcement ratio</b>	2,989-to-1	
<b>Student-to-social worker ratio</b>	6,132-to-1	250-to-1
<b>Student-to-psychologist ratio</b>	998-to-1	500/700-to-1
<b>Student-to-nurse ratio</b>	998-to-1	750-to-1
<b>Student-to-counselor ratio</b>	682-to-1	250-to-1

California schools reported referring 24,727 students to law enforcement and the arrest of 2,188 students at schools during the 2017-18 school year.<sup>221</sup>

In its 2023 Report, the Board stated that it would continue to explore the efficacy of school-based police and whether school-based police should continue to be present in K-12 schools, given the research showing the negative impacts.

## 2. Analysis of 2022 RIPA Data

Officers must report interactions with students on K-12 campuses when the purpose of questioning is to investigate whether the student committed a violation of law, including specific Education Code sections, or whether the student is truant. If the officer does not question the student for the purpose of investigating whether the student violated the law or is truant and the

<sup>221</sup> Department of Education, Office of Civil Rights. Civil Rights Data Collection: 2017-18 Referred to Law Enforcement Estimations (Referred to Law Enforcement with and without disability). Available at: [https://ocrdata.ed.gov/assets/downloads/2017-2018/School-Climate/Arrests/Referred-to-Law-Enforcement/Referred-to-Law-Enforcement\\_by-disability-and-no.xlsx](https://ocrdata.ed.gov/assets/downloads/2017-2018/School-Climate/Arrests/Referred-to-Law-Enforcement/Referred-to-Law-Enforcement_by-disability-and-no.xlsx); Department of Education, Office of Civil Rights. Civil Rights Data Collection: 2017-18 School-Related Arrests Estimations (Referred to Law Enforcement with and without disability). Available at: [https://ocrdata.ed.gov/assets/downloads/2017-2018/School-Climate/Arrests/School-Related-Arrest/School-Related-Arrest\\_by-disability-and-no.xlsx](https://ocrdata.ed.gov/assets/downloads/2017-2018/School-Climate/Arrests/School-Related-Arrest/School-Related-Arrest_by-disability-and-no.xlsx).

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officer does not take reportable actions<sup>222</sup> toward the student during the interaction, they should not report the interaction.<sup>223</sup>

a. Stop Data Analyses and Data Points

In 2022, XXX officers reported making one or more stops under the “K-12 Public School” assignment type. Officers with this assignment type reported XXXX stops.

When looking at all officer assignment types, XXXXX stops of students were made on K-12 school grounds. Nearly [insert proportion] of these stops were made by officers with a patrol assignment type and nearly [insert proportion] were made by officers with a K-12 Public School assignment type.

### Composition of Officer Assignment Type for Stops on K-12 Campuses

[insert graphic]

*Figure X: Total and percentage of stops by officer assignment*

Officers with the following eight agencies reported the largest numbers of stops of students on K-12 campuses:

Agency Name	Total Stops of Students on K-12 Campuses
Kern High School District Police Department	XXX
Fontana Unified School District Police Department	XXX
Hesperia School District Police Department	XXX
Escondido Police Department	XXX
Vacaville Police Department	XXX
Twin Rivers Unified School District Police Department	XXX
Clovis Unified School District Police Department	XXX
Santa Ana Unified School District Police Department	XXX

<sup>222</sup> Cal. Code Regs., tit. 11, § 999.227, subd. (e)(3)(C). [Reportable actions include: Admission or written statement obtained from student; Person removed from vehicle by order; Person removed from vehicle by physical contact; Field sobriety test conducted; Curbside detention; Handcuffed or flex cuffed; Patrol car detention; Canine removed from vehicle or used to search; Firearm pointed at person; Firearm discharged or used; Electronic control device used; Impact projectile discharged or used; Canine bit or held person; Baton or other impact weapon used; Chemical spray used; Other physical or vehicle contact; Person photographed; Asked for consent to search person; Search of person was conducted; Asked for consent to search property; Search of property was conducted; Property was seized; Vehicle impounded.]

<sup>223</sup> Cal. Code Regs., tit. 11, § 999.227, subd. (e)(3)

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X.XX% of students stopped on K-12 campuses were perceived to be 12 years of age and younger. Officers reported stopping [insert number] students perceived to be five through nine years of age on K-12 campuses.

### Primary Reasons for Stop of Students on K-12 campuses

Reason for Stop	Count	Percentage of Student Stops
Suspicion	X,XXX	XX.XX%
School Policy	X,XXX	XX.XX%
Traffic	XXX	XX.XX%
Education Code	XXX	X.XX%
Truancy	XXX	X.X%
Consensual	XXX	X.XX%
Warrant/Wanted	XX	X.XX%
Supervision	XX	X.XX%

Officers reported that the primary reason for In XX.XX% of stops of students on K-12 campuses was “to determine whether student violated school policy” and in X.XX% of stops of students on K-12 campuses, officers reported that the primary reason for the stop was “possible conduct under Education Code.” In [insert proportion] of the stops of students on K-12 campuses, officers reported that the primary reason for the stop was reasonable suspicion that the student was engaged in criminal activity. The RIPA data indicates that officers are more likely to treat Black and Latine students’ behaviors as criminal activity as opposed to a school policy or education code violations.

### Figure X – Percentage Reason for Stop by Perceived Race

[insert bar graphs with racial/ethnic distribution of stops in which the primary reason for the stop was to determine whether the student violated school policy, possible conduct under Education Code, and reasonable suspicion that the student was engaged in criminal activity]

The most commonly reported suspected offenses for stops of students based on reasonable suspicion of criminal activity were related to marijuana possession (XX.X%) and fighting,

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assault, and battery without injury or threats of assault and battery (XX.X%).<sup>224</sup> These suspected offenses can also be treated as violations of the Education Code.<sup>225</sup>

Additionally, officers cited trespassing as the suspected offense in XXX stops of students on K-12 campuses and vandalism as the suspected offense in an additional XX stops of students.<sup>226</sup>

A 2021 Report by the American Civil Liberties Foundation, California examining RIPA stop data in schools noted that this dataset “is among the first to track the perceived gender identity and sexuality of students interacting with police.”<sup>227</sup> Research shows that LGBTQ+ people in the United States have “historically been subject to heightened surveillance and victimization by law enforcement...”<sup>228</sup> Because RIPA stop data examines officers’ perception of stopped individuals’ gender and sexual identity, LGBTQ+ identities may be underrepresented in the RIPA data. Despite these limitations, the data suggests disproportionate policing of students perceived to be transgender for school policy violations.

*Figure X: Percentage Reason for Stop by Perceived Gender*

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<sup>224</sup> Here offense codes 35429 (Poss Marijuana 28.5-grms; 11357(A)), 35432 (Poss/Marijuana School Grounds; 11357(C)), and 35433 (Poss Marijuana Schl Grnds; 11357(D)) were grouped together as “related to marijuana possession” and offense codes 53072 (Fight in Public Place; 415(1)), 53131 (Fight/etc. in Public Place; 415(1)), 33028 (Fight/etc. at sch/univ/etc.; 415.5(A)(1)), 13045 (Battery; 242), 13048 (Battery on Person; 242), 13176 (Battery; 242), 13082 (Battery on person; 243(A)), 13152 (Bat on Prsn Sch/Park/etc.; 243.2(A)), 13198 (Batt on Prsn: Sch/hosp/etc.; 243.2(A)(1)), 13239 (Batt School Emp w/o injury; 243.6), 13231 (Asslt Person School Prop; 241(A)(1)), 13219 (ADW not firearm; 245(A)(1)), 16048 (Threaten Crime: Int: terrorize; 422(A)), and 16049 (Threatn Crime: Int: terrorize; 422(A)) were grouped together as “related to fighting, assault, and battery without injury or threats of assault and battery.”

<sup>225</sup> Whitaker et al. (2021). No Police in Schools: A vision for safe and supportive schools in CA. American Civil Liberties Union Foundations, California. Available at: [https://www.aclusocal.org/sites/default/files/field\\_documents/no\\_police\\_in\\_schools\\_report\\_aclu\\_082421.pdf](https://www.aclusocal.org/sites/default/files/field_documents/no_police_in_schools_report_aclu_082421.pdf) [The American Civil Liberties Union Foundation, California identified similar findings in their 2021 review of stops of students in schools reported in RIPA stop data, which addressed racial disparities in officer treatment of student behaviors that may be treated as education code violations, school policy violations, or criminal activity.]

<sup>226</sup> Here offense codes 32022 (Trespassing; 602) and 32100 (Trespass on prop w/o con; 602(M)) were grouped together as “trespassing” and offense codes 29138 (Vandalism; 594(A)) and 29110 (Vandalism: Deface Property; 594(A)(1)) were grouped together as “vandalism.”

<sup>227</sup> Whitaker et al. (2021). No Police in Schools: A vision for safe and supportive schools in CA. American Civil Liberties Union Foundations, California. p. 21. Available at: [https://www.aclusocal.org/sites/default/files/field\\_documents/no\\_police\\_in\\_schools\\_report\\_aclu\\_082421.pdf](https://www.aclusocal.org/sites/default/files/field_documents/no_police_in_schools_report_aclu_082421.pdf)

<sup>228</sup> Shaw, Violence and Law Enforcement Interactions with LGBT People in the US (Mar. 2020) The Williams Inst., p. 1. Available at: <https://oag.ca.gov/system/files/media/ripa-board-report-2022.pdf>.

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[insert bar graphs with distribution of stops in which the primary reason for the stop was to determine whether the student violated school policy, possible conduct under Education Code, and reasonable suspicion that the student was engaged in criminal activity across gender]

Officers reported having received a related call for service for [insert proportion] (XX.XX%) of the stops of students on K-12 campuses.

*Among stops of students - Rates of handcuffing*

Officers reported handcuffing XXX students during stops on K-12 school campuses. Of all racial/ethnic groups, officers handcuffed stopped students perceived to be Black at the highest rate (XX.XX%; XXX students).

[insert bar graph showing proportion of students across racial ethnic groups who were handcuffed during stops on K-12 campuses]

XX.XX% of students who were handcuffed during stops on K-12 campuses were also arrested. X.XX% of the students whom officers handcuffed during stops were also placed under a psychiatric hold.

Officers reported handcuffing XX children whom they perceived to be twelve years old or younger during stops on K-12 campuses during 2022. XX of the children perceived to be twelve years old or younger whom officers handcuffed during stops were also arrested. XX of the children perceived to be twelve years old or younger whom officers handcuffed during stops were also placed under a psychiatric hold.

The Board has reviewed the narrative text provided by officers describing the reasons for the stops in which officers handcuffed students perceived to be twelve years old or younger to better understand the context in which officers handcuff young children at school and the impact of the stops on the children involved.

(1) **All reason for stop narratives for stops of students perceived to be age of 12 and under who were handcuffed**

[insert the officers' narrative descriptions of the principal reason for these stops]

i. Use of Force

1. Overall, in what proportion of stops of students on K-12 campuses did officers report using force? What was the number of incidents of use of force against students on K-12 campuses? What proportion of these uses of force were against Black students?
2. What were the most frequent use of force actions that officers reported in stops of students on K-12 campuses?

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Officers reported using force at similar rates in stops that were for suspected education code (X.XX% of stops) and truancy violations (X.XX% of stops), stops based on reasonable suspicion that the student was engaged in criminal activity (X.XX% of stops), and consensual encounters in which officers conducted a search (X.XX%).

[insert chart showing use of force distributions across reason for stops of students on K-12 campuses]

*Figure X: Student Stops on K-12 Campuses and Use of Force - Percentage Stops with force by reason for stop*

Officers reported using chemical spray toward student in XX stops on K-12 campuses.

- a. I will provide a section on the harms of chemical spray use in schools.
  - b. The Los Angeles Unified School District Board recently adopted a policy prohibiting the use of chemical spray against students. I will review this policy.
- ii. Analysis of Results of Stops of Students on K-12 campuses

Officers most frequently reported [insert six most frequent result of stop types] as the results of stops of students on K-12 campuses. Officers reported that [insert number] students were placed in psychiatric holds following stops on K-12 campuses.

[insert bar graphs for six most frequent results of stops of students on K-12 campuses showing racial/ethnic distribution of stops within each type of result of stop]

*Figure X: Percent of stops with specific results of stops for students on K-12 campuses by perceived race and ethnicity*

Officers reported completing field interview cards as a result of XXX stops of students on K-12 campuses.

### 3. Investigatory Findings

In the 2019 Report *Beyond Suspensions: Examining school discipline policies and connections to the school-to-prison pipeline for students of color with disabilities*, the U.S. Commission on Civil Rights identified resources, guidance, training, and support for teachers as critical for ensuring nondiscriminatory discipline in schools and recommended providing funding to ensure all schools have adequate counselors and social workers.<sup>229</sup>

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<sup>229</sup> U.S. Commission on Civil Rights. (2019). *Beyond Suspensions: Examining school discipline policies and connections to the school-to-prison pipeline for students of color with disabilities*. p. 11. Available at: [https://urldefense.proofpoint.com/v2/url?u=https-3A\\_\\_www.usccr.gov\\_files\\_pubs\\_2019\\_07-2D23-2DBeyond-2DSuspensions.pdf&d=DwMFaQ&c=uASjV29gZuJt5\\_5J5CPRuQ&r=GOPaZTB3yj2obflEwWAdLr-cFC9q5\\_VVSUUXGmUwzLQ&m=Crdo7Qr\\_pwgdJQvtEfz6lzh8bdXx-](https://urldefense.proofpoint.com/v2/url?u=https-3A__www.usccr.gov_files_pubs_2019_07-2D23-2DBeyond-2DSuspensions.pdf&d=DwMFaQ&c=uASjV29gZuJt5_5J5CPRuQ&r=GOPaZTB3yj2obflEwWAdLr-cFC9q5_VVSUUXGmUwzLQ&m=Crdo7Qr_pwgdJQvtEfz6lzh8bdXx-)

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Also in 2019, the California Department of Education provided guidance to local educational agencies (school districts, county offices of education, charter schools, and special education local plan areas) about school site liaisons for children and youth experiencing homelessness.<sup>230</sup> The CDE specified that the educational agencies should not designate SROs or other law enforcement personnel as school site liaisons.<sup>231</sup> The CDE's guidance states that "SROs and law enforcement should not be a school's designated means of identifying students experiencing homelessness."<sup>232</sup>

#### a. Impact of SROs on School Discipline Practices

In 2022, the U.S. Department of Justice Community Oriented Policing Services (COPS) Office published *Guiding Principles for the Implementation of School Resource Officers*.<sup>233</sup> Among other things, the COPS guidance indicated that law enforcement agencies should have a memorandum of understanding with the school districts where SROs are assigned that should prohibit "SROs from engaging in school disciplinary incidents or enforcing school codes of conduct or addressing typical student behavior that can be safely and appropriately handled by school officials."<sup>234</sup> Currently, there is a lack of transparency and oversight in the contracts between school districts and law enforcement agencies.

At a national level, among schools that had a sworn law enforcement officer present at least once a week, 51 percent had officers who participated in maintaining student discipline.

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[gMqH1LoFoaB\\_kOuD7a8E\\_pBjhuy7M9A5C5&s=FUQbwC8brwmCnSvsuyPCEDow3dNAe9iWFdxC4EV4V4s&e=](https://www.google.com/url?client=internal-element-cse&cx=007899273231353282595:rooj8qfkg0k&q=https://www.cde.ca.gov/sp/hs/cy/documents/designatingliaisons.docx&sa=U&ved=2ahUKEwjx9j4lqD-AhVYLUQIHdxgAeEQFnoECAkQAQ&usg=AOvVaw2JrRLTzBVLh-ivDsQWdIL-).

<sup>230</sup> California Department of Education. (2019). *Designating Liaisons for Students Experiencing Homelessness*. p. 1 Available at: <https://www.google.com/url?client=internal-element-cse&cx=007899273231353282595:rooj8qfkg0k&q=https://www.cde.ca.gov/sp/hs/cy/documents/designatingliaisons.docx&sa=U&ved=2ahUKEwjx9j4lqD-AhVYLUQIHdxgAeEQFnoECAkQAQ&usg=AOvVaw2JrRLTzBVLh-ivDsQWdIL->.

<sup>231</sup> California Department of Education. (2019). *Designating Liaisons for Students Experiencing Homelessness*. pp. 3-4. Available at: <https://www.google.com/url?client=internal-element-cse&cx=007899273231353282595:rooj8qfkg0k&q=https://www.cde.ca.gov/sp/hs/cy/documents/designatingliaisons.docx&sa=U&ved=2ahUKEwjx9j4lqD-AhVYLUQIHdxgAeEQFnoECAkQAQ&usg=AOvVaw2JrRLTzBVLh-ivDsQWdIL->.

<sup>232</sup> California Department of Education. (2019). *Designating Liaisons for Students Experiencing Homelessness*. pp. 3-4. Available at: <https://www.google.com/url?client=internal-element-cse&cx=007899273231353282595:rooj8qfkg0k&q=https://www.cde.ca.gov/sp/hs/cy/documents/designatingliaisons.docx&sa=U&ved=2ahUKEwjx9j4lqD-AhVYLUQIHdxgAeEQFnoECAkQAQ&usg=AOvVaw2JrRLTzBVLh-ivDsQWdIL->.

<sup>233</sup> U.S. Department of Justice, Community Oriented Policing Services Office. (2022). *Guiding Principles for the Implementation of School Resource Officers*. Washington, DC: Office of Community Oriented Policing Services. Available at: <https://cops.usdoj.gov/RIC/Publications/cops-p460-pub.pdf>.

<sup>234</sup> U.S. Department of Justice, Community Oriented Policing Services Office. (2022). *Guiding Principles for the Implementation of School Resource Officers*. Washington, DC: Office of Community Oriented Policing Services. p. 7. Available at: <https://cops.usdoj.gov/RIC/Publications/cops-p460-pub.pdf>.

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- Among schools with an officer present who participated in maintaining student discipline, fewer than half (43%) reported that there were specific policies defining the role of officers related to discipline and 28 percent knew that there was not a specific policy outlining officers' roles.
- Among schools with an officer present who did not participate in maintaining student discipline, 27 percent reported that there were specific policies defining the role of officers related to discipline and 45 percent knew there was not a specific policy outlining officers' roles.<sup>235</sup>

A 2017 study, based to a great extent on the responses of school resource officers – whose descriptions were largely corroborated by other participating stakeholders and the researchers' observations, found that “[a]lthough SROs were fairly consistent in describing discipline as not being a function of their role ... there was significant nuance in what ‘not being involved in discipline’ meant for each SRO.”<sup>236</sup> In contrast with the majority of schools nationwide with a law enforcement officer present, both districts in this study had a memorandum of understanding (MOU) with the law enforcement agencies defining the SROs' role as “one of law enforcement and not of school discipline.”<sup>237</sup> While both MOUs specifically prohibited SRO involvement in school discipline issues, the SROs' disciplinary involvement expanded when interpretation of the MOU at the local level caused the meaning of not being involved in discipline to be negotiable.<sup>238</sup> This raised concerns that “[l]eaving administrators and SROs to informally negotiate the role they will play in discipline at the school potentially involves less forethought, consideration, or stakeholder input. Likewise, there may be less accountability given a lack of more uniform guidance on what constitutes appropriate or inappropriate involvement with discipline.”<sup>239</sup>

This study found that relationships with school personnel influence SROs' disciplinary involvement. When principals explicitly viewed SROs' involvement in discipline as inappropriate and actively communicated this to school personnel, SRO's disciplinary involvement was reduced. When principals and teachers requested SRO involvement in

<sup>235</sup> U.S. Department of Education, National Center for Education Statistics. (2020). *Policies Outlining the Role of Sworn Law Enforcement Officers in Public Schools*. p. 2. Available at: <https://www.bing.com/ck/a?!&p=f248bcbe58c3dea5JmltdHM9MTY4MTc3NjAwMCZpZ3VpZD0wMjQxMDc0ZC0xMDQ2LTYxMmMtMTMwMC0xNWFiMTFjMjYwNmImaW5zaWQ9NTIwNg&ptn=3&hsh=3&fclid=0241074d-1046-612c-1300-15ae11c2606b&psq=principals+report+that+their+SRO+is+involved+with+school+discipline&u=a1aHR0cHM6Ly9uY2VzLmVkdvd9wdWJzMjAyMC8yMDIwMDI3LnBkZg&ntb=1>.

<sup>236</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 44, 59.

<sup>237</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. p. 44.

<sup>238</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 48 & 53.

<sup>239</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 56-57.

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discipline, and SROs viewed doing so as being a helpful part of the school community, SROs' disciplinary involvement expanded.<sup>240</sup>

The researchers found that

[m]any SROs described activities that fell on a spectrum of school discipline involvement. On the one hand, SROs almost universally reported no formal involvement in writing disciplinary referrals or determining disciplinary outcomes (e.g., assigning a suspension). ... On the other hand, SROs were involved with discipline through a number of less formal mechanisms including verbal reprimands, one-on-one counseling or talks with students, lecturing classes on rules/consequences, being physically present for discipline responses (from school administrators), assisting school administrators with investigating misbehavior, and reporting misbehavior to school personnel.<sup>241</sup>

SROs sometimes viewed one-on-one meetings with students for disciplinary reasons as a form of counseling or role modeling rather than a punitive, disciplinary response. ... In cases such as this, SROs appeared to describe an involvement in discipline that meshed into that of (in NASRO's [National Association of School Resource Officers] terms) informal counseling.<sup>242</sup>

Though less common in our sample, in some instances, SROs took on roles as more active enforcers of school discipline. Sometimes such activities were SRO initiated. Although some SROs reported that turning students in for misbehavior was beyond their job description, many were active in bringing misbehaving students to school personnel or reporting observed misbehavior to such staff. Although such reporting fits with NASRO's recommendations, other SROs reported deeper involvement such as being present at administrators' discretion in the interviewing of students who were suspected of misconduct. In many cases, such presence amounted to no more than being a fly on the wall in an exchange between a student and an administrator. In other cases, SROs took on more active roles in questioning students or bringing evidence (such as from security cameras) to bear on the disciplinary situation.<sup>243</sup>

The researchers were told of a few cases in which the SRO led the enforcement of discipline. In one school, the SRO described being the primary respondent to a disciplinary situation, which illustrated "the potential for school disciplinary involvement to escalate into an arrestable offense, as has been described previously by scholars studying SROs (Bracy 2010; Nolan

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<sup>240</sup> Curran et al., *Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement* (2019) 126 *American J. of Education*. p. 48.

<sup>241</sup> Curran et al., *Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement* (2019) 126 *American J. of Education*. pp. 44.

<sup>242</sup> Curran et al., *Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement* (2019) 126 *American J. of Education*. p. 45.

<sup>243</sup> Curran et al., *Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement* (2019) 126 *American J. of Education*. p. 46.

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2011).”<sup>244</sup> The researchers found that at the middle and high school levels “a student’s defiance could quickly escalate into an arrest because both the school administration and the SROs were more willing to read these sorts of behaviors as illegal.”<sup>245</sup>

While, overall, the researchers found that SRO involvement with discipline was lower at the elementary school level, they found that SROs were particularly likely to assist with misbehavior from elementary school students with disabilities (SWD).

In particular, when restraining students with disabilities

[T]he SRO was commonly called in to maintain a presence, help diffuse the situation, or in some cases help the school staff to restrain the student. Some schools also had concerns about SWD running out of the building, so the administrators called on SROs to help block doors or chase down students trying to leave campus. Several SROs described building relationships with SWD specifically so that they could take an effective role if that student was having difficulties behaviorally. Both the school district leadership and the law enforcement agency’s leadership supported this being part of the SROs’ unofficial duties.<sup>246</sup>

Additionally, in relation to the role of SROs as teachers, as described by NASRO, the researchers observed “that as an SRO takes on a more active role in formal education, the need for them to engage in discipline increases.”<sup>247</sup>

It is important to keep in mind, as highlighted by the researchers conducting this study, that “[i]n many ways, [their] findings represent what might occur under optimal conditions in well-resourced and high-functioning school systems.”<sup>248</sup> Other research has shown that “the relationship between SRO presence and exclusionary discipline has been found to differ

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<sup>244</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 46-47. [“One SRO describes such a situation in detail. ‘Uh, last week, or the week before, we had a kid upstairs who wasn’t doing what he was told to do, wasn’t doing his work. Um, he was kinda getting smart with the teacher. Teacher said, ‘Fine, you know, if you’re not gonna listen to me, pick up your stuff and go to in-school suspension (ISS).’ Um, kid in and goes, ‘No. I’m not doing it.’ Well, now what? And he kinda had a stalemate, you know, right? Is the teacher going to physically pick him up and carry him down to ISS? So they uh, they notified the AP [assistant principal], and the AP said, ‘Okay, fine well I’ll write the referral up. Call the officer and have him go up there.’ Well I know the kid real well. And when I walked in I said, ‘Hey man, grab your backpack, go to ISS.’ And he says, ‘Why?’ And I said, ‘Because I told you to go to ISS, that’s why. Don’t make me ask you again.’ He got his backpack, up he went. Didn’t like it, but he went. So. You know, the next step after that is, if you’re refusing to do what I tell you to do . . . I’m probably going to take him into custody for unruly juvenile, and we’ll settle it that way. (SRO 104).”]

<sup>245</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 50-51.

<sup>246</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. p. 51.

<sup>247</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 52-53.

<sup>248</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. pp. 58-59.

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according to schools' disciplinary orientation as well as the racial and socioeconomic makeup of the student body (Fisher 2016)."<sup>249</sup> The researchers noted "that in other settings, such as in schools that are less well-functioning or in areas where law enforcement agencies have much more strained relationships with the community, such informal negotiation of the role of SROs in discipline could result in more punitive or confrontational approaches."<sup>250</sup> The SROs in this study "generally approached their jobs with a view of students as charges to be protected rather than potential criminals to be policed; this result differs from prior studies in which SROs are observed treating students as criminals to be feared (Nolan 2011) and studies in which SROs take on a dual notion of protecting vulnerable students while policing potential student criminals (Kupchik 2010)."<sup>251</sup>

A study by the University of Texas Education Research Center examined the impact of federal grants for police in schools through the analysis of data from 1999-2008 on over 2.5 million students in Texas.<sup>252</sup> In the study period, "approximately \$60 million was distributed to hire police officers in Texas public schools through the COPS [Community Oriented Policing Services, U.S. Department of Justice] office, representing about 7% of national funding through this program."<sup>253</sup> The study found "that federal grants for police in schools increase middle school discipline rates by 6%, with Black students experiencing the largest increases in discipline" and the increase was driven by disciplinary actions for low-level offenses or school conduct code violations.<sup>254</sup> The study additionally found "that exposure to a three-year federal grant for school police is associated with a 2.5% decrease in high school graduation rates."<sup>255</sup>

b. Impact on School Climate

- i. Aaron Kupchik & Katie A. Farina, Imitating Authority Students Perceptions of School Punishment and Security, and Bullying Victimization, 14 YOUTH VIOLENCE & JUV. Just. 147 (2016).

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<sup>249</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. p. 37.

<sup>250</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. p. 57.

<sup>251</sup> Curran et al., Why and When Do School Resource Officers Engage in School Discipline? The Role of Context in Shaping Disciplinary Involvement (2019) 126 American J. of Education. p. 57.

<sup>252</sup> Weisburst, E. (Nov. 2018). Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes [Policy Brief]. University of Texas, Education Research Center. p. 1. Available at: <https://files.eric.ed.gov/fulltext/ED612423.pdf>.

<sup>253</sup> Weisburst, E. (Nov. 2018). Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes [Policy Brief]. University of Texas, Education Research Center. p. 2. Available at: <https://files.eric.ed.gov/fulltext/ED612423.pdf>.

<sup>254</sup> Weisburst, E. (Nov. 2018). Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes [Policy Brief]. University of Texas, Education Research Center. pp. 1-2. Available at: <https://files.eric.ed.gov/fulltext/ED612423.pdf>.

<sup>255</sup> Weisburst, E. (Nov. 2018). Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes [Policy Brief]. University of Texas, Education Research Center. p. 1. Available at: <https://files.eric.ed.gov/fulltext/ED612423.pdf>.

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Available at:

<https://heinonline.org/HOL/P?h=hein.journals/yvja14&i=144>.

Researchers investigating the impact of school discipline practices on student risk for bullying victimization identified “[s]everal studies find that the security and discipline practices that have proliferated across the United States are enforced in authoritarian ways that resemble what is defined as bullying when it occurs between children; it involves a power imbalance (child vs. adult), it is repeated over time (students defined as ‘troublemakers’ are targeted by disciplinarians), and it is demeaning (e.g., Harber, 2004; Kupchik, 2010; Lyons & Drew, 2006; Mukherjee, 2007; Nolan, 2011).”<sup>256</sup>

“A small but growing body of research departs from this individual-level focus by recognizing the importance of school social climate in creating a context that is conducive to bullying. ... Research connecting social climate to bullying recognizes that bullying usually is not confined to merely one bully and one victim (150).”

“[P]rior studies hypothesize that school rules, punishment, and security are important elements of the school social climate that influence bullying, suggesting that authoritarian discipline may directly teach students aggressive behavior (Harber, 2004; Kupchik, 2010) (150).”

“The potential link between school social climate and bullying is an important component of the bullying literature, since it recognizes bullying as a systemic problem that needs to be understood at the macro level, not just as a result of micro-level factors (e.g., Swearer & Espelage, 2004). (150)”

“Unfortunately, the growing body of literature on school punishment demonstrates how rigid policing in schools, high suspension rates, and other hallmarks of contemporary school punishment and security erode students' perceptions of fairness (e.g., Fine et al., 2004; Nolan, 2011). Our results are therefore consistent with prior critical reflections on contemporary school rules and punishments and allow us to add another element to this critique: that unfair rules and punishments may actually increase the risk of bullying victimization (158).”

“Given the current focus on preventing bullying in schools, the results of our analysis should offer helpful guidance for schools that wish to reduce bullying victimization. Our results also help shed light on the limitations of bullying-prevention efforts that focus solely on individual students' characteristics (see Chesney-Lind & Irwin, 2007) (159).”

- c. City of Madison Wisconsin. (12/30/2019). City of Madison Police Department Standard Operating Procedure: Interactions with Youth. Available at: [www.cityofmadison.com/police/documents/sop/InteractionswithYouth.pdf](http://www.cityofmadison.com/police/documents/sop/InteractionswithYouth.pdf).

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<sup>256</sup> Aaron Kupchik & Katie A. Farina, Imitating Authority Students Perceptions of School Punishment and Security, and Bullying Victimization, 14 YOUTH VIOLENCE & JUV. JUST. 147 (2016). p. 149. Available at: <https://heinonline.org/HOL/P?h=hein.journals/yvja14&i=144>.

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“The purpose of this standard operating procedure is to provide guidelines for interactions with youth by Madison Police Department (MPD) officers. MPD recognizes that youth are psychologically, emotionally, and physically different than adults. These differences require officers to be aware of the unique circumstances and needs youth may have when interacting with youth during the scope of their duties. Officers should be aware of the typical developmental tendencies of youth to react anxiously, distrustfully, or defiantly to unfamiliar individuals, particularly those in positions of power and authority.

Research has shown that adolescent brains are not fully developed until the age of 25. As a result, youth do not process advanced thought, reasoning, or impulses the same as adults. Most youth will naturally age out of lawbreaking behavior, even without any intervention from the justice system. Research has also shown that diversion generally decreases a young person’s likelihood of re-arrest as compared with formal justice system involvement.

There are instances where alternatives to an arrest or citation will lead to better outcomes for the youth and for the community. MPD is committed to exercising alternatives to arrest and citation for young people whenever possible, consistent with public safety.”

- d. California Department of Education State and District Report Cards are required to include disaggregated data on referrals to law enforcement and school-based arrests. Consider further discussion of comparison of data about school staff referrals of students to law enforcement and school-based arrest data for California with calls for service related to stops in schools reported in the RIPA data. (Need to note that RIPA data would also include calls for service placed by individuals other than school staff and RIPA reporting will not include calls for service from school staff if officers do not make a stop related to the call, the CRDC data should include these calls.)
- e. California State Auditor. (2016). *School Violence Prevention: School Districts, County Offices of Education, and the State must do more to ensure that School Safety Plans help protect students and staff during emergencies*. Available at: <https://www.auditor.ca.gov/pdfs/reports/2016-136.pdf>. 2017 Letter from Kern County Office of Education states that an armed probation officer is present in every court school classroom administered by the district (40).
- f. Stockton Unified School District
  - i. Violations stemmed, in part, from the District’s failure to provide meaningful oversight of the District-administered Police Department.

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- ii. Judgment aimed to reform the policies and procedures relating to referrals to police, restricting use of force, and minimizing arrests and citations.
  - iii. The judgement set forth detailed restrictive parameters for the use of school police, requiring the District to create a policy distinguishing between disciplinary infractions appropriately handled by school officials and major threats to school safety or serious school-based criminal conduct.
- g. Oroville Union School District
  - i. Resolution focused on addressing disproportionate use of citations and arrests with greater impacts on students of color.
- h. Barstow Unified School District
  - i. Resolution focused on addressing disproportionate use of citations and arrests with greater impacts on students of color.
- 4. Recent school board resolutions eliminating school police
  - a. San Francisco Unified School District
  - b. Oakland Unified School District
- 5. Review of threat assessment practices
  - a. The Interagency School Safety Demonstration Act of 1985 requires school districts and county offices of education to be responsible for the overall development of Comprehensive School Safety Plans (CSSP) for its schools operating kindergarten or any of grades 1 to 12, inclusive. While Threat Assessment Teams are not a required element in CSSPs, The California Department of Education recommends that schools and their districts consider partnering to establish or enhance a Threat Assessment Team as a best practice for developing CSSPs. “A Threat Assessment Team is a group of officials that convene to identify, evaluate, and address threats or potential threats to school security. Threat Assessment Teams review incidents of threatening behavior by students (current and former), parents, school employees, or other individuals.”<sup>257</sup>
  - b. Every threat assessment model involves police getting involved in student misconduct.
  - c. Best practices around threat assessments – practices that are least harmful to children and youth
- 6. School-Wide Positive Behavioral Interventions and Supports (SWPBIS)
  - a. Successful SWPBIS utilizes multi-tiered support: primary/universal interventions for all students, secondary level prevention for students who are at risk, and tertiary/intensive interventions focused on students and families who are the most

<sup>257</sup> California Department of Education. (2022). *Comprehensive School Safety Plans*. Available at: <https://www.cde.ca.gov/ls/ss/vp/cssp.asp>.

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chronically and intensely at risk of negative behavior, and in need of greater supports.<sup>258</sup>

7. POST has a 40-hour campus law enforcement course, which is largely administered and controlled by POST and an SRO course, which is individually certified by agencies.
8. A number of districts rely on their supplemental and concentration grant funding under California's Local Control Funding Formula (LCFF)<sup>259</sup> to fund school police, SROs, or campus security.<sup>260</sup> Law enforcement personnel and activities do not increase or improve services for unduplicated students.
9. The Center for Policing Equity, in their 2023 paper on redesigning public safety in K-12 schools, emphasized that "[j]urisdictions considering alternatives to school-based policing programs should be mindful that even without police on campus, school safety procedures can still perpetuate racial bias and unnecessary punishment. Removing police from schools should be part of a holistic approach to school safety that includes investments in public health approaches, regulations limiting the role of law enforcement in school discipline, and a comprehensive reexamination of the policies and training that shape how school staff interact with students to assess potential contributors to racial disparities in student discipline and referrals to police."<sup>261</sup>
10. To mitigate the disproportionate and detrimental impacts of Black and Latine students, students with disabilities, and Black and Latine students with disabilities being subject to interactions with law enforcement, including introduction to the criminal justice system at young ages because of minor disciplinary conduct that should be addressed through restorative justice practices and Positive Behavioral Supports and Interventions, the Board recommends:

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<sup>258</sup> Public Counsel. (2023). Fix School Discipline: Toolkit for educators. p. 7. Available at: [http://www.fixschooldiscipline.org/?smd\\_process\\_download=1&download\\_id=5069](http://www.fixschooldiscipline.org/?smd_process_download=1&download_id=5069).

<sup>259</sup> Enacted on July 1, 2013, LCFF changed the way California finances public education. (Assem. Bill No. 97 (2013-2014 Reg. Sess.) Chapter 47; Sen. Bill No. 91 (2013-2014 Reg. Sess.) Chapter 49. Under LCFF, for each unduplicated pupil (i.e., English language learners, low-income students, and foster youth), a district receives a supplemental grant equal to 20% over the base amount. Additionally, when the overall unduplicated pupil enrollment in the school district equals or exceeds 55% of total enrollment, LCFF provides an additional concentration grant equal to 50% of the base amount for each student over the 55% threshold. School districts are required to "increase and improve services for unduplicated pupils" in proportion to the supplemental and concentration funds received. (Code Regs., tit. 5, § 15496(a).) Districts may use supplemental and concentration funds for districtwide/schoolwide purposes but such services must be "principally directed towards," and effective in meeting the district's goals for unduplicated pupils in the state and local priority areas.

<sup>260</sup> Cal. Dep't of Ed., *Appellate Decision* (May 5, 2017), [https://www.aclunc.org/docs/20170505-cde\\_response\\_to\\_aclu.pdf](https://www.aclunc.org/docs/20170505-cde_response_to_aclu.pdf).

<sup>261</sup> Neath and Rau. (2023). *Redesigning Public Safety: K-12 schools*. Center for Policing Equity. P. 7. Available at: <https://www.policingequity.org/school-safety/71-white-paper-school-safety/file>.

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(Potential policy recommendations and best practice recommendations)

- a. Eliminating school police departments under the purview of individual school districts, as currently permitted under Education Code section 38000 et seq.;
  - i. Repealing the part of Education Code Section 38000 authorizing school districts to operate police departments would free up resources and funding for critical education and support services in those districts that operate school police departments.
  - ii. This would also resolve policy problems relating to a school district, with no specialized training or knowledge of law enforcement policies and procedures, overseeing a police department when the district should be focused on educating students.

b. (Two alternatives for a potential recommendation)

The Legislature should prohibit districts from entering into agreements with law enforcement agencies for the use of SROs;

OR

The Legislature should require a memorandum of understanding (MOU) between school districts or County Offices of Education and law enforcement agencies that provide SROs to school campuses, which is not currently a requirement in state law, and specify some minimal requirements for that MOU to ensure that the role of officers is focused on protection and serious incidents and not minor and developmentally expected misbehaviors that should be addressed by school personnel.

- i. There should be detailed standards for SROs and how they can and cannot interact with students or use force. They should never be involved with discipline.
- ii. Prior draft bills have attempted to impose standards. During the 2017-2018 legislative session, AB 163 (Weber) and AB 173 (Jones-Sawyer) sought to impose standards on peace officer interactions with students and the adoption of policies and procedures for SROs. Neither bill made it out of committee.

1. School Safety: Peace Officer Interactions with pupils (introduced 2017). Available at:

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB163](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB163).

“The governing board of a school district shall adopt and annually review a policy regarding the scope of peace officer interactions with pupils. In reviewing the policy, the governing board of the school district shall consider how it can reduce the presence of peace officers on campus. If a school district has a permanent peace officer presence on campus, the governing board of the school district shall consider and assess the viability of alternatives to that presence, including, but not limited to, restorative justice

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methods, to ensure school safety and promote a climate for learning.”

“[A] school district shall, as a condition of entering into or continuing an agreement with a local law enforcement agency to have one or more regularly assigned peace officers at any of its schools, enter into a memorandum of understanding with the local law enforcement agency containing the policies listed...”

“School staff shall only call a peace officer when there is a real and immediate physical threat to pupils, teachers, or public safety, or when mandated by existing law. A peace officer shall not arrest or discipline pupils for violations of school rules or for low-level misconduct. Counselors and other school officials shall handle bullying, harassment, disruptiveness, vandalism, drug and alcohol abuse, and other nonviolent incidents.”

“The bill would require those policies to include specified elements, including, among others, ... that a peace officer not arrest or discipline pupils for violations of school rules or for low-level misconduct, and that a peace officer not interview or arrest a pupil on a school campus during school hours absent a real and immediate physical threat to pupils, teachers, or public safety.”

“Many school districts in California have conflicting, vague, or absent law enforcement policies that provide little to no meaningful guidance to school staff on when to call law enforcement to campus or how to interact with law enforcement. Most school districts in California give staff complete discretion to call law enforcement to address pupil misbehavior that should be handled by school staff such as administrators or counselors, including general school rule violations such as “disorderly conduct” or refusing to come in from recess, bullying and harassment, school “disruption,” and vandalism. Very few school districts in California have policies limiting law enforcement contact with pupils for rulebreaking or minor offenses.”

2. School Safety: Peace Officer Interactions with pupils (as originally introduced 2017). Available at:  
[https://leginfo.legislature.ca.gov/faces/billPdf.xhtml?bill\\_id=201720180AB173&version=20170AB17398AMD](https://leginfo.legislature.ca.gov/faces/billPdf.xhtml?bill_id=201720180AB173&version=20170AB17398AMD).

“School staff shall not call a peace officer to arrest, discipline, or otherwise interact with a pupil for a violation of school rules, including, but not limited to:

- Failure to participate in class or unpreparedness for class;
- Failure to carry a hall pass or appropriate identification;
- Trespassing;
- Loitering;

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Profanity;  
 Inappropriate public displays of affection;  
 Failure to wear or correctly wear a school uniform or follow policies regarding clothing;  
 Possession of a prohibited item that does not violate the Penal Code, including, but not limited to, a cellphone or marker;  
 Inappropriate use of an electronic device;  
 Insubordination or defiance;  
 Disorderly conduct;  
 Verbal altercations, abuse, or harassment;  
 Altercations, abuse, or harassment over the internet;  
 Physical altercations that do not involve a weapon;  
 Vandalism or graffiti;  
 Being late, cutting class, absenteeism, or truancy;  
 Perceived drunkenness or intoxication;  
 Possession of alcohol;  
 Possession of a tool that could be taken to be, but is not intended as, a weapon, including, but not limited to, a nail clipper or file, small pen knife, butter knife, toy gun, or pepper spray. This paragraph does not include an item that is brandished as a weapon;  
 Alleged or witnessed promoting or claiming of a neighborhood or crew, including, but not limited to, verbally or through graffiti, clothing, or hand signs.

School staff shall exhaust all alternatives before involving a peace officer for low-level misconduct, including, but not limited to:

Battery;  
 Battery on school property;  
 Battery against school staff;  
 Disturbing the peace or a similar offense that causes a disturbance;  
 Possession of marijuana for personal use.

MOUs between any school district or County Office of Education and law enforcement agency shall prohibit certain types of use of force against youth.

- iii. Pasadena Unified School District and Pasadena Police Department Memorandum of Understanding.
- iv. Oakland Unified School District's former policy required that a parent or guardian be notified before their child was questioned by police in school and required police officers to advise pupils of their constitutional right to remain silent during interrogation.
- c. The Legislature should identify student disciplinary issues that school administrators and staff should address themselves rather than requesting assistance from or making referrals to law enforcement.

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- d. The Legislature should defer to the expertise of educators or administrators instead of law enforcement in threat assessments for student misconduct that does not involve serious threat of harm to self or another.
- e. The Legislature should set forth a very restrictive standard on use of force by officers in schools: only when there is an imminent risk of bodily harm and injury and requiring de-escalation.
  - i. Provide that force shall not be used in response to disrespectful or noncompliant behavior that does not pose a threat to facility security or the safety of persons.
  - ii. Prohibit the use of chemical spray against students.
- f. The Legislature should prohibit the use of supplemental and concentration grant funding to pay for school police, probation department staff, school security, and SROs, as currently permitted under California's LCFF under certain circumstances.
  - i. Currently, the only way that these issues are raised and resolved is through community advocacy and/or the Uniform Complaint Process, with the California Department of Education as the ultimate decision maker.
- g. Districts should appropriate funding to ensure all schools have student to counselor and social worker ratios in line with the standards developed by professional associations.

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## POLICIES AND ACCOUNTABILITY

### Police Unions, Law Enforcement Agencies, and Cities

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

#### II. Police Union Collective Bargaining

Police unionism increased in the 1960s in response to the Civil Rights Movement and Supreme Court decisions issued under Chief Justice Earl Warren.<sup>262</sup> Today, police, along with teachers and core public sector workers, have the highest union membership levels in the United States with roughly 75 percent of law enforcement officers being union members.<sup>263</sup>

A major function of police unions is collective bargaining.<sup>264</sup> Officers do not need collective bargaining rights to be able to influence the governing body to improve their wages, benefits, or working conditions.<sup>265</sup> Officers can unionize without collective bargaining rights.<sup>266</sup> However, police union influence fundamentally grew due to collective bargaining, because the unionization of police officers often occurred only after state laws required jurisdictions to bargain with employee representatives.<sup>267</sup> Unions often focus bargaining and contract enforcement efforts on

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<sup>262</sup> Place, *Double Due Process: How Police Unions and Law Enforcement "Bills of Rights" Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 281 (hereinafter "Double Due Process"); Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights* (2020) p. 3, 6.

<sup>263</sup> Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights* (2020) p. 4.

<sup>264</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 187 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX]. Collective bargaining refers to the negotiation of contracts governing the terms of employment with respect to wages, benefits, working conditions, and worker rights for a particular group of employees. When an employer has a "duty to bargain," it is required to negotiate with employee representatives. *Ibid.*

<sup>265</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. 40 <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>266</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. 40 <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>267</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 187 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX]. (Ichniowski, *Public Sector Union Growth and Bargaining Laws: A Proportional Hazards Approach With Time-Varying Treatments* (1988) pp. 19–40).

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protecting officers from discipline and arbitrary work assignments, fighting for fair compensation, and ensuring compliance with seniority rules.<sup>268</sup>

Collective bargaining on behalf of law enforcement is often a confidential process between elected officials, unions, and police management.<sup>269</sup> A confidential negotiation “provides a forum for rational discussion and accommodation of competing interests.”<sup>270</sup> Elected officials decide whether to ratify a negotiated labor contract, thus offering an opportunity for an exchange of ideas and vocalized support or criticism by the public.<sup>271</sup> However, Walter Katz, a criminal justice advocate, argues, “[t]he public, especially the portion that is most impacted by policing practices, is locked out of the negotiation process and relies on elected officials to look out for its interests in having an accountable police force that treats members in predominantly racial minority neighborhoods fairly.... The lack of meaningful public accessibility to the negotiation process has contributed to officials agreeing to police labor contract that undermine accountability and run counter to the interests of residents who are already estranged from the political process.”<sup>272</sup>

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<sup>268</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 727

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

<sup>269</sup> See Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 433; Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1199 (citing Abraham, Opening the Curtain on Government Unions (2015) 5–8

<[http://www.commonwealthfoundation.org/docLib/20150609\\_CBTransparency.pdf](http://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf)>

[<https://perma.cc/H9Z5-7PHM>] (providing links to various state statutes that limit public participation and transparency in collective bargaining negotiations).); Rad, Police Unionism, p 190 (citing Katz 2021, Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 2017); Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422; see SF BAR, pg. 13 (“[Human Resources’ meet-and-confer process with SFPOA occurs behind closed doors.]”)

<sup>270</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436 (quoting Summers, *Public Employee Bargaining: A Political Perspective* (1974) 83 Yale L.J. 1156, 1200).

<sup>271</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436.

<sup>272</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422–23; see Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 433; Rushin, *Police Union Contracts* (2017) 66 Duke. L. J. 6, 1199 (citing Abraham, Opening the Curtain on Government Unions (2015) 5–8

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California law does not require meet-and-confer discussions to occur behind closed doors.<sup>273</sup> The Meyers Miliias Brown Act, the law that requires public employers to meet and confer with employees in good faith,<sup>274</sup> does not explicitly prohibit the disclosure of communications between bargaining parties.<sup>275</sup> Meet and confer correspondence between parties (i.e., opening bargaining offers, counter, and any other communications between parties) may be released to the public and stakeholders.<sup>276</sup> The Brown Act also expressly permits release of information legislative bodies acquire during closed sessions, so legislative bodies may release “salaries, salary schedules or compensation paid in the form of fringe benefits of its represented and unrepresented employees” and “any other matter statutorily provided within the scope of representation.”<sup>277</sup> Thus, bargaining sessions are not confidential and summaries of discussions may be disclosed to the public and stakeholders.<sup>278</sup>

### III. Police Unions’ Effects on Agency Reforms and Accountability

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<sup>273</sup> San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15  
<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%2022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX] (citing 61 Ops. Cal. Atty. Gen. 1, 2-3 (Jan. 4, 1978) (California Attorney General legal opinion noting that the Meyers Miliias Brown Act “is silent as to whether ‘meet and confer’ sessions may be private, or must be open to the public.”))

<sup>274</sup> Berkeley Office of the City Attorney, letter to the Police Accountability Board, Oct. 13, 2021

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

<sup>275</sup> San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 16

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%2022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

<sup>276</sup> San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 16

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<sup>277</sup> The Brown allows legislative bodies, such as city councils, to hold closed sessions with designated representatives regarding the “salaries, salary schedules or compensation paid in the form of fringe benefits of its represented and unrepresented employees” as well as “any other matter statutorily provided within the scope of representation.” San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%2022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

<sup>278</sup> San Francisco Bar Association, letter to the San Francisco Board of Supervisors and the San Francisco Police Commission Office, Oct. 22, 2020, pg. 15

<<https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/Oct%2022%20BASF%20ltr%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf>> [as of XXX].

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As a party at the collective bargaining table, unions have influence. Unions use their influence in several ways, including ways that influence accountability and reform. In California, unions supported the creation of the Public Safety Officers Procedural Bill of Rights, a set of statutory protections specifically for law enforcement officers.<sup>279</sup> Within bargaining agreements, unions negotiate terms affecting interrogations of officers suspected of misconduct, retention of disciplinary records, civilian oversight of discipline, complaint investigations, and arbitration for discipline decisions. Unions' relationships with police management and role in an agency's internal culture also influence reform and accountability

#### A. Peace Officer Bill of Rights

Police unions lobbied to support the development of Peace Officer Bills of Rights (POBOR). In California, POBOR<sup>280</sup> is a set of rights, codified in law, that is related to disciplinary action and supersedes police union contracts.<sup>281</sup> In other jurisdictions, a POBOR may be statutory or contractually negotiated by police unions into collective bargaining agreements on the local level.<sup>282</sup>

##### 1. Union Justifications Provided for a Bill of Rights

POBORs arose in response to demands for greater police accountability during the Civil Rights Movement.<sup>283</sup> The Fraternal Order of Police, a national federation of police unions, argues a POBOR is necessary, because law enforcement agencies sometimes subject officers to “abusive and improper procedures and conduct” and that officers “have no procedural or administrative protections whatsoever” in some jurisdictions.<sup>284</sup>

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<sup>279</sup> Barrata, The Creation of the Peace Officer Bill of Rights & PORAC, PORAC <[<sup>280</sup> California's POBOR is statutory, codified in Government Code Sections 3300-3312, and is called “Public Safety Officers Procedural Bill of Rights.”](https://porac.org/2020/08/17/the-creation-of-the-peace-officer-bill-of-rights-porac/#:~:text=AB%20301%3A%20The%20Peace%20Officers'%20Bill%20of%20Rights&text=In%201973%20a%20bill%20(AB,Policemans'%20Bill%20of%20Rights.%E2%80%9D> [as of XXX].</a></p></div><div data-bbox=)

<sup>281</sup> Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, (2020) p. 9.

<sup>282</sup> Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 277.

<sup>283</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 194; Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109, 125.

<sup>284</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 198 (citing Press Release, Police Benevolent Association, Due Process for Police Officers Introduced in Senate (May 9, 2009) <<http://www.grandlodgefop.org/press/pr010509.html>>).

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Other arguments unions make to justify a POBOR, which may or may not be justified, include the following: (1) officers need special protections, because officers are forced to answer questions or be fired;<sup>285</sup> (2) lack of due process rights leads to loss of officer confidence in the disciplinary process and loss of morale;<sup>286</sup> (3) treating officers unfairly may deter or prevent officers from carrying out their duties effectively and fairly;<sup>287</sup> (4) the perception or reality of unfair treatment may negatively affect recruitment and retention;<sup>288</sup> (5) effective policing depends on stable employer-employee relations, which POBOR promotes;<sup>289</sup> and (6) POBOR provides more uniform fairness among and between different departments that have different protections.<sup>290</sup>

## 2. California's Peace Officer Bill of Rights

California's POBOR provides the following protections and limitations on interrogations of police officers for misconduct.<sup>291</sup> Interrogations must be conducted at a reasonable hour.<sup>292</sup> Preferably, officers are to be interrogated when an officer is on duty or during normal waking hours.<sup>293</sup> If the interrogation occurs when the officer is off-duty, the officer shall be compensated.<sup>294</sup> An officer shall be interrogated by no more than two people at once and the officer will be provided the names of the interviewers.<sup>295</sup> The officer shall be informed of the nature of the interrogation before it occurs.<sup>296</sup> The interrogation shall also be limited to a reasonable time.<sup>297</sup>

<sup>285</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing Rashbaum, *Police Officials Hope Ruling Will Help End 48-Hour Rule* (May 10, 2002) N.Y. TIMES). This allegation has not been supported by empirical evidence. *Id.* at fn. 87.

<sup>286</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(2) (2001)).

<sup>287</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(3) (2001)).

<sup>288</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(4) (2001)).

<sup>289</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing Gov. Code, § 3301 (2001); N.M. STAT. ANN. § 29-14-2 (Michie 2001)).

<sup>290</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 199.

<sup>291</sup> Gov. Code, § 3303.

<sup>292</sup> Gov. Code, § 3303(a).

<sup>293</sup> Gov. Code, § 3303(a).

<sup>294</sup> Gov. Code, § 3303(a).

<sup>295</sup> Gov. Code, § 3303(b).

<sup>296</sup> Gov. Code, § 3303(c).

<sup>297</sup> Gov. Code, § 3303(d). Additional interrogation protections are as follows. POBOR limits the language that may be used during an interrogation such that the officer is not subjected to offensive language or threatened with punitive action. Gov. Code § 3303(e). POBOR also limits the use of the officer's statements in civil actions, if they

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California's POBOR also provides protections and limitations regarding discipline and personnel records. If an agency wishes to discipline an officer for misconduct, then the agency must complete its investigation of the misconduct and notify the officer of the discipline within one year of discovery of the misconduct.<sup>298</sup> An agency cannot include a comment adverse to an officer's interests in the officer's personnel file without allowing the officer to review the comment.<sup>299</sup> An officer has 30 days to respond in writing to the adverse comment, and the response must be included in the personnel file.<sup>300</sup> An agency cannot take punitive action against an officer because he or she is on a *Brady* list,<sup>301</sup> which is a list usually compiled by a prosecutor's office of officers that may have credibility issues, such as records of untruthfulness, integrity violations, or allegations of moral turpitude.<sup>302</sup>

### 3. Impediments Caused by POBOR

California's POBOR covers chiefs and supervisors in addition to rank-and-file officers.<sup>303</sup> Some policy obligations and pressures exist for police chiefs that do not exist for rank-and-file officers. Public officials may call a police chief to account for basic law enforcement policy (e.g., adoption of community policing, failure to reduce crime, etc.).<sup>304</sup> Public officials may also replace chiefs as political pressures demand.<sup>305</sup> Similarly, chiefs should have the flexibility in choosing and replacing commanders based on policy goals and basic job performance.<sup>306</sup> POBOR rights should not attach in such decisions.<sup>307</sup>

California's POBOR prevents reassignment of officers if the "department would not normally be sent to that location or would not normally be given that duty assignment under similar

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are made under duress, coercion, or threat of punitive action. Gov. Code 3303(f). The interrogation may be recorded, but the officer must have access to the recording and have the option to record with his or her own device. Gov. Code, § 3303(g).

<sup>298</sup> Gov. Code, § 3304(d).

<sup>299</sup> Gov. Code, § 3305.

<sup>300</sup> Gov. Code, § 3306.

<sup>301</sup> Gov. Code, § 3305.5. Placement on a *Brady* list has serious implications. A prosecutor may be wary of a *Brady* officer's account of an incident, if it is not corroborated by other evidence, thereby casting doubt on a case. A prosecutor may also be wary of allowing an officer to testify under penalty of perjury if the officer has credibility issues, thus limiting one of the vital functions an officer plays in the prosecution of a case.

<sup>302</sup> <https://porac.org/article/am-i-going-to-get-a-brady-letter>

<sup>303</sup> Gov. Code, § 3301; Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, p. 204.

<sup>304</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

<sup>305</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

<sup>306</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

<sup>307</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

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circumstances.”<sup>308</sup> Punitive reassignments that violate standards of fairness should not occur.<sup>309</sup> However, reassignment as a response to performance deficiencies is valuable.<sup>310</sup> In general, departments have not reassigned “problem officers” with performance problems away from sensitive assignments.<sup>311</sup> For example, departments often leave patrol officers who have many citizen complaints or who too frequently use force in their assignments, even though departments could transfer them to assignments that have minimal contact with the public.<sup>312</sup>

POBOR limits the reformation of procedures disciplining officers.<sup>313</sup> Because no more than two interrogators may question an officer at once,<sup>314</sup> POBOR may constrain a civilian review board from holding a hearing with the officer or may prevent an auditor from joining and asking questions during an interview.<sup>315</sup> Additionally, a citizen review board’s disciplinary recommendation may trigger an officer’s administrative appeal rights<sup>316</sup> if the recommendation may be used for discipline or other personnel decisions.<sup>317</sup> For example, a civilian oversight committee’s advisory recommendation for discipline constitutes punitive action, if a department may consider the advisory recommendation when disciplining the officer.<sup>318</sup> Thus, an officer’s right to administrative appeal of the advisory recommendation is triggered.<sup>319</sup>

## B. Collective Bargaining Agreements

As previously discussed, collective bargaining is a major function of police unions. While unions bargain for salary and related compensatory benefits, they also bargain about management

<sup>308</sup> Gov. Code, § 3303(j).

<sup>309</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005) 14 Public Interest L.J. 186, 236.

<sup>310</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005) 14 Public Interest L.J. 186, 236.

<sup>311</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005) 14 Public Interest L.J. 186, 236.

<sup>312</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005) 14 Public Interest L.J. 186, 236. Reassignments may be subject to collective bargaining agreements. *Ibid.*

<sup>313</sup> League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <[https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98\\_3](https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3)> [as of XXX].

<sup>314</sup> Gov. Code, § 3303(b).

<sup>315</sup> League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <[https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98\\_3](https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3)> [as of XXX] (citing *Berkeley Police Assn. v. City of Berkeley* (2007) 167 Cal.App.4th 385, 410).

<sup>316</sup> Gov. Code, § 3304(b).

<sup>317</sup> League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3 <[https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98\\_3](https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3)> [as of XXX] (citing *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223; *Hopson v. City of Los Angeles*, 139 Cal.App.3d 347 (1983)).

<sup>318</sup> See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222-23.

<sup>319</sup> *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222.

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rights.<sup>320</sup> These rights may influence discipline and investigation of misconduct, which in turn affects accountability.<sup>321</sup> Scholar Stephen Rushin identified seven categories of provisions in police contracts that limit accountability:<sup>322</sup> (1) delays of interrogation or interview of officers suspected of misconduct; (2) providing officers access to evidence of alleged misconduct prior to interrogation; (3) limiting consideration of disciplinary records by excluding records for future employments or destroying disciplinary records from files after a set period;<sup>323</sup> (4) limiting the length of time during which an investigation must conclude, or disciplinary action can occur; (5) limiting anonymous complaints; (6) limiting civilian oversight; and (7) permitting or requiring arbitration of disputes related to disciplinary actions.

## 1. Interrogations

Employers must maintain the workplace. Employers who suspect employees of misconduct, criminal behavior, or violations of internal policy, may conduct an internal investigation and question the employee.<sup>324</sup> As discussed in the Board's 2023 Report, an internal affairs department administratively investigates these issues for a police department.<sup>325</sup> Internal Affairs departments use administrative interrogations to judge the veracity of civilian complaints, collect facts after uses of force, and investigate officer misconduct.<sup>326</sup> While criminal suspects cannot be compelled to answer questions and may invoke their right to silence, investigators can and do compel officers to answer questions during administrative disciplinary interrogations.<sup>327</sup> An officer may be terminated for cause if they refuse to answer questions in the administrative review.<sup>328</sup> Thus, police union contracts or collective bargaining agreements often regulate disciplinary interrogations.<sup>329</sup> Stephen Rushin's analysis of 657 police union contracts, 140 of

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<sup>320</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 185 (citing hardway, Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610).

<sup>321</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 185 (citing hardway, Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610).

<sup>322</sup> Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer's Bills of Rights, (2020) p. 6; see also Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 191 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191).

<sup>323</sup> See also Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1230-32 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

<sup>324</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

<sup>325</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023), p. 143-44 <<https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>> [as of XXX].

<sup>326</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

<sup>327</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656. Compelled questioning raises Fifth Amendment concerns, especially the right to silence, when an officer suspected of criminal conduct that may serve as the basis of internal disciplinary action and criminal prosecution. The Supreme court has held that the government may not use an officer's compelled statement as evidence against him or her in a criminal prosecution. *Ibid.*

<sup>328</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

<sup>329</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 657.

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which were from California municipalities,<sup>330</sup> suggests that contracts have insulated officers from accountability by preventing investigators from using effective interrogation techniques against officers during internal disciplinary investigations.<sup>331</sup>

Some union contracts or collective bargaining agreements impose a time period before an officer may be interviewed, thereby delaying the interrogation.<sup>332</sup> Rushin's analysis revealed that of the contracts that allowed for an interrogation delay, the typical police department gives officers two days or more of notice before a department may interrogate an officer based on alleged misconduct.<sup>333</sup> Providing an officer with a reasonable period to obtain representation does not present accountability issues.<sup>334</sup> An officer is entitled to an attorney, like any other criminal suspect, if he or she is going to be interrogated about criminal behavior.<sup>335</sup> However, a 48-hour waiting period raises accountability concerns. Rushin surveyed police leaders about the effects of a waiting period on the integrity of an investigation (without specifying that the investigation was of an officer).<sup>336</sup> All those who responded to the survey agreed that interrogation delays burden investigations.<sup>337</sup> These police leaders stated that a 48-hour waiting period provides an opportunity to "line up an alibi," "strategize about how to conceal the truth," "destroy [or] hide evidence not already in police possession," "tamper with witnesses," or otherwise give "any advantage."<sup>338</sup> Others suggested "[the] first 48 hours of an investigation are critical."<sup>339</sup> Rushin argued that excessively delaying interrogations of officers after alleged misconduct allows officers to coordinate stories in a way that deflects responsibility for wrongful behavior.<sup>340</sup>

Some contracts or collective bargaining agreements also require internal investigators to turn over potentially incriminating evidence to an officer prior to interrogation.<sup>341</sup> In Rushin's analysis, the most common types of evidence provided are a copy of a civilian complaint and the

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<sup>330</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 657. police union contracts from 40 states and the District of Columbia that govern the internal disciplinary procedures. 140 contracts were from California municipalities. *Id.* at 662-63, 694-96.

<sup>331</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 684.

<sup>332</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 672.

<sup>333</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 672. The majority of contracts did not provide a delay period. However, a substantial number of police departments provide two hours or less, with many of the remaining agencies giving police officers a substantially longer delay before facing questions from internal investigators—generally between 24 and 72 hours. *Id.* at 673-74. 664

<sup>334</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 664.

<sup>335</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 664.

<sup>336</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 677.

<sup>337</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

<sup>338</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

<sup>339</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

<sup>340</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1240.

<sup>341</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 674; Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1227, Appendix C (second column entitled "Access to Evidence Before Interview").

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names of complainants.<sup>342</sup> Fewer jurisdictions give officers access to video or photographic evidence, such as body worn camera footage, or locational data, such as GPS.<sup>343</sup> Surveyed police leaders expressed concern that these protections would impair the ability of investigators to uncover the truth.<sup>344</sup> One police chief described this as “showing all of your cards in a poker game.”<sup>345</sup> Another claimed it allows for “tailor[ing] their lies to fit the evidence.”<sup>346</sup> Some argued that the purpose of an interrogation is to “determine if the suspect is being truthful.” Thus, providing evidence in advance of an interrogation “would greatly limit this position,” and would give “time to fabricate a better lie.”<sup>347</sup> One respondent worried about inadvertently publicizing the evidence, thereby calling into question the integrity of the investigation.”<sup>348</sup> Virtually no police chief believed these protections were useful in reducing the rate of false confessions.<sup>349</sup>

## 2. Disciplinary Records

During the regular course of business, employers keep personnel files for employees that often contain discipline records and evaluations, among other materials.<sup>350</sup> These files assist with the regular functions of the business or agencies; for example, discipline records may formulate the basis to terminate an employee or an evaluation may support a promotion.<sup>351</sup> Thus, the contents of a personnel file have influence on an individual’s employment. Many police contracts require destruction of disciplinary records from officer personnel files after a set period or prevent supervisors from considering an officer’s previous discipline history when making personnel decisions.<sup>352</sup> Some prevent police chiefs from fully using disciplinary records.<sup>353</sup> In another study, Rushin analyzed 178 police contracts, at least 37 of which are from California municipalities,<sup>354</sup> and found that approximately half require removal of personnel records at

<sup>342</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 674.

<sup>343</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 675.

<sup>344</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

<sup>345</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

<sup>346</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

<sup>347</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

<sup>348</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

<sup>349</sup> Rushin and DeProspo, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

<sup>350</sup> Jesani, The Importance of Employee Records and Files (Feb. 22, 2016) LinkedIn

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

<sup>351</sup> Jesani, The Importance of Employee Records and Files (Feb. 22, 2016) LinkedIn

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

<sup>352</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1228

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

<sup>353</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1228

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

<sup>354</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1218, Appendix A

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

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some point in the future.<sup>355</sup> There are compelling policy reasons to remove minor mistakes from records after a period of time<sup>356</sup> and evidence of wrongdoing may lose relevance or predictive value.<sup>357</sup> For example, tardiness from five years prior likely has little to no bearing on an officer's fitness as an officer in present day.<sup>358</sup> However, a pattern of more serious complaints over decades – even if the complaints are rarely sustained<sup>359</sup> – is often demonstrative of an issue that requires management's intervention.<sup>360</sup> Destruction of disciplinary records makes it more difficult for supervisors to identify officers engaged in a pattern of misconduct.<sup>361</sup>

### 3. Civilian Oversight

Community members and advocates recognize the importance of civilian oversight of police.<sup>362</sup> Civilian review boards are common across the country.<sup>363</sup> Civilian review boards allow the community to monitor police behavior, which can empower vulnerable communities.<sup>364</sup> Such oversight builds community trust, ensures transparency, and increases citizen's willingness to report complaints against police.<sup>365</sup>

<sup>355</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>356</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>357</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>358</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>359</sup> Because of the highly unstructured nature of police work, it is often difficult to prove definitively that an officer engaged in misconduct, in part because investigators must typically weigh the officer's word against a civilian's word. While modern technological tools like body cameras may somewhat level the playing field in these investigations, these tools only provide one angle on interactions between civilians and police. Thus, civilian complaints may not be sustained. Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>360</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1231

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

<sup>361</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1240

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

<sup>362</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1232.

<sup>363</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1233.

<sup>364</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234

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

<sup>365</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234

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

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Despite the growing importance of civilian review boards, unions have used the bargaining process to block or severely limit boards' ability to oversee police discipline.<sup>366</sup> Some keep civilians from having the final say in discipline.<sup>367</sup> Others establish methods for disciplinary determinations that do not leave room for civilian oversight.<sup>368</sup> Limiting an external agency from investigating misconduct places more reliance on police departments to police themselves.<sup>369</sup>

#### 4. Complaint Investigations

As discussed in previous Reports, community members may file complaints against officers alleging misconduct.<sup>370</sup> Civilian complaints are a police accountability mechanism, making their collection and investigation vital.<sup>371</sup> Union contracts may also affect the investigation of civilian complaints, which in turn affects accountability. Some contracts limit investigation of anonymous complaints;<sup>372</sup> others may disqualify investigations after a set period of time.<sup>373</sup> Law enforcement departments have a finite number of resources at their disposal, so there is value in discouraging frivolous complaints and avoiding endless disciplinary investigations.<sup>374</sup>

However, provisions limiting civilian complaints have consequences law enforcement agencies should wish to avoid. Bans on anonymous complaints may discourage some individuals from filing complaints, especially if they were victims of police brutality and who now fear

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<sup>366</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1233, 1234

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

<sup>367</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

<sup>368</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1234 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

<sup>369</sup> Fegley, *Police Unions and Officer Privileges* (2020) 25 The Independent Rev. 165, 175.

<sup>370</sup> Racial and Identity Profiling Advisory Board, Annual Report (2019) p. 34 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2019.pdf>> [as of XXX]; Racial and Identity Profiling Advisory Board, Annual Report (2020), p. 58-80 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of XXX].

<sup>371</sup> For a more in-depth discussion on civilian complaints, see Racial and Identity Profiling Advisory Board, Annual Report (2020), p. 58-80 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of XXX].

<sup>372</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1235-36 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

<sup>373</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1235-36 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX]; see Fegley, *Police Unions and Officer Privileges* (2020) 25 The Independent Rev. 165, 177.

<sup>374</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1236 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&context=dlj>> [as of XXX].

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retribution.<sup>375</sup> This would discourage some of the most vulnerable people from seeking redress for officer misconduct and prevent management from discovering patterns of egregious conduct.<sup>376</sup> The Board encourages anonymous complaints, so a union contract that limits the acceptance and investigation of these complaints hampers accountability. While time periods for investigations may have their benefits, some particularly egregious incidents of police misconduct may not come to light until years after they have occurred.<sup>377</sup>

## 5. Arbitration

Collective bargaining agreements also often contain arbitration clauses to adjudicate discipline appeals.<sup>378</sup> Arbitration is a legally binding form of dispute resolution held outside of formal courts.<sup>379</sup> It is a common dispute mechanism in public labor.<sup>380</sup> Mandatory arbitration may be beneficial in cases of intractable contractual disputes between police unions and management.<sup>381</sup> However, arbitration in disciplinary appeals raises accountability concerns.<sup>382</sup> It almost exclusively reduces disciplinary penalties for officers guilty of misconduct.<sup>383</sup> It also allows for third parties who may not be from the community to make final disciplinary decisions that overturn police supervisors' decisions or oppose civilian oversight entities.<sup>384</sup> Arbitrators can reinstate fired officers, sometimes with back pay.<sup>385</sup> Police chiefs have claimed to be undermined

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<sup>375</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

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

<sup>376</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

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

<sup>377</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1237

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

<sup>378</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

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

<sup>379</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194

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

<sup>380</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

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

<sup>381</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

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

<sup>382</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1238

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

<sup>383</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1239

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

<sup>384</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1239; Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>385</sup> Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

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when arbitrators return officers to duty that have multiple incidents of misconduct.<sup>386</sup> The tendency for arbitrators to side with officers is likely, because police officers and unions often have some level of influence over the selection of arbitrators.<sup>387</sup> Even when arbitrators side with police supervisors, their imposition of sanctions may be limited.<sup>388</sup> For example, one memorandum of understanding between a California city and police unions did not specify a limit to the amount an arbitrator may reduce discipline, but imposed limits on how much an arbitrator may increase discipline.<sup>389</sup>

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

### C. Officers Receive Special Protections

Officers have special protections.<sup>390</sup> Officers are required to make snap judgments in tense situations.<sup>391</sup> Some say that without the special protections some officers might be reluctant to act for fear that their job would be on the line, thereby putting public safety at risk.<sup>392</sup> Some justify the need for these protections saying that the absence of clear procedures with few protections could negatively affect recruiting officers of good character and ability to do the job.<sup>393</sup> Others argue that officers' protections guard against public corruption.<sup>394</sup> Law enforcement cannot work when an officer can be forced to act or refrain from acting because of

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<sup>386</sup> Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 8 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>387</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610)

<sup>388</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX].

<sup>389</sup> Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 194 <<https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030421-034244>> [as of XXX] (citing Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191).

<sup>390</sup> See McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”).

<sup>391</sup> Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>392</sup> Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>393</sup> Disalvo, Enhancing Accountability: Collective Bargaining and Police Reform, p. 6 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>394</sup> McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”).

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concern of unwarranted or unlawful retaliation from superiors, politicians, or those with politically connected economic interests.<sup>395</sup> Officers are also given protections, because those dismissed mid-career often find that their skills are not easily transferrable to other professions.<sup>396</sup> For police officers with only a high school diploma, losing their job can effectively kick them out of the middle class.<sup>397</sup>

Police officers are no different than other workers — they have the right to fair terms of employment<sup>398</sup> and have legitimate labor concerns;<sup>399</sup> however, the public has a vital interest in police accountability.<sup>400</sup> Like any other group of employees, management may mistreat officers in a variety of ways: arbitrary punishment, punitive reassignment, or grueling and unsustainable working hours.<sup>401</sup> There is also a real potential for good faith mistakes, misunderstandings, or mishaps beyond the control of individual officers as they carry out their duties.<sup>402</sup> However, public trust in the police is of utmost importance, and police must be held accountable for misconduct.<sup>403</sup> Law enforcement agencies are tasked with managing social control with a general mandate to control crime, maintain order, and provide miscellaneous services to the public.<sup>404</sup> Officers are required by law to treat all citizens fairly and equally.<sup>405</sup> While officers work in a job that can be dangerous, they are also authorized to use force against individuals – a responsibility unique to law enforcement.<sup>406</sup> “When society grants police the power to use force against civilians to coerce desired behavior, and even kill, it has an unquestionably strong

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<sup>395</sup> McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”) (citing Stenning, *The Idea of the Political ‘Independence’ of the Police: International Interpretations and Experiences*, p. 188).

<sup>396</sup> Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 5 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>397</sup> Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 5 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX].

<sup>398</sup> Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, Cunningham (2020) p. 11.

<sup>399</sup> Place, *Double Due Process*, p. 286; McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 53 (hereinafter “Our Uneasiness with Police Unions”); see Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109, 116-17 (police officers have an interest in “job security, fair pay, safe working conditions, and fair and appropriate treatment by their employers.”)

<sup>400</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

<sup>401</sup> Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 286.

<sup>402</sup> Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 286.

<sup>403</sup> Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights* (2020) p. 11.

<sup>404</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

<sup>405</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L. J. 186, 201.

<sup>406</sup> Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 276.

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interest regulating that use of power.”<sup>407</sup> Society has a strong interest in disciplining officers who use excessive or unnecessary force to prevent future unnecessary uses of force by that officer and to deter other officers from engaging in similar conduct.<sup>408</sup> Thus, officers, like other workers, deserve labor protections, but society also requires limits on officers’ uses of force and other misconduct.

#### D. Unions and Police Management

Given the role police chiefs play as managers of police departments, they must engage with the unions that represent their employees. The primary relationship between the police union and police management generally is limited to collective bargaining, grievances, and arbitration.<sup>409</sup> Police managers often characterize relationships with the union as their most stressful role, while unions frequently characterize the management of their organizations as “impossible to work with.”<sup>410</sup> This may be partly due to the difference in priorities of chiefs and unions. Police unions tend to concentrate on wages, benefits, and working conditions; police management tends to concentrate on control and discipline issues.<sup>411</sup> The Office of Community Oriented Policing Services (COPS) has stated “[r]arely do police unions and police management have a shared vision of the type of department they desire. None seem to have a shared vision of how to make the community safer.”<sup>412</sup> Moreover, [t]here have been no methods developed to encourage police unions and police management to work together to make the reduction of crime a part of their relationship.”<sup>413</sup>

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<sup>407</sup> Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability* (2018) 52 U. San Francisco L.Rev. 275, 276.

<sup>408</sup> Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005) 14 Public Interest L.J. 186, 201.

<sup>409</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-pl10-pub.pdf>> [as of XXX].

<sup>410</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xix <<https://cops.usdoj.gov/RIC/Publications/cops-pl10-pub.pdf>> [as of XXX].

<sup>411</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-pl10-pub.pdf>> [as of XXX].

<sup>412</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-pl10-pub.pdf>> [as of XXX].

<sup>413</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union*

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The complex relationship between unions and police chiefs may also be due to the inherent politics of union leaders' election to office. To remain in a leadership position, officers need to believe that union leaders are effective, which historically meant a union leader becomes critical of management.<sup>414</sup> Police managers who understand that are not as likely to personalize the conflict.<sup>415</sup> Relatedly, unions risk taking blame for a potentially unpopular police agency policy if they participate in the development of a program or policy in response to issues like racial profiling data collection or implementation of a civilian board.<sup>416</sup> Management and unions can work together to better the agency and community served by the agency.<sup>417</sup> Management and unions are not precluded from cooperative and productive relationships, but there are limits to the cooperation.<sup>418</sup> A union's healthy skepticism could work to better the agency.<sup>419</sup>

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Leaders (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>414</sup> See Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX]. According to the U.S. Department of Justice's Office of Community Oriented Policing Services, although union leaders do not intend to be destructive or undermine positive working relationships, they must maintain some level of strain to remain in office. If there are no issues with management, union leaders may find themselves no longer needed. *Ibid.* ; see Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101 ("[R]egardless of whether a particular issue is subject to negotiations under the local contract, a police chief is ever-mindful of the possibility of a challenge to any new measure – either in the form of a threatened or actual grievance or simply passive resistance. Even a blatantly ludicrous claim by the union that a change is subject to negotiations can stall implementation until the matter is resolved.")

<sup>415</sup> Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>416</sup> Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xxiv <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>417</sup> Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>418</sup> Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>419</sup> Office of Community Oriented Policing Services, Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders (2006) U.S. Department of Justice, p. xx <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

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Additionally, the composition of the unit has a significant impact on police management.<sup>420</sup> When first line supervisors or middle managers are part of the collective bargaining unit, the relationship to rank-and file officers is complicated, and some would argue compromised.<sup>421</sup> Common sense suggests that it is difficult for a supervisor to review the performance of a subordinate, and discipline them if necessary, when they are both members of a labor organization that may file a grievance against the supervisor and the department.<sup>422</sup> Common sense also suggests it would be difficult to bargain on behalf of both supervisors and rank-and-file officers at the same time, since each party's interest may oppose the other's interests.

#### E. Unions Affect Police Subculture

Unions are one influence in the multidimensional police subculture.<sup>423</sup> Culture varies between departments, as does the relative influence of a particular union.<sup>424</sup> Subculture affects policing, including overall management practices, accountability and discipline, police officer interactions with citizens, and local politics.<sup>425</sup> Unions play some role in shaping the public posture of the rank-and-file. In some departments, union leaders may be publicly antagonistic to management initiatives or reform demands voiced by community groups.<sup>426</sup> This encourages solidarity among officers while discouraging alternative points of view and, thereby, suppresses receptivity to innovation.<sup>427</sup>

#### F. Conclusion

<sup>420</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101 (hereinafter "Union Neglect")

<sup>421</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101.

<sup>422</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 101.

<sup>423</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103; McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

<sup>424</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103

<sup>425</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103; see Disalvo, *The Trouble With Police Unions* (2020) 55 National Affairs <<https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>> [as of XXX] ("[Unions] facilitate a culture that harms police work and community relations while frustrating reform efforts. Union culture, it is said, encourages good officers to defend bad officers by maintaining the 'blue wall of silence.'").

<sup>426</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103.

<sup>427</sup> Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103.

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

#### IV. Municipality's Role

Public bodies representing cities and counties negotiate with unions to reach collective bargaining agreements.<sup>428</sup> Employers—in the case of police cities, counties, or other municipalities—are required to meet and confer with union representatives if they wish to make changes to wages, hours, or other terms and conditions of employment.<sup>429</sup> The public, especially those marginalized by policing practices, often do not engage in negotiations, so the public relies on its elected officials to represent its interests in negotiations.<sup>430</sup> Local governments are obligated to protect the rights and interests of their constituents.<sup>431</sup> Thus, political leaders need to balance the interests of various stakeholders as they bargain.<sup>432</sup> Their goal during negotiations should be to enhance accountability.<sup>433</sup>

As a party to bargaining, municipalities have the ability to place bargaining chips on the table.<sup>434</sup> Municipalities should do so bearing in mind the various stakeholders municipalities represent

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<sup>428</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 419.

<sup>429</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 432.

<sup>430</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422.

<sup>431</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 434-35 (citing Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 177-78 (2019)).

<sup>432</sup> Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435.

<sup>433</sup> Disalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, p. 7 <<https://media4.manhattan-institute.org/sites/default/files/enhancing-accountability-police-reform-DD.pdf>> [as of XXX]. Reformers should remove obstacles in the process of receiving civilian complaints, investigating them, rendering a decision, determining penalties, recording the data and remove policies that undermine the authority of police chiefs to hold officers responsible. *Ibid.*

<sup>434</sup> See Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435 (finding that city leaders agree to wage and benefit concessions in exchange for discipline

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and the long-term consequences of placing those chips on the table. Some scholars claim that union contracts may be subject to regulatory capture, which occurs when the regulatory entity responsible for protecting the public interest instead advances the interest of the entity it is supposed to be regulating.<sup>435</sup> Police unions are politically powerful.<sup>436</sup> Budget conscious cities may make management concessions, such as changes in discipline policies and procedures, that will greatly affect accountability in the long run.<sup>437</sup> Municipalities are less likely to bear the costs of concessions in discipline procedure in the immediate future, which makes offering those concessions over increased salaries appealing.<sup>438</sup> Those affected by police misconduct are often part of a relatively small and politically disadvantaged minority of municipal voters,<sup>439</sup> meaning they may not be able to advocate against such changes and concessions.

Negotiating parties should exercise great caution in mixing economic demands with those pertaining to working conditions.<sup>440</sup> “Unions should be able to trust police management to do no harm in their efforts to win better economic packages. Police managers should be able to trust union officials to do no harm regarding the ability of management to effectively allocate and deploy scarce resources to control crime. If that practice already exists as standard operating

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

<sup>435</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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

<sup>436</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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

<sup>437</sup> See Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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

Heinzmann, Cops traded away pay for protection in police contracts (May 20, 2016) Chicago Tribune

<<https://www.chicagotribune.com/news/breaking/ct-chicago-police-contracts-fop-20160520-story.html>> [as of XXXXX].

<sup>438</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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

<sup>439</sup> Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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

<sup>440</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xxii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

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procedure, then far fewer issues will arise with regard to community policing, CompStat implementation,<sup>441</sup> or other change efforts.”<sup>442</sup>

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

To accomplish police reform, reform advocates need support from police unions.<sup>443</sup> According to scholars Catherine Fisk and L. Song Richardson, police unions theoretically could be agents of reform in at least two ways.<sup>444</sup> “First, as representatives of the line officers who have daily contact with the community whom the police are supposed to protect and serve, unions could help improve the relationship between police and citizens, and help ensure that force is used wisely and prudently, and that arrests are made and citations issued only when doing so actually improves life for the community. Second, unions could become intermediaries to convey the concerns of line personnel to management in a way that will improve policing.”<sup>445</sup>

### A. Representatives of Line Officers

Unions can be effective in changing officer behavior. Police officers are highly responsive to internal directives, even when they do not carry specific incentive shifts or higher negative consequences.<sup>446</sup> Police union directives may strongly influence officer conduct by increasing

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<sup>441</sup> Compstat is a performance management system that is used to reduce crime and achieve other police department goals. Compstat emphasizes information-sharing, responsibility and accountability, and improving effectiveness. Bureau of Justice Assistance, *Compstat: Its Origins, Evolution, and Future Law Enforcement Agencies*, p. 2 <<https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PERF-Compstat.pdf>> [as of XXX].

<sup>442</sup> Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xxii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

<sup>443</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778 <[https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship)> [as of XXX]; Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 12 (citing Rad, (2018) Police institutions and police abuse: Evidence from the US. Master’s thesis, University of Oxford, Oxford and McCormick, *Our uneasiness with police unions: Power and voice for the powerful* (2015) Louis U. Pub. L.Rev. 35, 47); see Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103 (“One aspect of the neglect of police unions has been the failure of accountability advocates to involve union leaders in discussions of reform measures.”)

<sup>444</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 768 <[https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship)> [as of XXX].

<sup>445</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 768 <[https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship)> [as of XXX].

<sup>446</sup> Ba and Rivera, The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago (2019) p. 31 <[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship)> [as of XXX]; see Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 7 (“[B]argaining over police protections and compensation may shift officers’

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self-monitoring among officers.<sup>447</sup> According to a study by Bocar Ba and Ramon Rivera, a union directive changed officer behavior and resulted in fewer constitutional violation allegations without increasing crime or decreasing arrests.<sup>448</sup> Thus, unions may help guide officer behavior to improve community policing.

Since unions can affect police culture, they may help develop and implement solutions towards reforming police culture and changing officer behavior.<sup>449</sup> For example, unions can help connect officers with the communities they police in.<sup>450</sup> Unions may improve relations with racially and ethnically diverse communities with mindful and measured defenses of officers accused of misconduct, especially excessive use of force, and by supporting policies designed to foster better community-police relations, particularly with racial profiling.<sup>451</sup> Unions may improve relations with civil rights leaders by supporting, or at a minimum remaining neutral to, civilian review boards.<sup>452</sup> Unions may promote transparency by softening rigid stances against the release of disciplinary records. “Cultivating a true spirit of mutual helpfulness and fraternalism with the community could easily encompass real connections, breaking down us versus them barriers.”<sup>453</sup> Thus, unions could be powerful partners for reform.

Unions could contribute to accountability. They may protect rank-and-file officers from unfair decisions and enable officers to exercise discretion and judgment, assure fairness in punishing mistakes, and enable officers to make legitimate complaints.<sup>454</sup> Unions may prevent blame from

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incentives or disincentivize for improper behavior due to a high-pressure political environment that pushes for lower crime rates.”)

<sup>447</sup> Ba and Rivera, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (2019) p. 7 <[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship)> [as of XXX].

<sup>448</sup> Ba and Rivera, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (2019) p. 7 <[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3111&context=faculty_scholarship)> [as of XXX].

<sup>449</sup> McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

<sup>450</sup> McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 61-62.

<sup>451</sup> See Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 105-06 (finding unions offend racial and ethnic minorities when unions aggressively defend officers accused of misconduct, especially excessive use of force, and unions often oppose policy changes designed to foster better community-police relations, particularly with racial profiling ).

<sup>452</sup> See Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 105-06 (finding unions aggressively oppose civilian review boards, which have been a demand from civil rights advocates).

<sup>453</sup> McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* (2015) 35 Saint Louis U. Public L.Rev. 47, 62 (citing Int’l Ass’n of Chiefs of Police, *Iacp National Policy Summit On Community Police Relations: Advancing A Culture of Cohesion and Community Trust* 11 (2015)).

<sup>454</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778 <[https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty\\_scholarship](https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1623&context=faculty_scholarship)> [as of XXX].

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being placed on a single officer when blame for mistreatment of citizens belongs elsewhere.<sup>455</sup> They could also work to counter insistence on dangerous policies.<sup>456</sup>

## B. Intermediaries Between Management and Line Officers

Line officers play a critical role in the implementation of law enforcement policies and any issues that may arise with the policies, since they operate in the community and have a front row seat to how effective or detrimental a policy may be. Policies may not work as intended, even when officers are doing their best to abide by them.<sup>457</sup> Accordingly, management and policymakers should consider their opinions and points of view. Including the rank-and-file in the discussion of reform may uncover areas of improvement that activists and civilians are unaware of, as well as give police a personal stake in public safety.<sup>458</sup> If officers do not have a voice, management may not find out about the problems with the policies.<sup>459</sup> Studies of the successes and failures of community policing models have found that participatory management style correlates with more positive officer attitudes about community policing.<sup>460</sup> “Moreover, it is likely that the insights and creativity of rank-and file officers can revolutionize policing. ‘[L]ine personnel are a powerful and important resource . . . to improve policing [and] the relationship between police and citizens.’”<sup>461</sup>

Additionally, officers having a voice is important, because it expresses to officers that their views are significant enough to be considered and avoids officer frustration and overt undermining of policies.<sup>462</sup> If officers do not have a voice or have an illusory voice, this demonstrates their status below managers and deprives them of interactions with power holders that can favorably influence officers’ attitudes.<sup>463</sup> Research about power reveals that certain

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<sup>455</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778

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

<sup>456</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 778

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<sup>457</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794

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<sup>458</sup> Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 12.

<sup>459</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794

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<sup>460</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 771

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

<sup>461</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 771 (quoting Kelling and Kliesmet, *Police Unions, Police Culture, and Police Abuse of Force*, in *Police Violence* 191, 210).

<sup>462</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770

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

<sup>463</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770

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exercises of authority, like failing to provide a voice, can breed deep resentment among lower-level employees, resulting in resistance to employer-mandated policies and procedures.<sup>464</sup> For example, in one department, officers resented a new policy created without their input.<sup>465</sup> While they did not overtly resist the policy, some quietly and covertly undermined the policy on the street.<sup>466</sup> Conversely, in another jurisdiction that included officer input in a new policy, officers worked toward improving it despite questioning the substance of the policy.<sup>467</sup> Because officers operate primarily out of sight of management, they have many opportunities to covertly resist reform-oriented policies.<sup>468</sup> When resistance is subtle rather than overt, management may not be aware that the policy is not being implemented.<sup>469</sup>

Likewise, policymakers should not disregard power dynamics in a department and their effect on line officers.<sup>470</sup> Exercises of authority within departments can influence whether rank-and-file officers view reforms as legitimate and entitled to deference or whether officers attempt to undermine and resist them.<sup>471</sup> When policymakers work solely with the top command levels of police departments, they might unintentionally exacerbate rank-and-file frustrations with existing power arrangements, leading to resistance to any new policies.<sup>472</sup>

## **Qualified Immunity**

### **I. Current State of Law**

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from

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<sup>464</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770

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

<sup>465</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772

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

<sup>466</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772

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

<sup>467</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 774

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<sup>468</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

<sup>469</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

<sup>470</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

<sup>471</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712,

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

<sup>472</sup> Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

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harassment, distraction, and liability when they perform their duties reasonably.”<sup>473</sup> Qualified immunity shields law enforcement officers “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>474</sup> The doctrine of qualified immunity as applied to 42 United States Code section 1983 is entirely a creation of the United States Supreme Court and not created by legislators.<sup>475</sup> “The protection of qualified immunity applies regardless of whether the government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’”<sup>476</sup>

The Supreme Court of the United States applied the doctrine of qualified immunity to a cause of action under 42 United States Code section 1983 for the first time in 1967.<sup>477</sup> Courts determine whether an officer is entitled to qualified immunity analysis through a three-part test: (1) whether the defendant was performing discretionary functions; (2) if so, whether the law was clearly established; and (3) if so, whether there were extraordinary standards that excuse the officials’ ignorance of the law.<sup>478</sup> Although the individual parts build upon one another, courts seldom give much consideration to either the first or third points.<sup>479</sup>

#### A. Discretionary Function

Officers’ duties may be either ministerial or discretionary. A ministerial duty is one that requires an officer to act without using his or her own judgement; it is a legal obligation that must be fulfilled.<sup>480</sup> For example, an officer directing traffic has a ministerial duty to follow established traffic laws.<sup>481</sup> The officer does not have the discretion to make their own decisions about how to direct traffic but relies on the laws to inform their direction.<sup>482</sup> A duty is discretionary if it

<sup>473</sup> *Pearson v. Callahan* (2009) 555 U.S. 223, 231.

<sup>474</sup> *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 818.

<sup>475</sup> *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242.

<sup>476</sup> *Pearson v. Callahan* (2009) 555 U.S. 223, 231 (quoting *Groh v. Ramirez* (2004) 540 U.S. 551, 567).

<sup>477</sup> *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1241.

<sup>478</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 6-7 (citing *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818)

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

<sup>479</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 7 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]

<sup>480</sup> LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>> [as of XXX].

<sup>481</sup> LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>> [as of XXX]

<sup>482</sup> LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>>.

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requires an officer to exercise their judgement to perform the duty.<sup>483</sup> Qualified immunity does not protect an officer from liability if they were performing a ministerial duty, but it may if they were performing a discretionary duty.

The challenge is how to distinguish discretionary functions from ministerial functions.<sup>484</sup> The Supreme Court stated that “judgements surrounding discretionary action almost inevitably are influenced by the decisionmaker’s experiences, values, and emotions.”<sup>485</sup> The Supreme Court has provided little guidance beyond that, leaving lower courts to disagree about what, if any, functions, should be classified as ministerial functions.<sup>486</sup> Lower courts generally avoid the question of discretionary functions in a qualified immunity analysis, so most courts conclude that the officer was performing a discretionary function.<sup>487</sup>

## B. Clearly Established Law

Most qualified immunity analyses depend on the second question: is the law clearly established?<sup>488</sup> If an officer violates a clearly established law, qualified immunity does not protect him or her from suit.<sup>489</sup> The Court believes “a reasonably competent public official should know the law governing his conduct.”<sup>490</sup> “[C]learly established” means a right is sufficiently clear to a reasonable officer that he would understand that what he is doing violates that right.<sup>491</sup> In other words, an officer is not liable for his “reasonable mistakes.”<sup>492</sup> Determining whether a right is clearly established is a case-by-case analysis.<sup>493</sup> Under the Court’s current standard, a court should only deny a defendant qualified immunity if every

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<sup>483</sup> <https://definitions.uslegal.com/d/discretionary-duty/> [as of XXX].

<sup>484</sup> Ravenell and Ross, Qualified Immunity and Unqualified Assumptions (2022) 112 J. Crim. Law and Criminology 1, 8 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>485</sup> *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 816.

<sup>486</sup> Ravenell and Ross, Qualified Immunity and Unqualified Assumptions (2022) 112 J. Crim. Law and Criminology 1, 8 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>487</sup> Ravenell and Ross, Qualified Immunity and Unqualified Assumptions (2022) 112 J. Crim. Law and Criminology 1, 8, 11 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]

<sup>488</sup> Ravenell and Ross, Qualified Immunity and Unqualified Assumptions (2022) 112 J. Crim. Law and Criminology 1, 13 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>489</sup> See *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

<sup>490</sup> *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

<sup>491</sup> *Saucier v. Katz* (2001) 533 U.S. 194, 195 (citing *Anderson v. Creighton* (1987) 483 U.S. 635, 640).

<sup>492</sup> *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242 (citing *Saucier v. Katz* (2001) 533 U.S. 194, 205).

<sup>493</sup> *Saucier v. Katz* (2001) 533 U.S. 194, 194 (“[The clearly established] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.”).

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government official in the defendant's position would know the conduct was illegal.<sup>494</sup> In other words, a court has to conclude there is a 50.1% chance a reasonable officer would know the conduct was unconstitutional.<sup>495</sup>

“[I]t has become increasingly difficult for courts to conclude that the law is clearly established.”<sup>496</sup> This is especially true for cases involving the Fourth Amendment,<sup>497</sup> which protects citizens from unreasonable searches and seizure by the police.<sup>498</sup> In excessive force cases, the Supreme Court notes that the “‘the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”<sup>499</sup> The Supreme Court describes the tension of qualified immunity and probable cause, the standard that applies to law enforcement's searches and seizures of individuals and property, as follows:

Probable cause turns on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules. It is incapable of precise definition or quantification into percentages. Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in the precise situation encountered. Thus, we have stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment. . . . [A] body of relevant case law is usually necessary to clearly establish the answer with respect to probable cause.<sup>500</sup>

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<sup>494</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>495</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>496</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>497</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX].

<sup>498</sup> U.S. Const., 4th Amend.

<sup>499</sup> *Kisela v. Hughes* (2018) 138 S. Ct. 1148, 1152–53 (quoting *Mullenix v. Luna* (2015) 136 S. Ct. 305, 309 (per curium)).

<sup>500</sup> *District of Columbia v. Wesby*, (2018) 138 S. Ct. 577, 590 (internal citations omitted). This standard means that officers would need to be well versed in case law. However, officers are not well versed in case law. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 (citing Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983) p. 4-5); see e.g., *Elder v. Holloway* (1994) 510 U.S. 510, 513-14 (exemplifying how police officials may be unaware of controlling appellate decisions). A study that examined officers' familiarity with case law found that nine of the ten departments reported that they provided federal judicial decisions to their police officials, but only four named decisions rendered within the last ten years. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1,

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This standard means that officers would need to be well versed in case law. However, officers are not well versed in case law.<sup>501</sup> A study that examined officers' familiarity with case law found that nine of the ten departments reported that they provided federal judicial decisions to their police officials, but only four named decisions rendered within the last ten years.<sup>502</sup> Even if they were well-versed, they would need to recall the facts of individual cases at a time when they may need to make very quick decisions.<sup>503</sup> Thus, it is not practical to have officers know the details of case law or think through legal arguments when making an arrest.<sup>504</sup> This means the clearly established prong is not satisfied and qualified immunity often applies. Thus, officers are shielded from lawsuits making accountability difficult.

### C. Reasonable Officials, Reasonable Reliance and Extraordinary Circumstances

If the officer “claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard” qualified immunity applies.<sup>505</sup> Courts' overall aim is to determine whether it was objectively reasonable for an officer to violate the law under the circumstances.<sup>506</sup> Typically, when officers claim “extraordinary circumstances” they argue they relied upon the advice of counsel or some superior official.<sup>507</sup>

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28 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]; see Schwartz, *Qualified Immunity's Boldest Lie* (2015) 88 U. Chicago L.R. 605, 649-64.

<sup>501</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 (citing Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983) p. 4-5); see, e.g., *Elder v. Holloway*, 510 U.S. 510, 513-14 (1994) (exemplifying how police officials may be unaware of controlling appellate decisions).

<sup>502</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 28; see also Schwartz, *Qualified Immunity's Boldest Lie* (2015) 88 U. Chicago L.R. 605, 649-64.

<sup>503</sup> See Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>504</sup> Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>505</sup> *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

<sup>506</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 23.

<sup>507</sup> Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 22; *Lucero v. Hart* (9th Cir. 1990) 915 F.2d 1367, 1371 (granting qualified immunity to defendant who relied on the advice of counsel under *Harlow's* “clearly established” right analysis); *Dixon v. Wallowa Cnty.* (9th Cir. 2003) 336 F.3d 1013, 1019 (considering whether defendant relied on the advice of counsel when determining “whether a reasonable officer could have believed that his conduct was lawful”).

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## II. Balancing State vs. Individual Citizen Interests

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

### A. Effects of Financial Liability

Qualified immunity is meant to shield officers from financial liability.<sup>508</sup> According to the Supreme Court, exposure to liability damages encourages officials to carry out their duty in a lawful manner and to pay their victims when they do not.<sup>509</sup> Thus, liability incentivizes officers to do their jobs appropriately, which is why immunity is qualified and not absolute. Liability discussions become contentious when discussing liability as a necessity to hold officers accountable for excessive force.<sup>510</sup> In some instances, individuals' constitutional rights are violated and those responsible do not pay for the cost.<sup>511</sup> Many municipalities indemnify their officers, meaning the city would pay for any settlement, not the officers themselves.<sup>512</sup> Qualified immunity scholar Joanna Schwartz found that officers employed by eighty-one jurisdictions, including several of California's largest law enforcement agencies, virtually never contributed to settlements and judgments during the six-year study period.<sup>513</sup> When municipalities pay, it means the taxpayers pay.

On the other hand, the threat of liability can also operate to inhibit officers in the proper performance of their duties. When threatened with personal liability for acts taken based on their official duties, officers may act with excess caution that may skew decisions in ways that result in officers not fulfilling their duties based on the criteria with which they should.<sup>514</sup> The Supreme Court explained that an officer should not have to choose between dereliction of duty, if he does

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<sup>508</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1804; see also Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>509</sup> *Forrester v. White* (1988) 484 U.S. 219, 223.

<sup>510</sup> See Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>511</sup> Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885, 885

<sup>512</sup> Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885, 885; Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>513</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1805 (summarizing Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885); Based on correspondence with government officials in the course of her research, Schwartz concluded that law enforcement officers almost never pay for defense counsel—instead, counsel is provided by the municipality, the municipal insurer, or the union. *Ibid.*

<sup>514</sup> *Forrester v. White* (1988) 484 U.S. 219, 223.

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not arrest someone when there is probable cause or being forced to pay out damages in a lawsuit, if he does.<sup>515</sup> Officers must make split-second decisions in stressful circumstances; without qualified immunity, they may be hesitant to act when the public needs it the most.<sup>516</sup> Some argue that removing qualified immunity would lead to unwarranted lawsuits in which officers' split-second decisions are second guessed, which would lead to additional costs for cities and officers.<sup>517</sup> Additionally, the Court fears that damages actions may “deter[ ] . . . able citizens from acceptance of public office” and “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”<sup>518</sup>

## B. Effects on Litigation

The Supreme Court has also justified qualified immunity as a protection from burdens of discovery and trial in “insubstantial” cases.<sup>519</sup> “Because qualified immunity is ‘an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.’”<sup>520</sup> Trials come with financial costs and other costs – distractions from official duties, limiting discretionary actions, and deterrence of able people from law enforcement.<sup>521</sup> The public has an interest in avoiding “burdens of broad-reaching discovery,” which may lead to interviews of multiple government officials, and “excessive disruption of

<sup>515</sup> *Pierson v. Ray* (1967) 386 U.S. 547, 555.

<sup>516</sup> Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX]; International Association of Chiefs of Police, IACP Statement on Qualified Immunity<<https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf>> [as of XXX].

<sup>517</sup> Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX].

<sup>518</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1803; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 814 (alteration in original) (quoting *Gregoire v. Biddle* (2d Cir. 1949) 177 F.2d 579, 581).

Schwartz argues that “to the extent that people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, available evidence suggests the threat of civil liability is not the cause. Instead, departments’ difficulty recruiting officers has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits...Finally, assuming for the sake of argument that the threat of liability deters officers, it is far from clear that qualified immunity could mitigate those deterrent effects.” Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1813.

<sup>519</sup> *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815–17; *Pearson v. Callahan* (2009) 555 U.S. 223, 231 (holding that avoidance of “insubstantial” law suits is a “driving force” in qualified immunity’s creation); see Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1808.

<sup>520</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526 (emphasis deleted)).

<sup>521</sup> See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 816.

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government.”<sup>522</sup> In the case of law enforcement, disruptions often entail removing officers from their public safety functions such as patrol or investigative work to speak with attorneys or testify in court.

Qualified immunity doctrine may also discourage individuals from bringing cases when their constitutional rights are violated.<sup>523</sup> Based on how the law has developed, attorneys who would represent those whose rights have been violated may believe that even if attorney brought lawsuits with egregious facts, the suits may be dismissed on qualified immunities grounds.<sup>524</sup> Meanwhile, attorneys representing law enforcement officers would be encouraged to use qualified immunity as a defense and immediately appeal court decisions that say qualified immunity does not apply.<sup>525</sup> These dynamics increase the cost, complexity, and delay of lawsuits, which discourages attorneys, and by extension the individuals they represent, from filing the suits.<sup>526</sup>

### III. Conclusion

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

#### Agency Data Reporting

[content in development]

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<sup>522</sup> See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 817-18.

<sup>523</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

<sup>524</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818; Fawbush, *Qualified Immunity: Both Sides of the Debate* (2023) FindLaw <<https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity--both-sides-of-debate.html#Benefits>> [as of XXX]. (“The current doctrine, as applied today, leads to hairsplitting - it is often impossible for plaintiffs to meet the burden.” “The doctrine is applied inconsistently and can greatly depend on the judge or judges involved in the case. For example, one judge has argued that “a court can almost always manufacture a factual distinction” when determining whether a previous precedent precludes an officer from getting qualified immunity.”)

<sup>525</sup> Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

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## CIVILIAN COMPLAINTS

### I. Introduction

For years, the Board has focused on making the civilian complaint process accessible and transparent to give voice to communities' concerns about their interactions with law enforcement. This year, the Board centers on the investigations of civilian complaints, in an effort to make them more consistent, comprehensive, and proactive, going beyond the behavior of individual officers to examine agency-wide policies and practices to avoid future similar complaints.

[Additional detail forthcoming.]

### II. Overview of Civilian Complaint Data

[2022 complaint data and analysis forthcoming.]

### III. The Legislature Should Amend Penal Code Section 832.5 to Define “Civilian Complaint”

While California law enforcement agencies are required to report civilian complaint data, the law does not define what constitutes a “civilian complaint.”<sup>527</sup> This is a significant issue because the lack of a uniform definition affords law enforcement agencies discretion to determine what community feedback is treated as a civilian complaint and, thus, which incidents are investigated, reported, and retained.

These decisions may vary from agency to agency and could potentially impact the validity of the RIPA complaint data, to the extent some agencies may report fewer complaints than others, even when the number of complaints received by the agencies is the same. For example, the classification of complaints as “inquiries,” rather than complaints to be investigated, could cause them to be handled differently by an agency and result in a lower number of reported complaints. Similarly, the classification of a complaint as “internal” or “external” can result in different reporting requirements, also skewing the number of reportable complaints and potentially subjecting complaints to different investigatory procedures.

Disparate treatment of community feedback between agencies can also result in some community members being denied access to the complaints process, based solely on the location of the complaint. In other words, the same complaint may be treated as a civilian complaint in one agency, but treated as an informal inquiry in another, based on agencies' varying definitions of “civilian complaint.”

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<sup>527</sup> See Cal. Pen. Code, § 832.5, subd. (d).

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The Board first identified this issue in its 2020 Report<sup>528</sup> and recommended in its 2022 Report that the Legislature define “civilian complaint.”<sup>529</sup> Since no definition of “civilian complaint” has been adopted, the Board reiterates its recommendation that the Legislature add the following definition to Penal Code section 832.5:

*(1) Complaint means either of the following:*

*(A) any issue brought to a department or agency where the complainant perceives that a department or agency employee engaged in criminal conduct, abusive or discriminatory behavior, inappropriate or discourteous conduct, or violation of any law or rules, policies, and regulations of the department or agency; or*

*(B) disagreement solely with the policies, procedures, or services of the department or agency and not with the performance of any personnel. If during the course of investigating this type of complaint, conduct is discovered that could be the basis of a complaint under subdivision (1)(A), the investigator shall report this conduct to a supervisor, which should be logged, tracked, and investigated separately from the original complaint.*<sup>530</sup>

The Board urges the Legislature to implement this recommendation in 2024 to provide clear guidance to law enforcement agencies regarding the meaning of “civilian complaint,” prevent disparities in the RIPA complaint data, and ensure that all community members have equal access to the complaints process. Absent legislative action, the Board also urges local law enforcement agencies to adopt this definition in developing and updating its civilian complaint policies.

#### **IV. Complaint Investigators Should Review Body-Worn Camera Footage Whenever It Exists**

In addition to standardizing the definition of civilian complaints, agencies should also work to make their complaint investigation procedures as objective as possible, to ensure that the outcome accurately reflects what occurred during a police interaction and how those events relate to departmental policy. To that end, video footage from body-worn cameras and police drones is an important piece of evidence that should not be overlooked in the investigation of civilian complaints.

[Research forthcoming re: prevalence of body-worn cameras and drones in California, and discussion of reasons for and against their implementation.]

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<sup>528</sup> Racial and Identity Profiling Advisory Board, Annual Report (2020) (“2020 RIPA Report”), p. 65-67.

<sup>529</sup> Racial and Identity Profiling Advisory Board, Annual Report (2022) (“2022 RIPA Report”), p. 229.

<sup>530</sup> Racial and Identity Profiling Advisory Board, Annual Report (2022) (“2022 RIPA Report”) p. 229.

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These recordings provide objective evidence of an interaction, which can help complaint investigators impartially assess the allegations of a complaint, benefitting the community and law enforcement agencies in several ways.

First, video footage can improve the accuracy of complaint dispositions.<sup>531</sup> For example, by reviewing videos from body-worn cameras, complaint investigators can independently observe what occurred during a police interaction, without relying solely on individuals' recollections of events.<sup>532</sup> In turn, investigators can more accurately determine whether a particular incident occurred as alleged and whether the documented actions amount to misconduct. For example, in Chicago, an analysis of 2,117 complaints over an eight-year period showed that complaints were 9.9% more likely to be "sustained" after body-worn camera footage was reviewed.<sup>533</sup> The number of complaints that were "not sustained" due to a lack of sufficient evidence also decreased. The decrease in "not sustained" complaints was particularly notable for Black and Latine(x) complainants, compared to White complaints, meaning that the roll-out of body-worn cameras was also associated with reductions in racial disparities in the complaint process. These improvements in the complaint process can have even larger impacts on agencies and the community. For example, reviewing body-worn camera and drone footage may improve the perceived legitimacy of the complaints process by both members of the community and law enforcement, since complaint dispositions are more likely to reflect what actually occurred during a police interaction. Law enforcement officers may also welcome the use of body-worn camera and drone footage because it can exonerate them if the footage shows their actions were lawful and followed agency policy.

Second, reviewing video footage provides agencies an opportunity to go beyond the allegations of a complaint and identify departmental policy violations that may not have been identified by the complainant.<sup>534</sup> This can also improve the perceived legitimacy of the complaints process by

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<sup>531</sup> See Cubukcu et al., *Body-Worn Camera and Adjudication of Citizen Complaints of Police Misconduct* (Jul. 2021) National Bureau of Economic Research, pp. 6-7, 10-11

<[https://www.nber.org/system/files/working\\_papers/w29019/w29019.pdf](https://www.nber.org/system/files/working_papers/w29019/w29019.pdf)> [as of May 17, 2023] (finding that complaints were less likely to be deemed "not sustained" when body-worn camera footage was reviewed).

<sup>532</sup> See Cubukcu et al., *Body-Worn Camera and Adjudication of Citizen Complaints of Police Misconduct* (Jul. 2021) National Bureau of Economic Research, pp. 6-7

<[https://www.nber.org/system/files/working\\_papers/w29019/w29019.pdf](https://www.nber.org/system/files/working_papers/w29019/w29019.pdf)> [as of May 17, 2023] (video footage can facilitate more impartial complaint investigations); Thurnaur, *Best Practices Guide: Internal Affairs: A Strategy for Smaller Departments* ("IACP Best Practices for Smaller Departments") International Association of Chiefs of Police, p. 2 <<https://www.theiacp.org/sites/default/files/2018-08/BP-InternalAffairs.pdf>> [as of May 17, 2023] (body-worn camera footage and video footage from civilian witnesses are important to internal investigations).

<sup>533</sup> See Cubukcu et al., *Body-Worn Camera and Adjudication of Citizen Complaints of Police Misconduct* (Jul. 2021) pp. 6-7, 10-11, 23-24 <[https://www.nber.org/system/files/working\\_papers/w29019/w29019.pdf](https://www.nber.org/system/files/working_papers/w29019/w29019.pdf)> [as of May 17, 2023] (noting that, prior to reviewing body-worn camera footage, only 2.1% of complaints were sustained).

<sup>534</sup> See Thurnaur, *Best Practices Guide: Internal Affairs: A Strategy for Smaller Departments* ("IACP Best Practices for Smaller Departments") International Association of Chiefs of Police, p. 9 <<https://www.theiacp.org/sites/default/files/2018-08/BP-InternalAffairs.pdf>> [as of May 17, 2023] (suggesting that investigators can go beyond the allegations in a complaint by "[o]btain[ing], if possible, the name of the

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members of the community by demonstrating an agency's commitment to identifying all misconduct or areas for improvement, rather than limiting their review to specific conduct identified by a complainant.

Third, reviewing video footage can help conserve police resources that would otherwise be expended through the complaint investigation process.<sup>535</sup> In general, review of body-worn camera footage has been shown to lead to a quicker resolution of complaints,<sup>536</sup> ultimately requiring less time and funding to investigate complaints. It can also lead to a decrease in the total number of complaints received,<sup>537</sup> again resulting in a cost savings to the agency. For example, some agencies have seen reductions of approximately 20% of the overall number of civilian complaints after implementing review of body-worn camera footage.<sup>538</sup> [Additional content forthcoming re: potential reasons for reductions in the number of complaints following

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officer(s), OR, us[ing] department resources to determine the identity of any officers potentially involved” and “[d]etermin[ing] if the alleged acts of the involved officer(s) violated any rules, regulations or policies of [the] agency”); Norwood, Body cameras are seen as key to policy reform. But do they increase accountability? (Jun. 25, 2020) PBS <<https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability>> [as of May 17, 2023] (body-worn camera footage provides an additional opportunity to identify problematic behavior and train officers).

<sup>535</sup> See Corley, Study: Body-Worn Camera Research Shows Drop In Police Use of Force (Apr. 26, 2021) NPR <<https://www.npr.org/2021/04/26/982391187/study-body-worn-camera-research-shows-drop-in-police-use-of-force>> [as of May 17, 2023] (estimating a 5 to 1 cost-benefit analysis for implementing body-worn cameras, relative to reductions in the number of complaints and use-of-force investigations).

<sup>536</sup> Chapman, Body-Worn Cameras: What the Evidence Tells Us (Nov. 14, 2018) National Institute of Justice <<https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us>> [as of May 17, 2023].

<sup>537</sup> Cubukcu et al., *Body-Worn Camera and Adjudication of Citizen Complaints of Police Misconduct* (Jul. 2021) National Bureau of Economic Research, pp. 7-9

<[https://www.nber.org/system/files/working\\_papers/w29019/w29019.pdf](https://www.nber.org/system/files/working_papers/w29019/w29019.pdf)> [as of May 17, 2023] (some prior studies have found that body-worn cameras led to less use-of-force incidents and fewer citizen complaints, although the data is mixed); Chapman, Body-Worn Cameras: What the Evidence Tells Us (Nov. 14, 2018) National Institute of Justice <<https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us>> [as of May 17, 2023] (“Reductions in citizen complaints were noted” after the introduction of body-worn cameras); Corley, Study: Body-Worn Camera Research Shows Drop In Police Use of Force (Apr. 26, 2021) NPR <<https://www.npr.org/2021/04/26/982391187/study-body-worn-camera-research-shows-drop-in-police-use-of-force>> [as of May 17, 2023] (complaints dropped by 17% following implementation of body-worn cameras).

<sup>538</sup> Zamoff et al., *Who Watches the Watchmen: Evidence of the Effect of Body-Worn Cameras on New York City Policing* (Feb. 7, 2021) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3490785](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3490785)> [as of May 17, 2023] (civilian complaints against NYPD decreased by approximately 20% after the introduction of body-worn cameras, even controlling for an increase in the number of stops that resulted from the roll-out of body-worn cameras); see also Kessler, *Police Body Cams Are Making NYC Safer* (Nov. 15, 2021) <<https://www.gmu.edu/news/2021-12/police-body-cams-are-making-nyc-safer>> [as of May 17, 2023] (same); Kessler, *New study finds NYPD body cameras decrease citizen complaints and arrests* (Nov. 29, 2021) <<https://www.gmu.edu/news/2021-11/new-study-finds-nypd-body-cameras-decrease-citizen-complaints-and-arrests>> [as of May 17, 2023] (same); Corley, Study: Body-Worn Camera Research Shows Drop In Police Use of Force (Apr. 26, 2021) NPR

<<https://www.npr.org/2021/04/26/982391187/study-body-worn-camera-research-shows-drop-in-police-use-of-force>> [as of May 17, 2023] (complaints dropped by 17% following implementation of body-worn cameras).

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review of body-worn camera footage, including changes in officer behavior and willingness of civilians to file complaints.]

The Board therefore recommends that all law enforcement agencies review any body-worn camera and drone footage in each complaint investigation. This recommendation is intended to expand on the Board’s prior best practices for investigatory procedures to ensure that all complaint investigations are thorough and objective. When appropriate, review of body-worn camera and drone footage should take place in addition to, and generally not replace, other investigatory procedures, such as witness interviews, when investigating civilian complaints. However, if the footage fully captures an entire interaction and exonerates the officer of any allegations raised in the complaint, the agency may feel it is sufficient as evidence in their investigation.

#### V. Law Enforcement Agencies Should Incorporate Root Cause Analysis Into Their Civilian Complaint Procedures

The traditional approach to civilian complaints investigations is retrospective, with a focus on individual culpability.<sup>539</sup> Investigators assess whether a particular officer’s actions during a past event complied with departmental policy. To the extent any corrective action is taken, it is generally limited to the individual officer(s) subject to a complaint. While this approach may prevent some intentional misconduct by those individual officers in the future, it may not be effective in preventing accidental or unintentional misconduct by those same officers.<sup>540</sup> This may, in part, be due to officers’ reluctance to relay negative information during complaint investigations, which in turn limits the full understanding of the event in question.<sup>541</sup> The traditional approach to complaint investigations may also forgo opportunities to remedy systemic issues that can contribute to individual behavior.<sup>542</sup> For example, investigations focused on the

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<sup>539</sup> See Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) p. 886 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023] (“Existing review mechanisms are based on retrospective accountability and evaluate whether the officer, the individual who was shot, or some third party bears blame”).

<sup>540</sup> Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) pp. 884, 886-87, 889 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023] (“Such measures which focus on individual culpability may deter police from shootings caused by deliberate or intentional misconduct[, but] [t]hey have failed to reduce the occurrence of accidental or unintentional acts or encounters that escalate into an [officer-involved shooting] . . . only occasionally will disciplining the officer be sufficient to prevent the next OIS” in instances where the shooting was not deliberate or intentional).

<sup>541</sup> See Browning et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Nov. 2015) National Institute of Justice, p. 2 <<https://www.ojp.gov/pdffiles1/nij/249097.pdf>> [as of May 17, 2023] (existing error-detecting procedures “often become ‘gotcha’ processes that focus on assigning individual blame,” which can then drive reporting of errors underground).

<sup>542</sup> See Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) pp. 884, 886-87 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023] (“[I]t is not clear that our systems for evaluating a past [officer-

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individual actions of one officer may fail to explore how shortcomings in a department's training might lead other officers in similar circumstances to act in the same manner as the person under investigation.

This narrow focus of traditional complaint investigations can have negative consequences for both members of the community and law enforcement. Community members may be unnecessarily subjected to inappropriate interactions with law enforcement, which could be otherwise remedied through departmental training. And, for law enforcement, the possibility of being subject to a complaint and disciplined for the result of a department-wide shortcoming can diminish morale.

Accordingly, the Board recommends that law enforcement agencies approach civilian complaints from a broader perspective, to not only address allegations of individual misconduct but also learn from past events to prevent future misconduct.<sup>543</sup> Ultimately, agencies should utilize complaint investigations to identify areas for improvement throughout an agency, after addressing specific allegations of individual misconduct. One way to do this is by incorporating the principles of root cause analysis into the civilian complaints process.

Root cause analysis is a problem-solving technique that aims to identify the underlying factors that contributed to an incident and take action to prevent undesirable outcomes in the future.<sup>544</sup> At its core, it is a “prospective, non-blaming ‘systems approach’ to preventing error in complex human systems.”<sup>545</sup> Root cause analysis asks why an incident occurred in the first place,

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involved shooting] through administrative reviews, civilian oversight, or civil and criminal litigation are effective in understanding how to learn from past OIS or how to prevent the next OIS from occurring”); *id.* at 916 (“Because behavior is more likely to conform to culture than rules, solutions that fail to address systemic risk factors beyond the reach of an office’s rules will fall short of altering a force’s conduct”); Ritter, *Testing a Concept and Beyond: Can the Criminal Justice System Adopt a Nonblaming Practice?* (Dec. 1, 2015) National Institute of Justice <<https://nij.ojp.gov/topics/articles/testing-concept-and-beyond-can-criminal-justice-system-adopt-nonblaming-practice>> [as of May 17, 2023] (“[W]hen a bad outcome occurs in a complex social system – like our criminal justice system – it is rarely the result of one person’s mistake. Rather, multiple errors combine and are exacerbated by underlying weaknesses in the system”).

<sup>543</sup> See Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) p. 890-91 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023] (“The standard administrative accountability mechanisms commonly used in policing today are necessary but insufficient to truly improve the safety and effectiveness of law enforcements, and root cause analysis and a culture of continuous learning from error should be added to [law enforcement agencies’] arsenal of quality improvement initiatives in policing”); Baer, *The Mollen Commission Report: An Overview* (1995) 40 N.Y.L. Sch. L. Rev. 73 (reviewing NYPD data to suggest that root cause analysis is important to make agency-wide change).

<sup>544</sup> See Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) pp. 884, 903 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023].

<sup>545</sup> Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) pp. 884 <<https://www.law.upenn.edu/live/files/7459-hollway--villanova-rca-for-policing>> [as of May 17, 2023].

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analyzing environmental, informational, situational, supervisory, and individual factors that contributed or led to an incident, rather than focusing on an individual officer's competence or negligence in the moment.<sup>546</sup> While many law enforcement agencies already conduct root cause analyses for certain “sentinel events,” such as officer shootings or deaths in custody, the technique is often not incorporated into the civilian complaint process, forgoing opportunities to identify and correct systemic weaknesses that may impact an agency and the community on a more regular basis.

To incorporate root cause analysis into the complaints process, law enforcement agencies must first establish criteria to identify which complaints require further analysis after the standard complaint investigation is complete. In general, root cause analysis may be warranted when a police interaction resulted in an undesirable outcome that was likely the outcome of compound errors and systemic weaknesses within the agency.<sup>547</sup> However, agencies may need to consider the age of the event and whether there is any pending legal liability when selecting events for root cause analysis, though liability alone should not exclude an event from root cause analysis.<sup>548</sup> An event need not be “big” to warrant root cause analysis.<sup>549</sup> In general, agencies should look for events that implicate more than a single actor or single cause.<sup>550</sup> “Lower-impact events”—events that are widely recognized within the agency as problematic, but which occur so frequently they are commonplace—are also well suited to root cause analysis.<sup>551</sup> Agencies can also analyze their annual complaint data to identify trends in police interactions that may indicate systemic weaknesses. [Additional content forthcoming re: how agencies can determine when to apply root cause analysis.]

Once an agency determines that an event should undergo root cause analysis, it must begin the fact-finding phase. The goal is to understand why the incident happened the way it did. Agencies should begin by creating a timeline or diagram of the event, reflecting the specific actions, or

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<sup>546</sup> Holloway et al., *Root Cause Analysis: A Tool to Promote Officer Safety and Reduce Officer Involved Shootings Over Time* (Dec. 15, 2017) p. 887-88 <<https://www.law.upenn.edu/live/files/7459-holloway-villanova-rca-for-policing>> [as of May 17, 2023].

<sup>547</sup> Browning, et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Nov. 2015) National Institute of Justice, pp. 1, 4-5 <<https://www.ojp.gov/pdffiles1/nij/249097.pdf>> [as of May 17, 2023].

<sup>548</sup> Browning, et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Nov. 2015) National Institute of Justice, p. 3-5 <<https://www.ojp.gov/pdffiles1/nij/249097.pdf>> [as of May 17, 2023].

<sup>549</sup> See Doyle et al., *Mending Justice: Sentinel Event Reviews* (date unknown) National Institute of Justice, p. 14 <<https://www.ojp.gov/pdffiles1/nij/247141.pdf>> [as of May 17, 2023] (“Many experts at the NIJ roundtable noted that there is no particular correlation between how much can be learned from an episode and its ‘bigness.’ In fact, notoriety might inhibit the innovative efforts of early adopters, and smaller events could yield the most informative accounts.”).

<sup>550</sup> Browning, et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Nov. 2015) National Institute of Justice, p. 4 <<https://www.ojp.gov/pdffiles1/nij/249097.pdf>> [as of May 17, 2023].

<sup>551</sup> Browning, et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Nov. 2015) National Institute of Justice, p. 4 <<https://www.ojp.gov/pdffiles1/nij/249097.pdf>> [as of May 17, 2023].

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subevents, that occurred from start to finish.<sup>552</sup> Each subevent should derive directly from the preceding one.<sup>553</sup> This timeline or diagram should be based on the facts learned during the complaint investigation and should tell the story of the event.<sup>554</sup> From there, agencies should begin the causal analysis phase, with the goal of identifying all factors that led to or contributed to the event.<sup>555</sup>

[Additional content forthcoming re: methods to identify root causes and other principles of root cause analysis to incorporate into the civilian complaints process.]

## VI. Civilian Complaints and Police Accountability

[Section forthcoming.]

## VII. Vision for Future Reports

[Section forthcoming.]

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<sup>552</sup> Joyce, *Sentinel Event Review: A Guide to Process, Techniques, and Tools* (date unknown) Pacific Institute for Research and Evaluation, p. 10-11.

<sup>553</sup> Joyce, *Sentinel Event Review: A Guide to Process, Techniques, and Tools* (date unknown) Pacific Institute for Research and Evaluation, p. 11.

<sup>554</sup> See Joyce, *Sentinel Event Review: A Guide to Process, Techniques, and Tools* (date unknown) Pacific Institute for Research and Evaluation, p. 11.

<sup>555</sup> See Joyce, *Sentinel Event Review: A Guide to Process, Techniques, and Tools* (date unknown) Pacific Institute for Research and Evaluation, p. 12.

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## POST TRAINING AND RECRUITMENT

The Commission on Peace Officer Standards and Training (POST) plays an important role in developing and updating guidelines and law enforcement training for all peace officers in California. With respect to training aimed at ending racial profiling specifically, “[t]he course or courses of instruction and the guidelines shall stress understanding and respect for racial, identity, and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment.”<sup>556</sup>

The RIPA Board is statutorily mandated to review and analyze law enforcement training, and Penal Code section 13519.4, subdivision (h), requires POST to consult with the RIPA Board on its development of racial and identity profiling courses.<sup>557</sup> Over the past seven years, many Board members have reviewed and provided feedback and recommendations on curriculum, videos, online course materials, and onsite classroom training. Despite the Board’s efforts to meet RIPA’s mandate, the Board does not have a clear understanding of how its feedback or the input of subject matter experts (SMEs) are incorporated into the development and updates of POST’s courses on racial and identity profiling and it is working with POST to better understand POST’s processes.

Given its experience over the last several years, including reviewing POST’s trainings and curricula, the Board believes that the trainings and curricula would benefit from a more structured feedback mechanism for both the Board and the community, as well as additional built-in systems and coordination. Incorporating recommendations from the Board and a diverse group of SMEs would meet the law’s requirement that POST consult the Board and include the perspectives of diverse, local constituency groups and experts. The Board also believes POST should establish well-defined guidelines for its racial and identity profiling courses that are independent of the curricula. In this Report, the Board examines research and potential protocols around POST’s guidelines for its racial and identity profiling trainings; proposed processes for course development and updates; community engagement; measures of course effectiveness; and the inclusion of accountability instruction in the courses and curriculum.

### A. Board Review of POST Training and Curriculum Updates

The Board has reviewed seven POST certified courses that cover racial and identity profiling and found these courses vary a great deal in the material provided, how it is presented, and the expectations of participants and trainers, depending on whether the course is offered in the academy or to in-service officers.

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<sup>556</sup> Cal. Pen. Code, § 13519.4, subd. (a).

<sup>557</sup> Cal. Pen. Code, § 13519.4, subd. (h).

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As described in the 2023 RIPA Board Report, several Board members participated in numerous workshops regarding the Racial and Identity Profiling Train the Trainer course offered through the Museum of Tolerance (MOT).

At the May 15, 2023 POST subcommittee meeting, POST stated that the MOT Train the Trainer course completed all revisions and completed a test run with veteran instructors. POST stated that the MOT Train the Trainer course would submit final revisions and an updated course outline to POST for certification, and would not present the course publicly until the revisions were certified by POST. We have now learned that MOT obtained POST certification of the course. [NOTE: we have not yet been able to obtain the training materials nor review them as of the time of the Board Meeting.]

This year, the Board hopes to review the dispatcher training course. In 2022, POST informed the Board that it planned to update its police dispatcher training, known as the Public Safety Dispatchers' Basic Course. POST last updated the course in 2010. In order to update the course, POST hosted a number of two-day workshops with SMEs such as training officers, law enforcement supervisors and managers, academy instructors, and members of professional organizations. During the Board's June 2022 Calls for Service Subcommittee Meeting, POST shared the focus of some updates for the training course, including how bias affects the call-taking process, radio transmissions, professional demeanor, and ethical behavior. Following this presentation, POST shared a link with the RIPA Board to help gather SMEs to attend future workshops. Board members suggested SMEs, and one of the Board's suggested experts attended the workshop updating the Community Policing/Cultural Diversity/Hate Crimes/Gang Awareness learning domain. POST completed its workshops by the end of 2022 and continued to work on the expanded course outline and a document explaining the course changes in 2023.

As of May 2023, POST has not provided the Board with additional updates regarding changes, but will provide the POST Commission an opportunity to review changes prior to public dissemination. The Board and the general public will be able to review the course updates after presentation at the POST Commission June 7, 2023 meeting, but the Board was not able to provide feedback on the dispatcher training update prior to it being completed and submitted to the POST Commission. The Board seeks to review the trainings as soon as POST makes the training available to the Board. Given the Board's expertise on racial and identity profiling, the Board welcomes working with POST as a consultant throughout the course update. This will ensure that the standards and guidelines surrounding racial and identity profiling will accurately reflect the Board's body of work. In this regard, the Board will continue to work with POST on getting updated on which recommendations were included or excluded. And, finally, in order to be able to make effective recommendations to POST in the future, it would be beneficial to know have the rationale behind why a recommendation was adopted or not adopted by POST.

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To date, the Board has invested significant time reviewing, providing comments, and participating in workshops and meetings related to POST trainings. Still, the Board has been unable to confirm whether the Board's recommendations or those of their SMEs were considered or incorporated in either the MOT or dispatch training updates. For example, with the dispatch training, one Board member recommended an expert, but the Board does not know if POST accepted the expert's comments. Similarly, with MOT training, the Board subcommittee members attended the short community listening session, but did not find the process constituted a fulsome consultation with the community. Although the subcommittee brought several subject matter experts, including judges and scholars, the community feedback time was limited to approximately twenty minutes for fifteen community members. The Board was told community members could review the course again after finalization, and the Board hopes this will take place soon as the course is now being finalized.

Overall, the Board has been unable to set up a regular feedback process with POST during the course development and update process. To be sure, incorporating the Board's feedback, consistent with Penal Code section 13519.4, subdivision (h)'s consultation mandate, is possible even under restrictive deadlines. For example, POST was able to extend its review process to include the Board's feedback regarding the AB 846 Bias Evaluations in Hiring regulations.<sup>558</sup> For those situations where an extension is not possible, the Board refers back to the request to be brought in earlier in the process to provide it expertise to POST projects related to racial and identity profiling. The Board examines this and other issues regarding POST trainings to improve the outreach and review of these trainings.

## **B. Board Recommendations for Consideration for POST Protocols and Procedure for Course Development and Updates**

### **1. Adopt protocols and publish separate training guidelines independent of the curriculum**

Penal Code section 13519.4, subdivision (a) requires POST to “develop and disseminate guidelines *and* training for all peace officers . . . on the racial and cultural differences among the residents of this state” (emphasis added). For its learning domains that the Board has reviewed, including LD 3 Principled Policing in the Community and LD 42 Cultural Diversity/Discrimination, POST publishes the guidelines within the curriculum, and believes this

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<sup>558</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) pp. 206-207, Appendix H1 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

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meets the Penal Code requirements. [Board will work with POST to confirm existence/location of other guidelines for all racial and identity profiling courses.] However, in the 2023 RIPA Report, the Board recommended that POST publish specific guidelines for racial and identity profiling related courses on the POST website, apart from publication in the curricula.<sup>559</sup> POST uses guidelines as an external facing document, to explain to local agencies the requirements under the law and aid in policy development. For example, POST defines their Hate Crimes guidelines as “the primary elements that law enforcement executives are now required to incorporate into their hate crimes policy.”<sup>560</sup> The Hate Crimes guidelines include minimum legal requirements for an agency’s hate crimes policy, a model policy framework, a checklist for the agency’s policy creation, and an appendix of relevant laws. In short, guidelines instruct local agencies on what their policies require. In the RIPA trainings context, separate guidelines would provide notice to California’s law enforcement agencies of the reasons behind specific trainings and curricula, the requirements under the law, and the expected outcomes of bias-free policing required by law.

The Board believes there are benefits to having the guidelines as a separate document. Incorporating the guidelines within the training may counteract the purpose of public awareness of the goals of each training because the trainings themselves are not easily accessible to the public. The Board also believes that broad guidelines encompassing all of the POST trainings concerning racial and identity profiling would be beneficial to make the trainings consistent and comprehensive. There is some precedent within POST for separate guidelines. In fact, POST published guidelines independent of the curriculum for other important trainings, such as the Use of Force guidelines (Penal Code Section 13519.10) and Hate Crime guidelines (Penal Code Section 13519.6). The Board believes that the guidelines for racial and identity profiling courses should be independent guidelines to ensure they are clear and easily accessible.

The Board recommends broadly applicable guidelines to start, including:

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<sup>559</sup> Racial and Identity Profiling Advisory Board, Annual Report (2020) p. 211 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of Apr. 27, 2023].

<sup>560</sup> *Commission on Peace Officer Standards and Training*, POST Hate Crimes Model Policy (Jul. 8, 2019) <[https://post.ca.gov/Portals/0/post\\_docs/publications/Hate\\_Crimes.pdf](https://post.ca.gov/Portals/0/post_docs/publications/Hate_Crimes.pdf)> [last accessed May 2, 2023]. (“These guidelines are the primary elements that law enforcement executives are now required to incorporate into their hate crimes policy if an agency creates a new hate crimes policy or updates an existing one. The guidelines are designed for department-wide application and are intended to reflect a values-driven ‘top-down’ process. They are intended to assist with the development and delivery of training and ensure proper identification, investigation, and reporting of hate crimes within each agency’s jurisdiction.”)

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- An acknowledgment that the training is mandated because racial profiling is against the law and, as the Legislature recognized, racial or identity profiling “is a practice that presents a great danger to the fundamental principles of our Constitution and a democratic society”<sup>561</sup>; “[r]acial or identity profiling alienates people from law enforcement, hinders community policing efforts, and causes law enforcement to lose credibility and trust among the people whom law enforcement is sworn to protect and serve”<sup>562</sup>; and “It is the intent of the Legislature in enacting the changes to [Penal Code 13519.4] made by the [RIPA] that added this paragraph that additional training is required to address the pernicious practice of racial or identity profiling.”<sup>563</sup>
- A discussion of the ineffectiveness of racial and identity profiling, relying on RIPA data and other studies to illustrate the infrequency with which minor stops result in arrests or the discovery of weapons or other serious contraband, and the higher yield rate for searches of White individuals versus Black and Latine(x) individuals who are more frequently subjected to discretionary searches.
- A history as required by the Penal Code: “[t]he history and role of the civil and human rights movement and struggles and their impact on law enforcement.”<sup>564</sup>
- General expectations of officers (individual responsibility) and of the profession (collective responsibility).
- The duty to intervene and how to report other officers engaging in racial profiling.
- Real-life scenarios and examples of racial profiling and discussion of what officers could have done differently (behavior modification and intervention strategies).
- Consequences of racial profiling.

## 2. Proposed integrated timeline for Board and community review of curriculum

Under Penal Code section 13519.4, subdivision (h), POST is mandated to consult with the RIPA Board in the development and review of racial and identify profiling courses.<sup>565</sup>

<sup>561</sup> Cal. Pen. Code, § 13519.4, subd. (d)(2).

<sup>562</sup> Cal. Pen. Code, § 13519.4, subd. (d)(3).

<sup>563</sup> Cal. Pen. Code, § 13519.4, subd. (d)(5).

<sup>564</sup> Cal. Pen. Code, § 13519.4, subd. (h)(3).

<sup>565</sup> Cal. Pen. Code, § 13519.4, subd. (h) (listing subjects).

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[placeholder for RIPA data]

The Board has sought to give feedback during course development and curriculum updates, but it is unclear how the Board's feedback is incorporated into the courses and curriculum. The Board requested a timeline from POST detailing their creation of online courses and updating workbooks to understand where the Board and community could participate in rounds of feedback and for the inclusion of SMEs outside of POST's regular pool. POST provided a workflow for updating workbooks for Learning Domains and a general training overview. These workflows do not include structured or planned points to include meaningful engagement with the Board or meaningful engagement with the community. POST has represented that since POST courses are continuously updated, and POST documents are "living documents" that are updated as needed, it is difficult to pinpoint or project exact timelines for course updates. Rather than this current ad hoc practice, the Board recommends incorporating three specific times for Board interaction and feedback, community feedback, and a public sourcing of subject matter experts before the course development or update process is finalized.

[Discussion of timeline parameters by POST subcommittee and POST]

- Ninety days before setting the timeline for course revision, POST will consult with the RIPA Board on the specific topic of the upcoming training course development or update and provide the current version of training materials and a summary of the subject matter, so POST can assist in a call for a diverse set of SMEs, including persons from targeted communities, persons affected by the training topic, advocates, academics, and other experts.
- Sixty days before publication of the training, POST shall present a draft publication to the Board with sufficient time to hold a subcommittee or Board meeting to discuss the draft, review community and SME feedback, and draft final recommendations to POST. POST will notify the Board which SMEs were included in training development and the expertise backgrounds of subject matter experts included in this specific training development.
- Before the public comment period closes, POST will memorialize in a letter to the Board how feedback was or was not incorporated in the training with time for the Board to respond in writing. This letter should also include the same review of which SME applicants were selected and those omitted, and which SME revisions were rejected.

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### 3. Community/stakeholder input on how to improve trainings

As with reviewing curriculum, POST is mandated to include the community in developing and revising trainings. RIPA established an obligation for POST to engage communities when developing training. As Penal Code section 13519.4, subdivision (b), states, “In developing the training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the field of racial, identity, and cultural awareness and diversity.”<sup>566</sup> POST is also required to develop an expanded evidence-based curriculum to “include and examine evidence-based patterns, practices, and protocols that prevent racial and identity profiling.”<sup>567</sup> That effort is incomplete without community engagement.

Community engagement is necessary while developing courses to “stress understanding and respect for racial, identity, and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a diverse racial, identity, and cultural environment.”<sup>568</sup> In the 2023 RIPA Report, the Board recommended creating broader transparency in the POST racial and identity course curriculum development and certification process by publishing this information on the POST webpage and engaging with a diverse group of interested stakeholders throughout the process.<sup>569</sup> Additionally, the 2019 Report called for RIPA training to include “the benefits of and means to achieve effective community engagement.”<sup>570</sup>

The Board’s recommendations have support. Recent consent decrees between the Civil Rights Division of the United States Department of Justice (U.S. DOJ) and local police departments illustrate how community engagement should be central to the training development process. Additionally, the stipulated judgment between the California Department of Justice and Bakersfield Police Department also requires community engagement in developing and revising use of force policies.<sup>571</sup> Several recent consent decrees mandate that training should be

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<sup>566</sup> Cal. Pen. Code, § 13519.4, subd. (b).

<sup>567</sup> Cal. Pen. Code, § 13519.4, subd. (h).

<sup>568</sup> Cal. Pen. Code, § 13519.4, subd. (b); see also *id.*, § 13519.4, subd. (g) (mandating expanded training as prescribed and certified by POST).

<sup>569</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) pp. 814-815 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

<sup>570</sup> Racial and Identity Profiling Advisory Board, Annual Report (2019) p. 78 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2019.pdf>> [as of May 8, 2023].

<sup>571</sup> Stipulated Judgment, *The People of the State of California v. City of Bakersfield and Bakersfield Police Department* (Super. Ct. Kern County, 2021, No. BCV-21-101928) ¶¶ 62-64, 100 [as of May 8, 2023] (In the case of Bakersfield Police Department, the stipulated judgment mandated consultation with the community advisory working group in revision and development

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developed in partnership with those outside of law enforcement,<sup>572</sup> including third party and community instructors, because “community members and organizations possess extensive subject and neighborhood-specific expertise that [law enforcement] should incorporate into its training curriculum.”<sup>573</sup> This partnership should “include members of the community who are knowledgeable about various communities and local issues, including representatives knowledgeable on issues of race, ethnicity, national origin, gender, age, religion, sexual orientation, gender identity, and disability.”<sup>574</sup> The consent decree requirements provide constructive examples for POST on community engagement, such as:

- ***Centering community engagement in officer training.*** The Ferguson consent decree required adopting a community-orientated policing approach,<sup>575</sup> including requiring that community policing trainings contain scenario-based lessons.<sup>576</sup> The Newark consent decree also requires eight hours of structured in-service training on community policing.<sup>577</sup>
- ***Integrating the community in decision-making roles.*** The Ferguson consent decree requires community members on the Neighborhood Police Steering Committee to advise on strategies, training, and policies to improve community relations, reform the municipal

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of use of force and related policies, bias-free policing policies, community policing, civilian complaints, and diversity in recruiting, hiring, promotion and other policies).

<sup>572</sup> Training could be developed in partnership with academic institutions or consultants with the requisite expertise to assist in developing and implementing trainings. These institutions or consultants should have documented experience conducting such racial and identity profiling trainings for institutional actors (and, ideally, helping design successful interventions). See, e.g., *U.S. v. Alamance County Sheriff Terry Johnson* (2016) 2: 16-cv-01731-MCA-MAH.; *U.S. v. City of Newark* (2016) 2: 16-cv-01731-MCA-MAH.

<sup>573</sup> *SFPD Community Policing Strategic Plan*, U.S. DOJ Recommendation 40.1 p. 7  
<<https://www.sanfranciscopolice.org/sites/default/files/2019-12/SFPDCommunityPolicingStrategicPlan.pdf>> [as of Apr. 27, 2023].

<sup>574</sup> Training should include members of the community who are knowledgeable about various communities and local issues, including representatives knowledgeable on issues of race, ethnicity, national origin, gender, age, religion, sexual orientation, gender identity, and disability *U.S. v. The City of Ferguson* (2016) 4:16-cv-000180-CP.; *U.S. v. City of Newark* (2016) 2:16-cv-01731-MCA-MAH; Trainings should cover cultural competency, cultural awareness, and sensitivity, including the impact of historical trauma on police-community interactions and locally relevant incidents and history *U.S. v. Police Department of Baltimore City, et. al.* (2017) 1: 17-cv-00099-JKB.

<sup>575</sup> *U.S. v. The City of Ferguson* (2016) 4:16-cv-000180-CP, ¶ 18.

<sup>576</sup> *U.S. v. Police Department of Baltimore City, et. al.* (2017) 1:17-cv-00099-JKB, ¶ 16.

<sup>577</sup> *U.S. v. City of Newark* (2016) 2: 16-cv-01731-MCA-MAH, ¶¶ 10-11.

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code, and provide input in hiring and recruitment for officers.<sup>578</sup> Similarly, the Newark consent decree requires civilian oversight in reviewing and recommending changes to the police department's policies and practices, including use of force, stop, search, and arrest.

- ***Adopt processes to ensure community feedback is considered.*** The Ferguson consent decree requires the police department develop policies to receive, consider, respond to, and act upon community recommendations in a transparent and timely manner. It also requires the development of a community-policing plan to ensure that policing is oriented around community priorities and partnerships. The consent decree also requires monthly command staff meetings to discuss community priorities for policing, among other items.
- ***Assess responsiveness to community recommendations and provide corrective action.*** In Ferguson, the consent decree required assessments to measure the level and impact of community engagement and community policing initiatives, to ensure community-based initiatives are being implemented effectively and appropriately. During this assessment, the City and police department are required to identify deficiencies and opportunities for improvement, documenting measures taken for corrective action.<sup>579</sup> In Baltimore, the consent decree requires a published annual public report that identifies deficiencies and opportunities for improvement in initiatives for community engagement and policing, including ways the police department sought input from the community, and identifying steps the department has taken to measure officer outreach to community members.<sup>580</sup> Likewise, Newark required a quarterly report that covered community policing efforts, enumerating the specific problems addressed and steps taken by the police department and the community toward their resolution. The report includes an assessment of these community outreach efforts, including identifying obstacles faced and recommendations for future improvement.<sup>581</sup>

Community engagement can help close existing knowledge gaps. For example, the Little Hoover Commission recommends POST widen its scope of researchers, and partner with researchers to develop new curriculum that addresses knowledge gaps identified by law enforcement and add additional public members from vulnerable communities, mental health professionals who serve vulnerable communities, and experts in adult education and scientific research.<sup>582</sup> This effort to diversify the SME used in POST's course revision process would be impossible without community outreach.

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<sup>578</sup> *U.S. v. The City of Ferguson* (2016) 4:16-cv-000180-CP, ¶ 21.

<sup>579</sup> *U.S. v. The City of Ferguson* (2016) 4:16-cv-000180-CP, ¶ 35.

<sup>580</sup> *U.S. v. Police Department of Baltimore City, et. al.* (2017) 1:17-cv-00099-JKB, ¶ 22.

<sup>581</sup> *U.S. v. City of Newark* (2016) 2: 16-cv-01731-MCA-MAH, ¶ 18.

<sup>582</sup> Little Hoover Com., *Law Enforcement Training: Identifying What Works for Officers and Communities* (Nov. 2021) p. 24

<<https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/265/Report265.pdf>> [as of May 2, 2023].

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Additionally, law enforcement experts agree that law enforcement must not assume an understanding of the communities' wants and needs, but should engage with the community often and ask what it wants and needs from them, including outreach and inclusion of the community in the development of racial and identity courses. This works to develop building blocks of community trust and departmental transparency.<sup>583</sup>

The Board has identified examples of community engagement best practices to provide feedback on training courses, including LAPD's Community Safety Partnership (CSP) and the San Francisco Police Department. CSP conducted community safety surveys at each Neighborhood Engagement Area to provide baseline data in support of the development of each Community Safety Advisory Committee (CSAC) Site Safety Plan (SSP). CSACs meet monthly to address public safety concerns, and are comprised of community stakeholders, including residents, institutional partners, and community-based organizations.<sup>584</sup> This partnership between the LAPD and the community could be used as a model for POST to engage a diverse group of community stakeholders to review and provide feedback on existing training courses as well as those in development.

The San Francisco Police Department Community Police Strategic Plan includes: "Third party and community instructors to contribute to SFPD training. Community members and organizations possess extensive subject and neighborhood-specific expertise that the Department should incorporate into its training curriculum. Bringing in diverse voices from outside the Department plays a vital role in officer development and understanding of issues traditionally considered beyond the scope of officers, but which are becoming routine in their work." As part of its community engagement objective, SFPD looks to identify and develop responses to local issues and concerns with individuals, community-based organizations, and city services, focusing on the root causes to safety issues rather than reactive solutions.<sup>585</sup> This approach integrates community voices into the training curriculum.

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<sup>583</sup> Gokey et al., *How To Increase Cultural Understanding. Police Perspectives: Building Trust In A Diverse Nation*, no. 1 p. 23 (2016) Office of Community Oriented Policing Services <[https://www.vera.org/downloads/publications/police-perspectives-guide-series-building-trust-diverse-nation-diverse-communities-cultural-understanding\\_1.pdf](https://www.vera.org/downloads/publications/police-perspectives-guide-series-building-trust-diverse-nation-diverse-communities-cultural-understanding_1.pdf)> [as of May 2, 2023].

<sup>584</sup> *LAPD Community Safety Partnership Bureau, Ramona Garden 2021 Community Safety Survey*, p. 2 <[https://www.lapdcsp.org/\\_files/ugd/a060ef\\_29d8f88df38d4ff7ab356ad7d61fdd49.pdf](https://www.lapdcsp.org/_files/ugd/a060ef_29d8f88df38d4ff7ab356ad7d61fdd49.pdf)>

<sup>585</sup> *SFPD Community Policing Strategic Plan*, U.S. DOJ Recommendation 40.1 p. 8 <<https://www.sanfranciscopolice.org/sites/default/files/2019-12/SFPDCommunityPolicingStrategicPlan.pdf>> [as of Apr. 27, 2023].

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#### 4. Measure course effectiveness of all POST racial and identity profiling courses

In addition to integrating community engagement into training development, all POST trainings should be evaluated for effectiveness. Given the longitudinal disparities demonstrated by the RIPA data, the Board has recommended that POST measure the effectiveness of their trainings. Other entities have further supported the call to measure effectiveness based on results and behavior change—such as a reduction in racial profiling—instead of perceptive changes. In the 2023 RIPA report, the Board recommended that as MOT and POST update their course, measures of effectiveness must be included.<sup>586</sup>

Other state agencies have called for measuring effectiveness of the training as a necessary requirement. The Little Hoover Commission and the California State Auditor raised concerns that POST trainings have not changed officer behavior. The Little Hoover Commission noted while the state of California spends millions of dollars on law enforcement training annually, “there is very little evidence to demonstrate which types of training actually achieve intended goals and positively impact officer behavior in the field—and which do not.”<sup>587</sup> In a separate report, The Little Hoover Commission further noted “neither the course certification process nor the regular course assessments measure the effectiveness of officer training” and recommended POST “review the effectiveness and relevancy of courses for today’s community needs and identify gaps in foundational training necessary to prepare new officers.”<sup>588</sup> The Little Hoover Commission warned that “[w]ithout more rigorous evaluation of the impacts of law enforcement training on officer behavior, California risks inadvertently prolongating use of training techniques that are useless or, even worse, erode community trust and result in other unintended consequences.”<sup>589</sup> The 2023 RIPA report discussed the consequences of declining community trust at length. The 2023 Report further cited studies that demonstrated pretextual stops are

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<sup>586</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) pp. 211, 1137 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

<sup>587</sup> Little Hoover Com., *Law Enforcement Training: Identifying What Works for Officers and Communities* (Nov. 2021) p. 5 <<https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/265/Report265.pdf>> [as of May 2, 2023].

<sup>588</sup> Little Hoover Com., *Law Enforcement Training: Identifying What Works for Officers and Communities* (Nov. 2021) pp. 4, 6 <<https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/265/Report265.pdf>> [as of May 2, 2023].

<sup>589</sup> Little Hoover Com., *Law Enforcement Training: Identifying What Works for Officers and Communities* (Nov. 2021) p. 17 <<https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/265/Report265.pdf>> [as of May 2, 2023].

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costly—with limited efficacy in reducing crimes—and monopolize valuable resources that could be redirected to more effective public safety measures.<sup>590</sup>

Training alone is insufficient. In a review of five major police departments, the California State Auditor found none of the departments had fully implemented best practices to mitigate the effects of officer bias.<sup>591</sup> Additionally, research from the John F. Finn Institute for Public Safety showed that while trainings can elevate officers' comprehension of implicit bias, the data – the “breakdown of the ethnic disparities among the people who were arrested and had other kinds of interactions with those officers” show “no meaningful change.”<sup>592</sup> Measures of effectiveness can be evaluated not just by course outcomes or a pass rate, but by data points that show behavioral changes, such as measuring a reduction in disparities in traffic stops, or real-time intervention in officer behavior.<sup>593</sup> The Board proposes POST measure the effectiveness of its courses by:

- Measuring the effectiveness of course outcomes through the goal of actual behavior changes, not just the pass rate of the course. The behavior changes would be supported by data, such as a reduction in disparities in traffic stops, and not simply perceptive changes through self-reporting surveys. Relying on official documents that are self-reporting, and time-stamped documents, are better indicators of behavioral changes (*i.e.* reason for stop written down and data trends decrease) than survey results of officer's perceptive changes.
- Encouraging long-term changes in police behavior by pairing training with additional practice that supports training tenets with complementary policies, supervisory oversight, managerial support, and community involvement in reform efforts.
- Encouraging short-term behavior correction of “split second” decisions during training by simulating the dangers of implicit bias. Some efforts include the Counter Bias Training

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<sup>590</sup> See Racial and Identity Profiling Advisory Board, Annual Report (2023 ), p. 64, <<https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf>> [as of May 23, 2023].

<sup>591</sup> The departments examined by the State Auditor included the Los Angeles Sheriff, the police departments of San Bernardino, San José, and Stockton, and CDCR. Cal. State Auditor, *Law Enforcement Departments Have Not Adequately Guarded Against Biased Conduct* (Apr. 26, 2022) p. 5 [as of Apr. 28, 2022].

<sup>592</sup> Worden et al., *The Impacts of Implicit Bias Awareness Training in the NYPD* (Jul. 2020) IACP/UC Center for Police Research and Policy & John F. Finn Institute for Public Safety <[https://www.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/impacts-of-implicit-bias-awareness-training-in-the-nypd.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/impacts-of-implicit-bias-awareness-training-in-the-nypd.pdf)> [as of Apr. 27, 2023]; Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior* (Sept. 10, 2020) NPR <<https://tinyurl.com/NYPD-Study/>>[as of Apr. 27, 2023].

<sup>593</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 11 [as of Apr. 27, 2023].

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Simulation, a curriculum from Washington State University researchers that uses video scenarios in shooting simulators to show officers the dangers created by implicit bias.<sup>594</sup> This simulation is currently being used by the Sacramento Police Department, where some officers will get simulator-based training, some will get traditional, seminar-style implicit bias training, and some will get neither.<sup>595</sup> The control group that receives the counter bias simulation training are required to debrief to identify why they made their decisions during the simulation, and to self-reflect on how bias influences actions. The officers' actions will be reviewed and scored. Professor Lois James at Washington State University and her graduate students will review the body camera videos of officers' interactions with the public — before and after the training period — and score them for how civilly the officers treat each ethnic group. The researchers' feedback is intended to evaluate the effectiveness of implicit bias trainings on the officer's actions.

- Measure effectiveness by outcomes related to specific behavioral change goals. These goals should be mandated in curriculums approved or certified by POST to determine if trainings are having the desired effect. Consider how to include community needs and concerns in determining how to measure effectiveness of trainings.

## **5. Incorporating accountability as a required topic in Racial and Identity Profiling-Related Content in POST Trainings**

RIPA added a legal obligation for POST's course of instruction to include "specific obligations of peace officers in preventing, reporting, and responding to discriminatory or biased practices by fellow peace officers."<sup>596</sup> The Board advocated to add accountability as a topic in the 2020 Report.<sup>597</sup> Additionally, in the 2023 RIPA report, the Board recommended course objectives "prominently discuss and emphasize law enforcement agency expectations regarding unlawful racial or identity profiling behavior and accountability for engaging in those acts."<sup>598</sup>

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<sup>594</sup> See *Advanced Curriculum Solutions for Counter Bias Training*, FAAC <<https://www.faac.com/milo/cognitive/cbtsim/>> [as of May 8, 2023].

<sup>595</sup> Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior* (Sept. 10, 2020) NPR <<https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>> [as of May 8, 2023].

<sup>596</sup> Cal. Pen. Code, § 13519.4, subd. (h)(4).

<sup>597</sup> Racial and Identity Profiling Advisory Board, Annual Report (2020) p. 5 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>> [as of Apr. 27, 2023] ("Model Language for Training: The [agency] will ensure that, at a minimum, all officers and employees are compliant with requirements regarding bias-free policing training.").

<sup>598</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 10 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

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Further, the State Auditor has called for the Legislature to require officers to receive training at least biannually on “reporting obligations and how officers should respond after observing biased behavior by peers.”<sup>599</sup> Accordingly, the Board recommends POST’s training development include the topic of accountability and a discussion of how officers are accountable for each other. This important topic has been a subject of interest in police reform efforts for decades, following long-standing reports of retaliation against officers who report bias and profiling.<sup>600</sup> To that end, the Board recommends POST include the following content to ensure that every racial profiling course contains material on officer and supervisor accountability. The Board has made the following recommendations in past Board reports:

- Racial and identity profiling and accountability should be integrated into most POST courses implemented in field training and as a reminder in daily roll call meetings.<sup>601</sup>
- Provide courses on officer peer behavior and supervisor accountability and reporting and responding to biased practices by fellow officers.<sup>602</sup>
- Racial and identity profiling curriculum should also include information on the consequences of officers engaging in racial or identity profiling behavior or of not reporting profiling by other officers.<sup>603</sup>

POST trainings should focus on the need for both individual and collective accountability. Additionally, the training topics on accountability should contain real-world examples and interactive components so officers can understand how bias may have affected the

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<sup>599</sup> Cal. State Auditor, *Law Enforcement Departments Have Not Adequately Guarded Against Biased Conduct* (Apr. 26, 2022) p. 5 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 28, 2022].

<sup>600</sup> Independent Commission on the Los Angeles Police Department, *Report of the Independent Commission on the Los Angeles Police Department*, (Jul. 1991) p. 170 (describing several instances of officers who reported other officer’s use of racial epithets and biased behavior facing retaliation).

<sup>601</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 212 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

<sup>602</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 5 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

<sup>603</sup> Racial and Identity Profiling Advisory Board, Annual Report (2023) p. 212 <<https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2023.pdf>> [as of Apr. 27, 2023].

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interaction. The development of such training should include consultation with the RIPA Board.<sup>604</sup>

### **C. Recommendations**

The Board's concerns can be addressed by integrating Board and community feedback earlier in the course development or update process, with built in opportunities for consultation with the Board and SMEs before finalizing the curriculum.

[Potential recommendations from past Board discussions for consideration at subcommittee meeting]

1. To aid in public transparency, community engagement, and Board engagement around training and curriculum development and the goals of trainings, the Board recommends POST adopt and publish guidelines for Racial Justice and Identity Profiling training courses separate from publishing guidelines within the curriculum. This practice would make RIPA topic guidelines consistent with the Hate Crimes and Use of Force guidelines and others and would provide clear direction to law enforcement agencies and the public of what topics the courses will cover and what officers are expected to learn from the courses.
2. Adopt a process and publish timelines for Board and community review that will allow meaningful feedback on curriculum updates and development, including community sourcing of subject matter experts.
3. Engage community and stakeholder input on how to improve trainings. (Pen. Code 13519.4, subd. (b).)
4. Measure course effectiveness through behavioral change and data.
5. Include individual and collective accountability as a required training topic.

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<sup>604</sup> Pen. Code, § 13519.4, subd. (h).

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**PLACEHOLDER FOR RELEVANT LEGISLATION ENACTED IN 2023**

DRAFT

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## **PLACEHOLDER FOR CONCLUSION**

DRAFT

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