

POLICE ACCOUNTABILITY

Table of Contents

| | |
|--|----|
| Police Unions, Law Enforcement Agencies, and Cities | 3 |
| I. Functions of Police Unions..... | 3 |
| A. Collective Bargaining..... | 3 |
| B. Lobbying..... | 6 |
| II. Police Unions’ Effects on Agency Reforms and Accountability..... | 8 |
| A. Peace Officer Bill of Rights..... | 8 |
| 1. Union Justifications Provided for a Bill of Rights..... | 9 |
| 2. California’s Peace Officer Bill of Rights..... | 10 |
| 3. Impediments Caused by POBR..... | 11 |
| a. Interrogations..... | 13 |
| b. Disciplinary Records..... | 15 |
| c. Civilian Oversight..... | 16 |
| d. Complaint Investigations..... | 17 |
| e. Arbitration..... | 18 |
| B. Unions and Police Management..... | 19 |
| C. Conclusion..... | 22 |
| III. The Role of Municipalities..... | 23 |
| IV. Intermediaries Between Management and Line Officers..... | 25 |
| Qualified Immunity | 26 |
| I. Current State of Law..... | 26 |
| A. Discretionary Function..... | 27 |
| B. Clearly Established Law..... | 28 |
| C. Reasonable Officials, Reasonable Reliance, and Extraordinary Circumstances..... | 30 |
| II. Balancing State vs. Individual Citizen Interests..... | 31 |
| A. Effects of Financial Liability..... | 31 |
| B. Effects on Litigation..... | 33 |

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III. Conclusion 34
Agency Data Reporting 34

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Police Unions, Law Enforcement Agencies, and Cities

The 2023 Report featured internal and external mechanisms for police accountability. This year’s Report discusses additional influences on police accountability and highlights two of these influences, specifically police unions and qualified immunity.

I. Functions of Police Unions

Today, police have one of the highest union membership levels in the United States, with roughly 75 percent of law enforcement officers in unions.¹ Two major functions of police unions related to accountability are collective bargaining and lobbying.²

A. Collective Bargaining

Collective bargaining is the process by which unions negotiate contracts with employers on behalf of employees to determine terms of employment, including pay, benefits, hours, leave, job health and safety policies, and work-life balance.³ Management at public agencies and employee representatives have an obligation to “meet and confer,” meaning to bargain in good faith to reach an agreement on terms and conditions of employment.⁴ Management rights, which are the merits, necessity, or organization of the services the agency provides to the community, are outside the scope of bargaining except to the extent that they impact wages, hours, or other terms and conditions of employment.⁵ “Unions often focus bargaining and contract enforcement efforts on protecting officers from discipline and arbitrary work assignments, fighting for fair

¹ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights (2020) p. 4.

² 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.*

³ *Collective Bargaining*, AFL-CIO <<https://aflcio.org/what-unions-do/empower-workers/collective-bargaining>> [as of July 12, 2023]. Collective bargaining is also a way to solve workplace problems. *Ibid.*

⁴ Gov. Code 3505. Wages and benefits, hours and other terms and conditions of employment are the “mandatory” subjects within the scope of bargaining and upon which the parties must meet and confer in good faith. https://www.ca-ilg.org/sites/main/files/file-attachments/labor_relations_glossary_2013_update.pdf?1491845013, p. 3

⁵ https://www.ca-ilg.org/sites/main/files/file-attachments/labor_relations_glossary_2013_update.pdf?1491845013, p. 6 (citing *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931). Examples of management rights include the right to hire, fire, determine whether a public program is necessary and to what extent it should be staffed. *Ibid.*

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compensation, and ensuring compliance with seniority rules.”⁶ However, researchers have found that unions also improperly bargain about management rights in ways that impede police accountability (to be discussed further below in section XXXX).⁷

Collective bargaining on behalf of law enforcement is often a confidential process between elected officials, unions, and police management.⁸ 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.⁹ 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.”¹⁰

⁶ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 727

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

⁷ Rad et al., *Police Unionism, Accountability, and Misconduct* (2023) 6 Annual Rev. Criminology 183, 185 (citing Hardaway AB. 2019. Time is not on our side: why specious claims of collective bargaining rights should not be allowed to delay police reform efforts. *Stanf. J. Civ. Rights Civ. Lib.* 15(2):137–200; Rushin, *Police Disciplinary Appeals* (2019) 67 Univ. Pa. L.Rev. 545–610).

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

<http://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf>

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

⁹ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 436.

¹⁰ 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 and some of those communications may be accessible to the public.¹¹

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.¹² The Meyers Miliias 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.”¹³ Thus, bargaining sessions are not confidential and summaries of discussions may be disclosed to the public and stakeholders.¹⁴ Releasing this information before an agreement is negotiated or signed would aid the public in holding elected and appointed officials accountable for the police contracts they negotiate.¹⁵ The community and its advocates would have notice of what changes

[%20re%20SFPOA%20MC%20-%20Final%20-%20Signed.pdf](#)> [as of XXX] (“[Human Resources’ meet-and-confer process with SFPOA occurs behind closed doors.”]

¹¹ 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.”). The Meyers Miliias Brown Act, the law that requires public employers to meet and confer with employees in good faith, Berkeley Office of the City Attorney, letter to the Police Accountability Board, Oct. 13, 2021

https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/2021-10-13-SuppMaterial.PAB_PublicSummaryofMeet.and_Confer.Rules%283of4%29.pdf> [as of XXX], does not explicitly prohibit the disclosure of communications between bargaining parties, 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].

¹² 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].

¹³ 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].

¹⁴ 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].

¹⁵ Fisk et al., Reforming Law Enforcement Labor Relations <https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

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will potentially be implemented and can lobby their elected officials for the changes they want or want to avoid. It would provide the public the opportunity to ensure that the contracts serve the common good.¹⁶

B. Lobbying

Scholars have also linked union lobbying and other electoral politics to police accountability.¹⁷ Unions may influence legislation by supporting or opposing it.¹⁸ Between 2012 and 2022, California police unions and their affiliates contributed \$38.5 million to political campaigns – the most of any state in that ten-year period and almost four times as much as the next highest state.¹⁹ Police unions often oppose bills that are intended to increase police accountability.²⁰ Even after a bill becomes law, unions may dilute or thwart its effect by influencing the law’s implementation.

The histories of Assembly Bills 931 and 392 illustrate how powerful police unions are as lobbyists and influencers. The American Civil Liberties Union (ACLU) of Southern California tracked the legislative histories of these bills and obtained emails and other evidence through discovery in the case *Gente Organizada v. Pomona Police Department* that demonstrated the effect police unions and their affiliates had on AB 392’s implementation.

In April 2018, AB 931 was introduced to change the legal standard for police use of deadly force to reduce officers’ use of force to situations when it is “necessary” rather than “reasonable.” “Necessary” is a higher standard that would reduce the situations in which officers may use deadly force. Many law enforcement unions, agencies, and groups opposed the bill.²¹ Peace Officers Research Association of California (PORAC), a law enforcement lobbying group, ran

¹⁶ Fisk et al., Reforming Law Enforcement Labor Relations <<https://californialawreview.org/reforming-law-enforcement-labor-relations/>> [as of XXX].

¹⁷ 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 Walker 2008, Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct* (2017) 28 Stan. L. and Policy Rev. 109)

¹⁸ See 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]. For instance, in 2018 California police unions successfully blocked a bill that would have restricted officers’ discretion to use deadly force. However, another use-of-force bill was introduced and passed in 2019 and implemented in 2020, the first change in the state’s use-of-force policy since 1872. *Id.* at p. 191, fn 4.

¹⁹ [Police unions spend millions lobbying to retain their sway over big US cities and state governments • OpenSecrets](#). New York unions spent the next highest amount of \$9.3 million.

²⁰ AB 1196 (chokehold); SB 203 (juvenile interrogation); AB 953 (RIPA) [insert other bills]

²¹ file:///C:/Users/solimaj/Downloads/201720180AB931_Senate%20Public%20Safety.pdf

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radio ads against AB 931 and sent calls to action to the official email accounts of police officers across California to urge them to contact their elected officials to oppose the bill.²² Other police interested groups distributed articles strongly opposing AB 931 and called for active campaigning against the bill.²³ In August 2018 following all these efforts the bill was pulled, preventing legislators from taking a vote on it.²⁴

In the next legislative session, AB 392 was introduced and also sought to raise the standard for police use of deadly force from “reasonable” to “necessary.”²⁵ Again, the ACLU documented that PORAC sent calls to action and talking points to officers’ official email addresses.²⁶ PORAC also convened meetings of local police and police associations to organize opposition against AB 392.²⁷ The bill was amended, diminishing some of the changes it initially set out to make.²⁸ In light of the amendments, many law enforcement lobbying groups changed their positions from “oppose” to “neutral,” and the bill later passed both houses of the legislature.²⁹ The governor signed the bill into law, affirming that the bill changed the standard for use of deadly force to only be used when necessary.³⁰ On the day the Governor approved the bill, PORAC emailed officers across the state stating the use of force standard did not change, even though the governor explicitly stated it did.³¹ A few days later, PORAC circulated another email stating the deadly use of force standard was “reasonableness” and that AB 392 would not significantly change officers’ jobs.³² The email also provided a legal analysis of the bill produced by Lexipol, a private company that sells police policies and trainings to law enforcement agencies.³³ Law enforcement agencies were improperly training their officers on AB 392 based on PORAC’s stance and Lexipol’s legal analysis.³⁴ Proper training materials and characterization of the law were not issued until over a year after the law went into effect and after litigation began that challenged the AB 392 training.³⁵

²² [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

²³ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

²⁴ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

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³⁰ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

³¹ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

³² [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

³³ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

³⁴ [Timeline of How Police Groups Undermine AB 392 | ACLU of Southern California \(aclusocal.org\)](https://www.aclusocal.org/timeline-of-how-police-groups-undermine-ab-392)

³⁵ *Gente Organizada v. Pomona Police Department*

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While these two bills focus on the use of force, their histories and the implementation of AB 392 demonstrate how lobbying can affect police accountability bills, including those related to racial and identity profiling. Police union influence was tracked for Assembly Bills 931 and 392, but it is not always possible. One difficulty in understanding and tracking the nature of union political influence is that there is a great deal of informal and “backdoor” lobbying and meetings that remain undocumented and, therefore, largely invisible to the public.³⁶ This enables unions to influence reform and legislation outside of the public eye, vastly reducing the public’s ability to oppose and object to union agendas. By extension, unions may influence and reduce accountability for its members –the officers who have taken an oath to serve their communities – with very little input from the community.

II. Police Unions’ Effects on Agency Reforms and Accountability

As a party at the collective bargaining table, unions have a significant influence on police accountability and reform. Unions use their influence in several ways lobbying for protections within the Peace Officer Bills of Rights that other public employees do not have or collectively bargaining for terms that affect a law enforcement agency’s ability to hold officers accountable. Within bargaining agreements, unions negotiate terms affecting the questioning 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 their role in an agency’s internal culture also influence reform and accountability.

A. Peace Officer Bill of Rights

In California, police unions supported the creation of the Public Safety Officers Procedural Bill of Rights (POBR), a set of statutory protections specifically for law enforcement officers.³⁷

³⁶ Police Unionism, Accountability, and Misconduct

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³⁷ Barrata, The Creation of the Peace Officer Bill of Rights & PORAC, PORAC

<[https://porac.org/2020/08/17/the-creation-of-the-peace-officer-bill-of-rights-porac/#:~:text=AB%20301%3A%20The%20Peace%20Officers%20Bill%20of%20Rights&text=In%201973%20a%20bill%20\(AB,Policemans%20Bill%20of%20Rights.%E2%80%9D](https://porac.org/2020/08/17/the-creation-of-the-peace-officer-bill-of-rights-porac/#:~:text=AB%20301%3A%20The%20Peace%20Officers%20Bill%20of%20Rights&text=In%201973%20a%20bill%20(AB,Policemans%20Bill%20of%20Rights.%E2%80%9D)> [as of XXX]. California’s POBR is statutory, codified in Government Code Sections 3300-3312, and is called “Public Safety Officers Procedural Bill of Rights.

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California’s POBR is related to disciplinary action and supersedes police union contracts.³⁸ In other jurisdictions, a POBR may be statutory or contractually negotiated by police unions into collective bargaining agreements on the local level.³⁹

1. Union Justifications Provided for a Bill of Rights

The Fraternal Order of Police, a national federation of police unions, argues a POBR 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.⁴⁰

Other arguments unions make to justify a POBR include the following: (1) officers need special protections, because officers are forced to answer questions or be fired;⁴¹ (2) lack of due process rights leads to loss of officer confidence in the disciplinary process and loss of morale;⁴² (3) treating officers unfairly may deter or prevent officers from carrying out their duties effectively and fairly;⁴³ (4) the perception or reality of unfair treatment may negatively affect recruitment and retention;⁴⁴ (5) effective policing depends on stable employer-employee relations, which POBR promotes;⁴⁵ and (6) POBR provides more uniform fairness among and between different departments that have different protections.⁴⁶

³⁸ Cunningham et al., Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights, (2020) p. 9.

³⁹ 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.

⁴⁰ 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>>).

⁴¹ 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.

⁴² Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills Of Rights* (2005)14 Public Interest L.J. 186, 199 (citing H.R. 1626, 107th Cong. § 2(a)(2) (2001)).

⁴³ 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)).

⁴⁴ 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)).

⁴⁵ 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)).

⁴⁶ 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.

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Opponents of POBR believe POBR provides special protections that are not available to other public sector employees and that officers do not deserve these special protections. Officers are authorized to use force against individuals – a responsibility unique to law enforcement.⁴⁷ Therefore, police must be held accountable for misconduct.⁴⁸ “When society grants police the power to use force against civilians to coerce desired behavior, and even kill, it has an unquestionably strong interest regulating that use of power.”⁴⁹ 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.⁵⁰ In drafting Senate Bill 2, the bill allowing decertification of problematic officers, the legislature commented “[f]or years, there have been numerous stories of bad-acting officers committing misconduct and not facing any serious consequences... Allowing the police to police themselves has proven to be dangerous and leads to added distrust between communities of color and law enforcement.”⁵¹

2. California’s Peace Officer Bill of Rights

California’s POBR provides the following protections and limitations on questioning of police officers for misconduct.⁵² Interrogations must be conducted at a reasonable hour.⁵³ Preferably, officers should be interrogated when on duty or during normal waking hours.⁵⁴ If the interrogation occurs when the officer is off-duty, the officer shall be compensated.⁵⁵ An officer shall be interrogated by no more than two people at once and the officer will be provided the names of the interviewers.⁵⁶ The officer shall be informed of the nature of the interrogation before it occurs.⁵⁷ The interrogation shall also be limited to a reasonable time.⁵⁸ These

⁴⁷ 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.

⁴⁸ Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights* (2020) p. 11.

⁴⁹ 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.

⁵⁰ 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.

⁵¹ Senate Committee on Public Safety , SB 2 (2021-2022 session), p. 6-7 <[202120220SB2 Senate Public Safety \(2\).pdf](#) >

⁵² Gov. Code, § 3303.

⁵³ Gov. Code, § 3303(a).

⁵⁴ Gov. Code, § 3303(a).

⁵⁵ Gov. Code, § 3303(a).

⁵⁶ Gov. Code, § 3303(b).

⁵⁷ Gov. Code, § 3303(c).

⁵⁸ Gov. Code, § 3303(d). Additional interrogation protections are as follows. POBR 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). POBR also limits the use of the officer’s statements in civil actions, if they are made

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protections are above and beyond the protections provided to individuals suspected of a crime who are facing potential losses of personal freedom.

California's POBR provides protections and limitations regarding discipline and personnel records. If an agency wishes to discipline an officer for misconduct, the agency must complete its investigation of the misconduct and notify the officer of the discipline within one year of discovery of the misconduct.⁵⁹ 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.⁶⁰ An officer has 30 days to respond in writing to the adverse comment, and the response must be included in the personnel file.⁶¹ An agency cannot take punitive action against an officer because they are on a *Brady* list,⁶² 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.⁶³ These protections regarding discipline for officer misconduct are specific to law enforcement officers and go above and beyond those established for other public employees. While POBR was intended to protect to officers, in reality it has affected community interests by obstructing some aspects of police accountability.

3. Impediments Caused by POBR

California's POBR may impede accountability with its restrictions regarding: (1) accountability of police chiefs and by police chiefs; (2) officer reassignments; (3) and reformation of officer discipline procedures.

California's POBR covers chiefs and supervisors in addition to rank-and-file officers.⁶⁴ 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.).⁶⁵ Public officials may also

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).

⁵⁹ Gov. Code, § 3304(d).

⁶⁰ Gov. Code, § 3305.

⁶¹ Gov. Code, § 3306.

⁶² 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.

⁶³ <https://porac.org/article/am-i-going-to-get-a-brady-letter>

⁶⁴ 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.

⁶⁵ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

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replace chiefs as political pressures demand.⁶⁶ Similarly, POBR rights also affect the ability of police chiefs to choose and replace commanders based on policy goals and basic job performance.⁶⁷

California's POBR prevents reassignment of officers if the "department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances."⁶⁸ Nevertheless, experts believe that reassignment as a response to performance deficiencies is valuable.⁶⁹ In general, departments have not reassigned "problem officers" with performance problems away from sensitive assignments.⁷⁰ 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.⁷¹

POBR limits agencies from reforming procedures for disciplining officers.⁷² Because no more than two interrogators may question an officer at once,⁷³ POBR 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.⁷⁴ Additionally, a citizen review board's disciplinary recommendation may trigger an officer's administrative appeal rights⁷⁵ if the recommendation may be used for discipline or other personnel decisions.⁷⁶

⁶⁶ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁶⁷ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 205.

⁶⁸ Gov. Code, § 3303(j).

⁶⁹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236.

⁷⁰ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236.

⁷¹ Keenan and Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills Of Rights* (2005)14 Public Interest L.J. 186, 236. Reassignments may be subject to collective bargaining agreements. *Ibid.*

⁷² League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3

<https://www.calcities.org/docs/default-source/city-attorneys/police-reform-legal-challenges---paper.pdf?sfvrsn=58282c98_3> [as of XXX].

⁷³ Gov. Code, § 3303(b).

⁷⁴ League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3

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

⁷⁵ Gov. Code, § 3304(b).

⁷⁶ League of California Cities, *Police Reform: Legal Challenges and Solutions* (2002) p. 3

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

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Overall, POBR’s protections affect an agency’s ability to hold officers accountable, especially when combined with the protections included in collective bargaining agreements.

4. Collective Bargaining Agreements

As previously discussed, collective bargaining is a major function of police unions. While unions bargain for salary and related compensatory benefits, they also bargain about management rights.⁷⁷ These rights may influence discipline and investigation of misconduct, which in turn affects accountability.⁷⁸ Scholar Stephen Rushin identified seven categories of provisions in police contracts that limit accountability:⁷⁹ (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;⁸⁰ (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. The Board will discuss each of these provisions and how they might affect the ability of communities and agencies to hold officers accountable for misconduct and racial or identity profiling.

a. Interrogations

Employers who suspect employees of misconduct, criminal behavior, or violations of internal policy, may conduct an internal investigation and question the employee.⁸¹ As discussed in the Board’s 2023 Report, an internal affairs department administratively investigates these issues to judge the veracity of civilian complaints, collect facts after uses of force, and investigate officer misconduct.⁸² While a person suspected of a crime 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.⁸³ An officer may be terminated for cause if

⁷⁷ 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).

⁷⁸ 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).

⁷⁹ 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).

⁸⁰ *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].

⁸¹ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

⁸² Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

⁸³ Rushin and DeProspero, *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

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they refuse to answer questions in the administrative review.⁸⁴ Thus, police union contracts or collective bargaining agreements often regulate disciplinary interrogations.⁸⁵

Stephen Rushin's analysis of 657 police union contracts, 140 of which were from California municipalities,⁸⁶ suggests that contracts have insulated officers from accountability by preventing investigators from using effective interrogation techniques against officers during internal disciplinary investigations.⁸⁷ Some union contracts or collective bargaining agreements impose a certain time period before an officer may be interviewed, thereby delaying the interrogation.⁸⁸ Rushin's analysis revealed that of the contracts that allowed for an interrogation delay, the typical police department gives officers notice of two days or more before a department may interrogate an officer based on alleged misconduct.⁸⁹ An officer is entitled to an attorney, like any other a person suspected of a crime, if they are going to be interrogated about criminal behavior.⁹⁰ However, Rushin surveyed 156 police leaders from across the country about the effects of a waiting period on the integrity of an investigation (without specifying that the investigation was of an officer).⁹¹ All those who responded to the survey agreed that interrogation delays burden investigations,⁹² stating 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."⁹³ Others suggested "[the] first 48 hours of an investigation are critical."⁹⁴ 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,⁹⁵ and thereby raises accountability concerns for communities who are harmed by such misconduct.

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.*

⁸⁴ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 656.

⁸⁵ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 657.

⁸⁶ Rushin and DeProspero, *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.

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

⁸⁸ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 672.

⁸⁹ Rushin and DeProspero, *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

⁹⁰ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 664.

⁹¹ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 677.

⁹² Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

⁹³ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

⁹⁴ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 678.

⁹⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1240.

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Some contracts or collective bargaining agreements also require internal investigators to turn over potentially incriminating evidence to an officer prior to interrogation.⁹⁶ In Rushin’s analysis, the most common types of evidence provided are a copy of a civilian complaint and the names of complainants.⁹⁷ Fewer jurisdictions give officers access to video or photographic evidence, such as body worn camera footage, or locational data, such as GPS.⁹⁸ Surveyed police leaders expressed concern that these protections would impair the ability of investigators to uncover the truth.⁹⁹ One police chief described this as “showing all of your cards in a poker game.”¹⁰⁰ Another claimed it allows for “tailor[ing] their lies to fit the evidence.”¹⁰¹ 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.”¹⁰² One respondent worried about inadvertently publicizing the evidence, thereby calling into question the integrity of the investigation.¹⁰³ Virtually no police chief believed these protections were useful in reducing the rate of false confessions.¹⁰⁴

b. Disciplinary Records

During the regular course of business, employers keep personnel files for employees that often contain discipline records and evaluations, among other materials.¹⁰⁵ 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.¹⁰⁶ 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

⁹⁶ Rushin and DeProspero, *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”).

⁹⁷ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 674.

⁹⁸ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 675.

⁹⁹ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

¹⁰⁰ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹⁰¹ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹⁰² Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹⁰³ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 679.

¹⁰⁴ Rushin and DeProspero, *Interrogating Police Officers* (2019) 87 Geo. Wash. L.Rev. 646, 680.

¹⁰⁵ 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].

¹⁰⁶ 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].

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decisions.¹⁰⁷ Some prevent police chiefs from fully using disciplinary records.¹⁰⁸ In another study, Rushin analyzed 178 police contracts, at least 37 of which are from California municipalities,¹⁰⁹ and found that approximately half require removal of personnel records at some point in the future.¹¹⁰ Rushin states that there are compelling policy reasons to remove minor mistakes from records after a period of time¹¹¹ and evidence of wrongdoing may lose relevance or predictive value.¹¹² For example, tardiness from five years prior likely has little to no bearing on an officer's fitness as an officer in present day.¹¹³ However, according to Rushin, a pattern of more serious complaints over decades – even if the complaints are rarely sustained¹¹⁴ – is often demonstrative of an issue that requires management's intervention.¹¹⁵ Rushin states that destruction of disciplinary records makes it more difficult for supervisors to identify officers engaged in a pattern of misconduct.¹¹⁶

c. Civilian Oversight

Community members and advocates recognize the importance of civilian oversight of police.¹¹⁷ Civilian review boards are common across the country¹¹⁸ to allow the community to monitor

¹⁰⁷ 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].

¹⁰⁸ 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].

¹⁰⁹ 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].

¹¹⁰ 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].

¹¹¹ 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].

¹¹² 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].

¹¹³ 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].

¹¹⁴ 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].

¹¹⁵ 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].

¹¹⁶ 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].

¹¹⁷ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1232.

¹¹⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1233.

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police behavior, which can empower vulnerable communities.¹¹⁹ Such oversight builds community trust, ensures transparency, and increases community members' willingness to report complaints against police.¹²⁰

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.¹²¹ Some keep civilians from having the final say in discipline.¹²² Others establish methods for disciplinary determinations that do not leave room for civilian oversight.¹²³ Limiting an external agency from investigating misconduct places more reliance on police departments to police themselves.¹²⁴

d. Complaint Investigations

As discussed in previous Reports, community members may file complaints against officers alleging misconduct.¹²⁵ Civilian complaints are a police accountability mechanism, making their collection and investigation vital.¹²⁶ Union contracts may also affect the investigation of civilian complaints, which in turn affects accountability. Some contracts limit investigation of anonymous complaints;¹²⁷ others may disqualify investigations after a set period of time.¹²⁸ Law

¹¹⁹ 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].

¹²⁰ 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].

¹²¹ 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.

¹²² 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].

¹²³ 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].

¹²⁴ Fegley, *Police Unions and Officer Privileges* (2020) 25 *The Independent Rev.* 165, 175.

¹²⁵ 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].

¹²⁶ 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].

¹²⁷ 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].

¹²⁸ 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.

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enforcement departments have a finite number of resources at their disposal, so there is value in discouraging frivolous complaints and avoiding endless disciplinary investigations.¹²⁹

However, bans on anonymous complaints may discourage some individuals from filing complaints, especially if they were victims of police brutality who fear retribution.¹³⁰ This would discourage some of the most vulnerable people from seeking redress for officer misconduct and prevent management from discovering patterns of egregious conduct.¹³¹ The Board continues to encourage acceptance of anonymous complaints and, therefore, believes a union contract that limits the acceptance and investigation of these complaints hampers accountability. Scholars have found that while time periods limits for investigations may have their benefits, some particularly egregious incidents of police misconduct may not come to light until years after they have occurred.¹³²

e. Arbitration

Collective bargaining agreements also often contain arbitration clauses to adjudicate discipline appeals.¹³³ Arbitration is a common dispute mechanism in public labor¹³⁴ and is a legally binding form of dispute resolution held outside of formal courts.¹³⁵ Nevertheless, using arbitration for peace officers' disciplinary appeals raises accountability concerns. According to research, it almost exclusively reduces disciplinary penalties for officers guilty of misconduct.¹³⁶ Research also shows 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

¹²⁹ 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].

¹³⁰ 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].

¹³¹ 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].

¹³² 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].

¹³³ 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].

¹³⁴ 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].

¹³⁵ 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].

¹³⁶ 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].

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entities.¹³⁷ Studies show arbitrators can reinstate fired officers, sometimes with back pay.¹³⁸ Police chiefs have claimed to be undermined when arbitrators return officers to duty that have multiple incidents of misconduct.¹³⁹ According to researchers, 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.¹⁴⁰ Even when arbitrators side with police supervisors, their imposition of sanctions may be limited.¹⁴¹ 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.¹⁴²

As discussed in this section, law enforcement collective bargaining agreements often contain provisions that directly address discipline and misconduct investigations. Because of this, collective bargaining agreements may significantly affect an agency's ability to investigate and discipline officers, which is at the heart of police accountability. Community members who are victims of police misconduct or racial or identity profiling want reassurance that law enforcement agencies will hold those officers accountable for their harmful behavior.

B. 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 (if they participate with the City), grievances, and arbitration.¹⁴³ According to a police labor-management relations manual drafted by the Office of Community Oriented Policing Services (COPS) of the U.S. Department

¹³⁷ 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].

¹³⁸ 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].

¹³⁹ 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].

¹⁴⁰ 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)

¹⁴¹ 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].

¹⁴² 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).

¹⁴³ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xvii <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

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of Justice, 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.”¹⁴⁴¹⁴⁵ 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.¹⁴⁶ 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.”¹⁴⁷ Moreover, there are not readily apparent best practices to encourage police unions and police management to work together to make the reduction of crime a part of their relationship.¹⁴⁸

The complex relationship between unions and police chiefs may also be due to the inherent politics of union leaders’ election to office. According to the COPS police labor-management relations manual, 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.¹⁴⁹ The manual states that police managers who understand that are not as likely to personalize the conflict.¹⁵⁰ Relatedly, the manual states that 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.¹⁵¹ According to the COPS manual, management and unions can work together to better the agency and community served by the agency.¹⁵² Management and unions are not precluded from cooperative and productive relationships, but there are limits to the cooperation.¹⁵³

Additionally, the composition of the unit has a significant impact on police management.¹⁵⁴ 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.¹⁵⁵ If a supervisor is responsible for reviewing the performance of a subordinate and discipline the

¹⁴⁴ Office of Community Oriented Policing Services, *Police Labor-Management Relations (Vol. I): Perspectives and Practical Solutions for Implementing Change, Making Reforms, and Handling Crises for Managers and Union Leaders* (2006) U.S. Department of Justice, p. xix <<https://cops.usdoj.gov/RIC/Publications/cops-p110-pub.pdf>> [as of XXX].

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subordinate if necessary, it could be a conflict of interest when they are both members of a labor organization that may file a grievance against the supervisor and the department.¹⁵⁶ If supervisors have separate bargaining unions, they can have more autonomy from the interests of the rank and file.

Unions and police management should be working towards community trust.¹⁵⁷ As law enforcement professional Booker Hodges pointed out, “We are to blame for [the public’s poor view of police unions] in part because unlike other unions, we very seldom admit when one of us makes a mistake. An occasional reminder to the public regarding the legal obligation of unions to defend their members and admitting when we make a mistake could go a long way toward improving neighborhood relations . . . A union is required to represent an officer, but in cases where someone has clearly violated our oath of office, publicly defending an officer who has clearly violated our oath of office strains neighborhood relations and erodes trust.”¹⁵⁸ According to legal scholar Samuel Walker, 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.¹⁵⁹ Unions may improve relations with civil rights leaders by supporting, or at a minimum remaining neutral to, civilian review boards.¹⁶⁰ Unions may promote transparency by softening rigid stances against the release of

¹⁵⁷ See *Public Safety Blueprint for Change*, AFL-CIO (May 17, 2021) <<https://aflcio.org/reports/public-safety-blueprint-change>> [as of XXX] (“Effective and efficient public safety depends on securing the confidence, support and partnership of local communities, and engaging with those communities to develop and support initiatives that make for a safe and harmonious place to live for all people. Public safety agencies and communities should partner to solve problems and enhance quality of life in a manner that is fair, impartial, transparent and consistent.”)

¹⁵⁸ *Public Safety Blueprint for Change*, AFL-CIO (May 17, 2021) <<https://aflcio.org/reports/public-safety-blueprint-change>> [as of XXX] (citing Hodges, *What Police Unions Do (and Why It Matters)*, Police1, April 2, 2018, available at police1.com/legal/articles/what-police-unions-do-and-why-it-matters-D11MptG2fXOZZAmH.)

¹⁵⁹ 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).

¹⁶⁰ 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).

¹⁶⁰ 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).

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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.”¹⁶¹

Unions are one influence in the multidimensional police subculture.¹⁶² Culture varies between departments, as does the relative influence of a particular union.¹⁶³ Subculture affects policing, including overall management practices, accountability and discipline, police officer interactions with citizens, and local politics.¹⁶⁴ 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.¹⁶⁵ According to legal scholar Stephen Walker, this public opposition may encourage solidarity among officers while discouraging alternative points of view and, thereby, suppress receptivity to reforms aimed at bringing best practices.¹⁶⁶ It may also contribute to an “us vs. them” mentality.

C. Conclusion

Police unions do well in advocating for and protecting their members, especially for salary and related compensatory benefits. However, as discussed above, researchers have found that police unions negatively affect police accountability through a variety of mechanisms: lobbying and the 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. Altogether, many communities feel that unions place individual officer protections above regulating individuals who have the power to coerce and use force against community

¹⁶¹ Mick, *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)).

¹⁶² 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.

¹⁶³ Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing* (2008) 9 Policy, Practice, and Research 95, 103

¹⁶⁴ 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.’”).

¹⁶⁵ 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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members and reducing the impact of police misconduct and racial and identity profiling on historically marginalized groups.¹⁶⁷

III. The Role of Municipalities

Since unions lobby and negotiate with municipalities, municipalities also play an important role in police accountability. Public bodies representing cities and counties negotiate with unions to reach collective bargaining agreements.¹⁶⁸ 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.¹⁶⁹ The public, especially those marginalized by policing practices, often do not engage in such negotiations, so they rely on their elected officials to represent their interests.¹⁷⁰ Thus, political leaders need to balance the interests of various stakeholders as they bargain¹⁷¹ and, according to legal scholars, focus on enhancing accountability.¹⁷²

As a party to bargaining, municipalities have the ability to place bargaining chips on the table.¹⁷³ Municipalities should do so bearing in mind the various stakeholders municipalities represent

¹⁶⁷ See *The Trouble With Police Unions* (2020) 55 National Affairs

<<https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>> [as of XXX] (“A consensus quickly emerged, asserting that unions protect officers who behave poorly and impede reform that would improve policing and police-community relations. The central idea animating the new consensus is that police-union power has translated into too many officer job protections, enabling a few bad officers to act with impunity. The inability to hold officers accountable poisons public relations and puts American lives at risk. Rolling back protections enshrined in union contracts and state statutes, many now argue, will reduce the use of force by police and increase community trust in law enforcement.”).

¹⁶⁸ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 419.

¹⁶⁹ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 432.

¹⁷⁰ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 422.

¹⁷¹ Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435.

¹⁷² 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.*

¹⁷³ See Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435 (finding that city leaders agree to wage and benefit concessions in exchange for discipline policies and procedures). Setting the policies and procedures of the police department is a managerial function of a local government. Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy* (2021) 74 SMU L.Rev. 419, 435 (citing Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of*

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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.¹⁷⁴ Legal scholars have found that police unions are politically powerful.¹⁷⁵ According to scholar Stephen Rushin, budget-conscious cities may make management concessions, such as changes in discipline policies and procedures, that will greatly affect accountability in the long run.¹⁷⁶ According to Rushin, 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.¹⁷⁷ Rushin states that those affected by police misconduct are often part of a relatively small and politically disadvantaged minority of municipal voters,¹⁷⁸ meaning they may not be able to advocate against such changes and concessions.

According to the COPS manual on police labor and management relationships, negotiating parties should exercise great caution in mixing economic demands with those pertaining to working conditions.¹⁷⁹ According to COPS, “[u]nions 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

Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts, 15 STAN. J. C.R. & C.L. 137, 177-78 (2019)).

¹⁷⁴ 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.

¹⁷⁵ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1215-16

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

¹⁷⁶ 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].

¹⁷⁷ 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].

¹⁷⁸ Rushin, *Police Union Contracts* (2017) 66 Duke. L.J. 1191, 1216

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¹⁷⁹ 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,¹⁸⁰ or other change efforts.”¹⁸¹

IV. Unions as 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.¹⁸² Accordingly, management and policymakers may consider their opinions and points of view. Including the rank-and-file in the discussion of as well as give police a personal stake in public safety.¹⁸³ If officers do not have a voice, management may not find out about the problems with the policies.¹⁸⁴ 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.¹⁸⁵ Legal scholars have found that “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.’”¹⁸⁶

Additionally, Catherine Fisk and L. Song Richardson applied a study of power dynamics to officers and found that when officers have a voice to express their views, it avoids frustration and overt undermining of policies and can favorably influence officers’ attitudes.¹⁸⁷ Research about power reveals that certain exercises of authority, like failing to provide a voice, can breed

¹⁸⁰ 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].

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

¹⁸² Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794

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

¹⁸³ Cunningham et al., *Overview of Research on Collective Bargaining Rights and Law Enforcement Officer’s Bills of Rights*, (2020) p. 12.

¹⁸⁴ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 794

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

¹⁸⁵ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 771

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

¹⁸⁶ 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).

¹⁸⁷ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770

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deep resentment among lower-level employees, resulting in resistance to employer-mandated policies and procedures.¹⁸⁸ For example, in one department, officers resented a new policy created without their input.¹⁸⁹ While they did not overtly resist the policy, some quietly and covertly undermined the policy on the street.¹⁹⁰ Conversely, in another jurisdiction that included officer input in a new policy, officers worked toward improving it despite questioning the substance of the policy.¹⁹¹ Because officers operate primarily out of sight of management, they have many opportunities to covertly resist reform-oriented policies.¹⁹² When resistance is subtle rather than overt, management may not be aware that the policy is not being implemented.¹⁹³

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.¹⁹⁴

Qualified Immunity

I. Current State of Law

Qualified immunity arises when an officer has or may have violated an individual's constitutional rights and a court or jury must determine whether the officer or law enforcement agency will be held liable for that conduct or if the victim will be entitled to compensation for the harm inflicted. According to the Supreme Court of the United States, “[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”¹⁹⁵ Qualified immunity shields law

¹⁸⁸ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 770

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

¹⁸⁹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772

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

¹⁹⁰ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 772

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

¹⁹¹ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 774

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

¹⁹² Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

¹⁹³ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

¹⁹⁴ Fisk and Richardson, *Police Unions* (2017) 85 Geo. Wash. L.Rev. 712, 775

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

¹⁹⁵ *Pearson v. Callahan* (2009) 555 U.S. 223, 231.

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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.”¹⁹⁶ 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.¹⁹⁷ “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.’”¹⁹⁸

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 1967.¹⁹⁹ 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.²⁰⁰ Although the individual parts build upon one another, courts seldom give much consideration to either the first or third points.²⁰¹

A. Discretionary Function

¹⁹⁶ *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 818.

¹⁹⁷ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242. Qualified immunity as applied to 42 United States Code section 1983 is a federal protection, meaning it may only be applied in federal courts. California does not have an equivalent law, but provides immunity protection within statutes. Under California’s Tom Bane Civil Rights Act, citizens can file civil lawsuits against government employees if they interfere by threat, intimidation, or coercion with an individual’s constitutional rights. Civ. Code § 52.1. Senate Bill 2 (2020-2021 Session) added a provision to the Bane Act that eliminated certain immunity provisions. Specifically, the following immunity provisions no longer apply to civil actions brought under the Bane Act against peace officers, custodial officers, or directly against a public agency that employs them: Government Code Section 821.6, which provides immunity to a public employee “for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause”; Government Code Section 844.6, which provides limited immunity to public entities for injuries to, or caused by, a prisoner (subject to a variety of existing exceptions); and Government Code Section 845.6, which provides limited immunity to public entities and public employees for injuries caused by a public employee’s failure to obtain medical care for a prisoner in their custody.

¹⁹⁸ *Pearson v. Callahan* (2009) 555 U.S. 223, 231 (quoting *Groh v. Ramirez* (2004) 540 U.S. 551, 567).

¹⁹⁹ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1241.

²⁰⁰ 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].

²⁰¹ 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]

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Officers' duties may be either ministerial or discretionary. A ministerial duty is a legal obligation and requires an officer to act without using his or her own judgment.²⁰² For example, an officer directing traffic has a ministerial duty to follow established traffic laws.²⁰³ The officer does not have the option to make their own decisions about how to direct traffic but relies on the laws to inform their direction.²⁰⁴ A duty is discretionary if it requires an officer to exercise their judgment to perform the duty.²⁰⁵ 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.

Challenges arise in how to distinguish discretionary functions from ministerial functions.²⁰⁶ The U.S. Supreme Court stated that “judgments surrounding discretionary action almost inevitably are influenced by the decision maker’s experiences, values, and emotions.”²⁰⁷ The Court has provided little guidance beyond that, leaving lower courts to disagree about what, if any, functions, should be classified as ministerial functions.²⁰⁸ Lower courts generally avoid the question of discretionary functions in a qualified immunity analysis, so most courts have concluded that officer were performing discretionary functions.²⁰⁹

B. Clearly Established Law

Most qualified immunity analyses depend on the second question: is the law clearly established?²¹⁰ If an officer violates a clearly established law, qualified immunity does not protect him or her from suit.²¹¹ The U.S. Supreme Court found that “a reasonably competent

²⁰² 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].

²⁰³ 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]

²⁰⁴ LSD.Law Dictionary <<https://www.lsd.law/define/ministerial-duty#:~:text=Definition%3A%20A%20duty%20that%20requires,about%20how%20to%20direct%20traffic>.
<https://definitions.uslegal.com/d/discretionary-duty/>> [as of XXX].

²⁰⁵ <https://definitions.uslegal.com/d/discretionary-duty/> [as of XXX].

²⁰⁶ 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].

²⁰⁷ *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 816.

²⁰⁸ 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].

²⁰⁹ 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]

²¹⁰ 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].

²¹¹ *See Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

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public official should know the law governing his conduct.”²¹² “[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.²¹³ In other words, an officer is not liable for his “reasonable mistakes.”²¹⁴ Determining whether a right is clearly established is a case-by-case analysis.²¹⁵ Under the Court’s current standard, a court should only deny a defendant qualified immunity if every government official in the defendant’s position would know the conduct was illegal.²¹⁶ In other words, a court has to conclude there is a 50.1% chance a reasonable officer would know the conduct was unconstitutional.²¹⁷

“[I]t has become increasingly difficult for courts to conclude that the law is clearly established.”²¹⁸ This is especially true for cases involving the Fourth Amendment,²¹⁹ which protects citizens from unreasonable searches and seizure by the police.²²⁰ In excessive force cases, the U.S. 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.”²²¹ The 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

²¹² *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

²¹³ *Saucier v. Katz* (2001) 533 U.S. 194, 195 (citing *Anderson v. Creighton* (1987) 483 U.S. 635, 640).

²¹⁴ *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1242 (citing *Saucier v. Katz* (2001) 533 U.S. 194, 205).

²¹⁵ *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.”).

²¹⁶ 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].

²¹⁷ 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].

²¹⁸ 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].

²¹⁹ 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].

²²⁰ U.S. Const., 4th Amend.

²²¹ *Kisela v. Hughes* (2018) 138 S. Ct. 1148, 1152–53 (quoting *Mullenix v. Luna* (2015) 136 S. Ct. 305, 309 (per curium)).

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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.²²²

This standard means that officers would need to be well-versed in case law.²²³ 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.²²⁴ 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.²²⁵ Thus, it is not practical to have officers know the details of case law or think through legal arguments when making an arrest.²²⁶ This means the clearly established prong is not often satisfied and qualified immunity applies. Thus, officers are shielded from lawsuits, making accountability difficult for civil damages for violations of constitutional law.

C. Reasonable Officials, Reasonable Reliance, and Extraordinary Circumstances

If an officer "claims extraordinary circumstances and can prove that they neither knew nor should have known of the relevant legal standard," qualified immunity applies.²²⁷ Courts' overall aim is to determine whether it was objectively reasonable for an officer to violate the law under

²²² *District of Columbia v. Wesby*, (2018) 138 S. Ct. 577, 590 (internal citations omitted). This standard means that officers would need to be well versed in case. However, officers are not well versed in case law. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 18 (citing Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983) p. 4-5); *see e.g., Elder v. Holloway* (1994) 510 U.S. 510, 513-14 (exemplifying how police officials may be unaware of controlling appellate decisions). A study that examined officers' familiarity with case law found that nine of the ten departments reported that they provided federal judicial decisions to their police officials, but only four named decisions rendered within the last ten years. Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 28 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7712&context=jclc>> [as of XXX]; *see* Schwartz, *Qualified Immunity's Boldest Lie* (2015) 88 U. Chicago L.R. 605, 649-64.

²²³ 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).

²²⁴ 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.

²²⁵ *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].

²²⁶ 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].

²²⁷ *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

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the circumstances.²²⁸ Typically, when officers claim “extraordinary circumstances,” they argue they relied upon the advice of counsel or some superior official.²²⁹ Courts may consider the following factors for reliance on legal advice: (1) how frequently legal advice is sought; (2) who provided the legal advice; (3) whether the advisor was informed of all the relevant facts; (4) whether the advice was tailored to the specific facts of the case; (4) whether the advice was given before or after the alleged conduct; and (5) whether the officer followed the advice given.²³⁰

II. Balancing State vs. Individual Citizen Interests

Qualified immunity may simultaneously affect the public’s interests and individuals’ interests by affecting police accountability. In discussing the effects of qualified immunity, financial liability and lawsuits are often discussed. An officer’s behavior may be affected, if he or she could be held liable for the behavior.

A. Effects of Financial Liability

Qualified immunity is meant to shield officers from financial liability.²³¹ According to the U.S. 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.²³² Thus, liability incentivizes officers to do their jobs appropriately, which is why immunity is qualified and not absolute. In some instances, individuals’ constitutional rights are violated and those responsible do not pay for the cost.²³³ Many municipalities indemnify their officers, meaning the city would pay for any settlement, not the officers themselves.²³⁴ Qualified immunity scholar Joanna Schwartz found that officers employed by eighty-one jurisdictions, including several of California’s largest law

²²⁸ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 23.

²²⁹ 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”).

²³⁰ Ravenell and Ross, *Qualified Immunity and Unqualified Assumptions* (2022) 112 J. Crim. Law and Criminology 1, 21-22 (citing various federal cases).

²³¹ 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].

²³² *Forrester v. White* (1988) 484 U.S. 219, 223.

²³³ Schwartz, *Police Indemnification* (2014) 89 N.Y.U. L.Rev. 885, 885

²³⁴ 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].

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enforcement agencies, virtually never contributed to settlements and judgments during the six-year study period.²³⁵ 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 extremely cautiously.²³⁶ This excessive caution may lead to decisions that result in officers not fulfilling their duties as they should.²³⁷ The U.S. Supreme Court explained that an officer should not have to choose between dereliction of duty – if he does not arrest someone when there is probable cause –or being forced to pay out damages in a lawsuit if he does.²³⁸ Officers must make split-second decisions in stressful circumstances; according to the International Association of Chiefs of Police, officers may be hesitant to act when the public needs it the most without qualified immunity.²³⁹ 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.²⁴⁰ Additionally, the U.S. Supreme 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.”²⁴¹ However, 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.”²⁴²

²³⁵ 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.*

²³⁶ *Forrester v. White* (1988) 484 U.S. 219, 223.

²³⁷ *Forrester v. White* (1988) 484 U.S. 219, 223.

²³⁸ *Pierson v. Ray* (1967) 386 U.S. 547, 555.

²³⁹ 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].

²⁴⁰ 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].

²⁴¹ 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).

²⁴² Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1813.

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B. Effects on Litigation

The U.S. Supreme Court has also justified qualified immunity as a protection from burdens of discovery and trial in “insubstantial” cases.²⁴³ “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.’”²⁴⁴ According to the U.S. Supreme Court, trials come with financial costs and other costs – distractions from official duties, limiting discretionary actions, and deterrence of able people from law enforcement.²⁴⁵ The Court also believes the public has an interest in avoiding “burdens of broad-reaching discovery,” which may lead to interviews of multiple government officials, and “excessive disruption of government.”²⁴⁶ According to legal scholars, disruptions for law enforcement often entail removing officers from their public safety functions – including patrol or investigative work – to speak with attorneys or testify in court, which removes them from their law enforcement duties in the community.

Qualified immunity doctrine may also discourage individuals from bringing cases when their constitutional rights are violated.²⁴⁷ According to qualified immunity scholar Joanna Schwartz, the law has developed such that attorneys who would represent individuals in lawsuits alleging constitutional law violations may be concerned of case dismissals on qualified immunity grounds, even with egregious facts.²⁴⁸ Meanwhile, Schwartz says that 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.²⁴⁹ These dynamics increase the cost, complexity, and delay of lawsuits, which discourages attorneys, and by extension the individuals they represent, from filing the suits.²⁵⁰

²⁴³ *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.

²⁴⁴ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526 (emphasis deleted)).

²⁴⁵ See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 816.

²⁴⁶ See *Harlow v. Fitzgerald*, (1982) 457 U.S. 800, 817-18.

²⁴⁷ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

²⁴⁸ 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.”)

²⁴⁹ Schwartz, *The Case Against Qualified Immunity* (2018) 93 Notre Dame L.Rev. 1797, 1818.

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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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