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POLICE DISCIPLINARY APPEALS

STEPHEN RUSHIN†

This Article argues that police disciplinary appeals serve as an underappreciated barrier to officer accountability and organizational reform. Scholars and experts generally agree that rigorous enforcement of internal regulations within a police department promotes constitutional policing by deterring future misconduct and removing unfit officers from the streets. In recent years, though, a troubling pattern has emerged. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers who have engaged in serious misconduct. Little legal research has comprehensively examined the appeals process available to officers facing disciplinary sanctions.

† Assistant Professor, Loyola University Chicago School of Law. Thank you to my colleagues who provided valuable feedback on earlier drafts of this paper. This paper also benefitted from presentations at Loyola University Chicago School of Law, the Law and Society Annual Meeting in Toronto, and Northern Illinois University's Chicagoland Junior Scholars Work-in-Progress Conference.

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

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INTRODUCTION

In August of 2015, an officer with the San Antonio Police Department (SAPD) reported to the scene of an apparent shooting in the city's South Side neighborhood.¹ While collecting evidence, the officer encountered forty-eight-year-old neighborhood resident Elroy Leal, who pointed out several bullet casings that the officer had missed during his inspection of the crime scene.² The situation quickly escalated,³ and moments later, the officer placed Mr. Leal under arrest.⁴

At this point, a dash camera captured video and audio of a disturbing series of events, as Mr. Leal sat handcuffed in the back of the officer's squad car.⁵ Throughout the seventeen minutes of video released by the SAPD, the officer appeared to verbally berate Mr. Leal,⁶ describing him as a "trashy human being,"⁷ mocking his intelligence,⁸ and labeling him as "disrespectful."⁹ When

¹ Kimbriell Kelly et al., *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired> [<https://perma.cc/S4YE-4Y4Y>] (describing the San Antonio incident, along with a number of other similar incidents where police officers were eventually rehired through the appeals process after termination); Mark D. Wilson, *Video: SAPD Officer Suspended After Challenging Arrestee to Fight, Removing Handcuffs*, SAN ANTONIO EXPRESS, <http://www.mysanantonio.com/news/local/crime/article/VIDEO-SAPD-officer-agreed-to-fight-man-during-7973241.php> [<https://perma.cc/ZD7D-LKEM>] (last updated June 10, 2016) (stating that the event took place in the South Side neighborhood of San Antonio, at 5 a.m. in the 3100 block of Cahmita Street).

² According to Mr. Leal, this officer became upset after he said: "Hey cop, can I walk through here? Hey, some investigation you guys did." Michael Barajas, *San Antonio Cop Arrests, Berates and Threatens to Fight Man for Being "Disrespectful"*, SAN ANTONIO CURRENT (June 9, 2016, 8:30 AM), <https://www.sacurrent.com/the-daily/archives/2016/06/09/san-antonio-cop-arrests-berates-and-threatens-to-fight-man-for-being-disrespectful> [<https://perma.cc/P94A-NFK8>].

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

⁴ E.g. Tim Gerber, *City Releases Video of SAPD Officer Agreeing to Fight Suspect, Removing His Handcuffs*, ABC KSAT 12 NEWS (June 7, 2016, 9:45 PM), <https://www.ksat.com/news/defenders/city-releases-video-of-sapd-officer-agreeing-to-fight-suspect-removing-his-handcuffs> [<https://perma.cc/TQ8E-VUHP>] ("[The officer] had arrested Leal last August for interfering with the duties of a public servant at the scene of a shooting.").

⁵ See *id.* (providing a link to a YouTube video of the dash camera footage).

⁶ In addition to the comments discussed elsewhere in this summary, *supra* note 3, the officer also called Mr. Leal a "sorry human being." Barajas, *supra* note 2.

⁷ Barajas, *supra* note 2.

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

⁹ *Id.*

Mr. Leal asked why he was under arrest, the officer replied that he would “think of something.”¹⁰ But perhaps most disturbing of all, as Mr. Leal sat handcuffed in the back of the squad car, the officer challenged Mr. Leal to a fistfight for the chance to be released.¹¹

The dash camera video understandably shocked police supervisors and officials in the district attorney’s office.¹² Soon thereafter, the SAPD moved to fire the officer involved in Mr. Leal’s unlawful arrest.¹³ But before the SAPD could finalize the firing, Texas law and the San Antonio police union contract provide officers with the right to appeal disciplinary decisions to a “qualified, neutral arbitrator.¹⁴ Arbitrators, selected in part by the officer under investigation,¹⁵ have the power to review the factual and legal justification for disciplinary actions taken against an officer.¹⁶ And a decision handed down by such an arbitrator is binding, effectively

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

¹¹ The officer actually went to the back of the squad car and took off Mr. Leal’s handcuffs, seemingly in hopes of engaging in a fistfight. The officer promised that he would “beat [Mr. Leal’s] ass.” Kelly et al., *supra* note 1.

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

¹³ *Officer to be Fired for Challenging Man to Fight*, ALBUQUERQUE J. (June 11, 2016, 10:23 AM), <https://www.abqjournal.com/790351/officer-to-be-fired-for-challenging-arrested-man-to-fight.html> [<https://perma.cc/YM74-P8RX>] (noting that the SAPD gave Officer Belver an indefinite suspension for violating departmental policies). Section 143.052 of the Texas Local Government Code, which governs disciplinary suspensions in communities like San Antonio, describes an “indefinite suspension” as “equivalent to dismissal from the department.” TEX. LOC. GOV’T CODE ANN. § 143.052(b) (2017).

¹⁴ TEX. LOCAL GOV’T CODE ANN. § 143.057(d) (2017). Texas Local Government Code Section 143.053 deals with appeals of disciplinary suspensions for communities with a population under 1.5 million, providing officers with the ability to appeal suspensions to the civil service commission. But under Texas Local Government Code Section 143.057, police officers have the option to waive the right to appeal to the civil service commission, and instead appeal to an “independent third party hearing examiner” defined as a “qualified neutral arbitrator.” *See also* Collective Bargaining Agreement Between the City of San Antonio and the San Antonio Police Officers’ Association, at 73-80 (Sept. 23, 2016) [hereinafter San Antonio Collective Bargaining Agreement] (on file with author).

¹⁵ TEX. LOCAL GOV’T CODE ANN. § 143.057(d) (2017) (noting that the officer and the police supervisor may each alternately strike names of potential arbitrators from a panel of seven arbitrators provided by the American Arbitration Association or the Federal Mediation and Conciliation Service). San Antonio Collective Bargaining agreement, *supra* note 14, at 75.

¹⁶ Section 143.057(d) appears to provide no explicit limitation on the arbitrator’s authority to re-evaluate the factual and legal grounding for a supervisor’s disciplinary decision. The union contract requires the SAPD to prove its case on appeal by a preponderance of evidence. *Id.* at 76.

overruling any decisions made by a police chief, mayor, city council, or civilian review board.¹⁷

This particular officer was no stranger to the disciplinary appeals process. Six years earlier, he stood accused of number of serious incidents of misconduct, including a suspiciously similar allegation that he challenged a different man to a fistfight after a drunk driving arrest.¹⁸ In that case, the SAPD also attempted to fire the officer, only to have an arbitrator on appeal reduce his termination to a mere thirty-day suspension.¹⁹

But this time seemed different. The entire exchange between Mr. Leal and the officer was caught on video, leaving no doubt about the facts in this case. And since this was the second time that this officer had apparently challenged a suspect in custody to a fight, it raised even more serious concerns about his temperament and judgment. However, an arbitrator *again* ordered the SAPD to rehire the officer.²⁰

Stories like this should worry police reform advocates. Scholars and experts generally agree that to promote the protection of constitutional rights, police supervisors must consistently investigate and respond to officer misconduct. Theoretically, rigorous enforcement of departmental regulations deters future misconduct and removes unfit officers from the streets.²¹ But in recent years, various media outlets have observed a troubling

¹⁷ TEX. LOCAL GOV'T CODE ANN. § 143.057(c) (2017) (“The hearing examiner’s decision is final and binding on all parties. If the . . . police officer decides to appeal to an independent third party hearing examiner, the person automatically waives all rights to appeal to a district court . . .”).

¹⁸ The victim in the earlier case claimed that this officer promised to let him go if he could “kick his [a—].” Kelly et al., *supra* note 1. Additionally, “[b]y the time Flores reached the police detention center, he had a bruised left eye, injuries to his back and neck, and a large bruise across his face . . .” *Id.* In addition, the SAPD found that the officer assaulted a different man after entering the man’s home without a warrant. *Id.*

¹⁹ *Id.* After the department was forced to rehire the officer, it made him sign a “last chance agreement” that premised his future employment on no future misconduct and limited his ability to patrol the streets alone. *Id.*

²⁰ More specifically, the arbitrator found that, under the terms of the San Antonio police union contract, supervisors could not consider his past misconduct in their decision to terminate him, since it had taken place over 180 days earlier. *Id.* This, according to the police union and the arbitrator, made the “last chance agreement” effectively null and void. *Id.* As a result, the arbitrator concluded that the city could only consider the immediate circumstances of the behavior in question, making termination an unreasonably harsh punishment. *Id.*; see also Tim Gerber, *SAPD Officer Appeals Termination, Wins Job Back Through Arbitration*, ABC KSAT 12 NEWS (April 27, 2017, 9:47 PM), <https://www.ksat.com/news/defenders/sapd-officer-appeals-termination-wins-job-back-through-arbitration> [<https://perma.cc/D2HY-KVBH>] (elaborating on the rehiring and providing a link to the decision handed down by the arbitrator).

²¹ As Judge Thelton Henderson of the U.S. District Court for the Northern District of California observed, “[j]ust like any failure to impose appropriate discipline by the [police] chief or city administrator, any reversal of appropriate discipline [during the appeals process] undermines the very objectives of [the reform program].” Matthew Artz, *Judge Orders Investigation into Oakland’s Police Arbitration Losses*, MERCURY NEWS (Aug. 14, 2014, 1:38 PM),

pattern. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers that have committed egregious acts of misconduct.²² The story from San Antonio is hardly unique.

The media has documented similar stories in police departments across the country. For example, in 2007 an Oakland police officer shot and killed an unarmed twenty-year-old man.²³ Only a few months later, the same officer “killed *another* unarmed man, shooting him three times in the back as he ran away.”²⁴ Oakland paid a \$650,000 settlement to the family of the deceased man and fired the officer.²⁵ But during the disciplinary appeals process, an arbitrator ordered Oakland to reinstate the officer and awarded him back pay.²⁶ Similarly, an arbitrator overruled a decision by the police department in Sarasota, Florida to fire an officer who misled investigators after being caught on camera repeatedly and excessively beating a suspect without justification.²⁷ And in Washington, D.C., police officials fired an officer after his criminal conviction for sexually abusing a teenager in his squad car, only to have an arbitrator order him rehired on appeal.²⁸

In each of these cases and hundreds of others like them across the country,²⁹ police disciplinary appeals have forced communities to rehire

<http://www.mercurynews.com/2014/08/14/judge-orders-investigation-into-oaklands-police-arbitration-losses> [<https://perma.cc/UHB8-UHG2>]. These comments came after reports emerged that the police union was successful in reducing or overturning punishment against officers in twelve of the previous fifteen cases.

²² See, e.g., Kelly et al., *supra* note 1 (showing that in a survey of large American police departments, approximately twenty-three percent of officers won their jobs back through appeals after being terminated for misconduct).

²³ Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Streets*, ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258> [<https://perma.cc/TJG9-J3YS>].

²⁴ *Id.* (emphasis added); see also Sean Maher, *Early Report Shows Oakland Police Shot Man in Back*, E. BAY TIMES (July 28, 2008, 4:56 PM), <http://www.eastbaytimes.com/2008/07/28/early-report-shows-oakland-police-shot-man-in-back> [<https://perma.cc/S48S-PEQP>].

²⁵ Henry K. Lee, *Fatal Shooting to Cost Oakland \$650,000*, S.F. GATE (July 8, 2009, 4:00 AM), <http://www.sfgate.com/bayarea/article/Fatal-police-shooting-to-cost-Oakland-650-000-3224969.php> [<https://perma.cc/8AU7-72CN>].

²⁶ Henry K. Lee, *Oakland Must Rehire Cop Who Shot Suspect in Back*, S.F. GATE (March 5, 2011, 4:00 AM), <http://www.sfgate.com/crime/article/Oakland-must-rehire-cop-who-shot-suspect-in-back-2528215.php> [<https://perma.cc/L9UK-S3WQ>]; Sean Maher, *Oakland Police Officer to Be Reinstated*, MERCURY NEWS (Mar. 6, 2011, 11:11 AM), <http://www.mercurynews.com/2011/03/06/oakland-police-officer-to-be-reinstated> [<https://perma.cc/8SGB-CGH5>].

²⁷ See Friedersdorf, *supra* note 23 (describing the incidence and additionally noting that after the incident, the officer told investigators that he “should have killed him”).

²⁸ See Kelly et al., *supra* note 1 (discussing the firing, the subsequent order to rehire, and the efforts by the city to keep the officer, Michael Blaise Sugg-Edwards, out of the department).

²⁹ For example, in Portland, Oregon, an arbitrator ordered the rehiring of a police officer who had allegedly unjustifiably killed an unarmed twenty-five-year-old. See Everton Bailey Jr., *Portland Must Rehire Cop Fired After Killing Unarmed Man in 2010, Court Rules*, OREGONIAN (Dec. 31, 2015),

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

This is in part because police disciplinary appeals vary from one jurisdiction to another.³⁰ These procedures are often articulated not just in state statutes or municipal codes, but also in department-specific police union contracts. Given that there are thousands of decentralized police departments in the United States,³¹ each with their own municipal codes, internal policies, and union contracts,³² the content of police disciplinary appeals procedures has largely escaped scholarly inquiry.

To begin filling this gap in the literature, this Article analyzes disciplinary appeals procedures across a large number of American police departments. It draws on a dataset of 656 police union contracts collected via open record requests, searches of municipal websites, state repositories, and the web.³³

This dataset provides a detailed account of the disciplinary appeals process available to a large number of American police officers working at the state and local level.³⁴ The vast majority of these police departments give officers the ability to appeal disciplinary sanctions through multiple levels of appellate review.³⁵ At the end of this complex process, the majority of departments permit officers to appeal disciplinary sanctions to an arbitrator selected in part by the

https://www.oregonlive.com/portland/index.ssf/2015/12/portland_must_rehire_cop_fired.html [<https://perma.cc/9XV4-SQZM>] (explaining that the Oregon Court of Appeals ultimately reaffirmed an arbitrator and state board's order to reinstate the officer). And in New London, Connecticut, an arbitrator ordered the rehiring of a police officer who shot and paralyzed an unarmed man. *Connecticut Town Rehires Officer Who Shot Unarmed Man*, NEW HAVEN REG., (Mar. 18, 2014, 8:16 AM), <https://www.nhregister.com/connecticut/article/Connecticut-town-rehires-officer-who-shot-unarmed-11367888.php> [<https://perma.cc/Z3SL-BVRD>]. In 2008, the Pittsburgh Bureau of Police fired an officer for "accidentally shooting a 20-year-old man he was trying to pistol whip" at the officer's wife's birthday party, only to have an arbitrator order the bureau to rehire him. Friedersdorf, *supra* note 23.

³⁰ See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1258-66 (2017) (showing that some police departments' collective bargaining agreements "provide[] for arbitration" and others do not).

³¹ See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/22VR-UCZ9>] (estimating that there are around 17,985 police and law enforcement agencies in the United States).

³² The majority of police officers are part of labor unions that collectively negotiate their own contracts with their local police department. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), <http://bjs.gov/content/pub/pdf/lpd07.pdf> [<https://perma.cc/F8G6-ULEG>] (noting that about two-thirds of police officers are part of departments that authorize collective bargaining).

³³ See *infra* Part III (describing in more detail the methodology for this project). This dataset builds on the work of prior researchers.

³⁴ See *infra* Part III.

³⁵ See *infra* Section IV.A (finding that approximately seventy-three percent of police departments studied used some form of outside arbitrators in the disciplinary appeals process).

local police union.³⁶ And in virtually all of these cases, police departments give arbitrators significant authority to re-litigate the factual and legal grounds for disciplinary action.³⁷ While each of these appellate procedures may be individually defensible, they could theoretically combine in a large number of police departments to create a formidable barrier to accountability.

This hypothesis has several important implications for the literature on police accountability. First, these findings demonstrate that, in most American police departments, police supervisors, city councils, mayors, and civilian review boards are often not the true adjudicators of internal discipline. The final authority on disciplinary actions frequently rests with outside arbitrators or third parties.³⁸ This suggests that the average American police officer faces even less democratic accountability than many scholars have previously assumed.

Second, the complexity and formidability of the disciplinary appeals process may explain the inability of traditional external legal mechanisms to promote reform in American police departments.³⁹ In many documented cases, supervisors have been forced to rehire officers that have engaged in criminal offenses, violence, and other behaviors that raise serious questions about their fitness to serve in any law enforcement capacity.⁴⁰ Sometimes, the offenses committed by rehired officers raise serious enough concerns about an officer's proclivity towards dishonesty that prosecutors are required to place the officer on a *Brady* list⁴¹ and reassign them so as to avoid impairing future criminal prosecutions. This suggests that supervisors may be limited in their ability to bring about important personnel changes that could remedy patterns of misconduct within a police department.

³⁶ See *infra* Section IV.B (finding that fifty-four percent of police departments studied allow unions significant authority in choosing the arbitrators who will hear disciplinary appeals).

³⁷ See *infra* Section IV.C (finding that around seventy percent of departments studied gave arbitrators authority to conduct "expansive" or "de novo" review of disciplinary determinations).

³⁸ See, e.g., Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1039-43, 1047-48, 1052 (2016) (providing an excellent and detailed summary of civilian review models across a large number of American cities, but spending somewhat less time considering how disciplinary appeals may make civilian review more symbolic than substantive).

³⁹ See *infra* Section IV.E (describing the implications of these findings for the effectiveness of the exclusionary rule, civil litigation, criminal prosecution, civilian review boards, and structural reform litigation as regulatory mechanisms).

⁴⁰ See generally Friedersdorf, *supra* note 23 (providing numerous, detailed examples of officers who were removed from police forces following internal investigations or criminal prosecutions and subsequently reinstated following arbitration); Kelly et al., *supra* note 1 (providing even more examples of the same).

⁴¹ See, e.g., Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 749-51, 762-79 (2015) (describing the requirements imparted by *Brady* and how they interact with records of officer misconduct).

Based on these findings, this Article offers some preliminary thoughts on how communities could reform the police disciplinary appeal process. For one thing, states and localities could increase democratic accountability in police disciplinary appeals. To be clear, police officers deserve procedural protections to avoid arbitrary punishment. However, in many police departments across the country, disciplinary procedures seem as if they are designed to insulate officers from democratic oversight. Thus, to the extent that communities want to promote democratic oversight of police behavior, policymakers could replace arbitrators with democratically accountable actors.⁴² A number of police departments already do this, by providing officers with an opportunity to appeal discipline levied by a police supervisor to civilian review boards, city councils, mayors, or city managers.⁴³

Nevertheless, many police officers and union leaders may understandably argue that appellate procedures are designed to provide a check on the discretionary authority of democratic actors.⁴⁴ A city council member, mayor, civilian review board, or city manager may not be sufficiently detached from police department supervisors so as to make an impartial decision on an internal disciplinary matter. By contrast, police unions may argue that arbitrators are truly neutral and disinterested parties, and thus well situated to adjudicate disciplinary appeals.

Thus, if communities continue using appellate procedures like arbitration in cases of disciplinary appeals, this Article proposes several steps that communities could take to balance the need for impartiality and with the community interest in democratic accountability. For example, communities could follow the lead of cities like Grand Rapids, Michigan, and Fullerton, California, in giving arbitrators narrower standards of

⁴² See *infra* Section V.A (proposing that appellate review authority be vested in actors like city councils, mayors, city managers, or civilian review boards).

⁴³ For example, in Murrieta, California, officers have the ability to appeal punishment handed down by the police chief to the City Manager. The City Manager must then hold a hearing, where he or she determines whether the punishment is supported by evidence. While employees can challenge the City Manager's decision to advisory arbitration, the arbitrator's decision is not binding on the city. See Memorandum of Understanding Between the City of Murrieta and the Murrieta Police Officers Association 5-10 (2007) (on file with author) [hereinafter City of Murrieta]. Other cities allow for officers to appeal disciplinary decisions to an arbitrator, but they make these arbitrators' decisions advisory. In such cases they often give power to the City Manager, or a similar actor, to determine the final disposition. See, e.g., City of Oxnard, Memorandum of Understanding Between City of Oxnard and Oxnard Peace Officers' Association 21-23 (2016), <https://www.oxnard.org/wp-content/uploads/2016/11/OPOA-MOU.pdf> [<https://perma.cc/26EC-6AQP>] (giving the City Manager authority to depart from the "advisory recommendation of the arbitrator," including to impose "new and more severe discipline").

⁴⁴ Cf. Ofer, *supra* note 38, at 1050 ("Police officers who are accused of wrongdoing must be fully protected from false accusations and must enjoy the full range of due process protections in all stages of the investigatory and disciplinary process, including . . . the right to appeal the substantiation or the discipline.").

review,⁴⁵ or limiting their ability to reduce punishment if the evidence supports the alleged violation.⁴⁶ Such a move would provide more deference to disciplinary decisions made by democratically accountable representatives of the community, while still empowering theoretically disinterested third parties like arbitrators to provide relief in cases of truly arbitrary or capricious punishment.

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

I. THE INTERNAL DISCIPLINARY PROCESS IN AMERICAN POLICE DEPARTMENTS

Modern policing scholars widely recognize that individual acts of officer misconduct are often symptoms of broader organizational deficiencies within law enforcement agencies.⁴⁷ Thus, in order to address police misconduct effectively, the law must not only punish “bad apples,”⁴⁸ but also incentivize the nation’s roughly 18,000 state and local police

⁴⁵ For example, the Grand Rapids contract states that an arbitrator “shall be limited to a determination of the facts only and shall have no authority to modify the discipline imposed if the facts support the violation.” This effectively means that the arbitrator can review the factual sufficiency of the allegations against an officer, but the arbitrator cannot exercise their own personal judgment about the proper punishment. Agreement Between City of Grand Rapids and the Grand Rapids Police Officer Association, Office and Sergeant Unit 6 (2016), <https://www.grandrapidsmi.gov/files/assets/public/departments/administrative-services/files/labor-union-contracts/police-officers-and-sergeants-contract-070116-063019.pdf> [https://perma.cc/U7LL-AYCG].

⁴⁶ The Fullerton contract says that an arbitration may not overrule, reverse, or modify a city’s decision unless in the arbitrator finds the city has violated the terms of the contract, or if the city’s decision is “arbitrary, capricious, discriminatory or otherwise unreasonable.” Agreement Between the City of Fullerton and the Fullerton Police Officers Association Police Safety Unit 45 (2015), <https://www.cityoffullerton.com/civicax/filebank/blobdload.aspx?BlobID=23642> [https://perma.cc/BRT6-B22Y] [hereinafter City of Fullerton].

⁴⁷ See, e.g., Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493-514 (2004) (arguing that police misconduct is caused in part by organizational deficiencies).

⁴⁸ See Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 135 (2016) (“After all, every large organization will have a few bad apples. In the absence of any national statistics on local behavior, it can be difficult . . . to prove that an individual act of police misconduct is connected to a broader problem within a police department.”).

departments⁴⁹ to implement rigorous internal oversight and disciplinary procedures. The law primarily relies on a handful of external, legal mechanisms⁵⁰ to do this: the exclusionary rule,⁵¹ criminal prosecution,⁵² and

⁴⁹ Reaves, *supra* note 31.

⁵⁰ This list, of course, leaves off other major forms of police regulation like structural reform litigation and state licensing or accreditation, which have received some scholarly discussion—although less so than the exclusionary rule, criminal prosecution, and civil litigation. *See, e.g.*, Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 546 (2001) (“Without a mechanism at the state or national level to remove the certificate of law enforcement officials who engage in such misconduct, it is likely that there will be more such instances of repeated misconduct.”). *See generally*, Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008) (arguing for a more collaborative approach to § 14141 enforcement); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1417 (2000) (offering a normative recommendation for improving the DOJ’s use of § 14141 litigation); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2010) (offering normative recommendations for improving the DOJ’s implementation of § 14141); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3193 (2014) [hereinafter Rushin, *Federal Enforcement*] (assessing § 14141 implementation empirically); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1349 (2015) [hereinafter Rushin, *Structural Reform Litigation*] (providing an empirical assessment of the use of the DOJ’s implementation of § 14141).

⁵¹ The exclusionary rule prohibits prosecutors from admitting evidence in criminal trials in state and federal courts obtained by police in violation of the Constitution. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (expanding the exclusionary rule to cover wrongdoing by state and local police, not just federal law enforcement); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-92 (1920) (extending the exclusionary rule to address both illegally obtained material and copies of illegally obtained material, establishing the groundwork for the “fruit of the poisonous tree” doctrine); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule at the federal level, but not applying it to the states), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

Theoretically, the exclusionary rule deters officer misconduct by removing the incentive for such behavior. *Elkins v. United States*, 364 U.S. 206, 217 (1960) (“The rule is calculated to prevent, not to repair. Its purpose is to deter . . . by removing the incentive to disregard it.”). However, there is debate about whether the exclusionary rule contributes to meaningful change in police departments. *Compare* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 359 (1991) (arguing that, with sufficient institutional support, the exclusion rule can stand as a significant deterrent against police misconduct), *and* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987) (finding that the Chicago Police Department underwent some reforms after implementation of exclusionary rule), *with* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 322-23 (2d ed. 2008) (arguing the exclusionary rule is ineffective at bringing about real change).

⁵² Police officers can be subject to criminal prosecution at the state or federal level. At the federal level, under 18 U.S.C. § 242 (2012), police officers can be subject to criminal prosecution if their conduct willfully deprives someone of their constitutional rights. At the state level, prosecutors can bring charges against police officers for any criminal law violation, subject to the usual protections afforded to criminal suspects, including criminal defenses like self-defense. Scholars recognize that only a small subset of police misconduct constitute criminal acts, making it an underinclusive method for addressing the wide range of officer misconduct. *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815,

civil litigation.⁵³ Each of these mechanisms penalizes individual acts of unlawful behavior by frontline police officers, which in the aggregate should theoretically force rational police supervisors to enact rigorous internal oversight and disciplinary procedures within their police agencies.⁵⁴

But for decades, researchers have lamented the apparent failure of these external mechanisms to usher in the desired organizational reform. Scholars have offered a wide range of explanations for the failure of these mechanisms. Some have argued that, because of the organization of municipal governments, police departments fail to internalize the costs imposed by civil judgments.⁵⁵ Others have pointed out that courts have established dozens of exceptions to the exclusionary rule, making it less effective at discouraging officer

842 n.138 (1999) (“[C]riminal law standards define ‘the outer limits of what is permissible in society’—not the good police practices that police reformers aspire to institute in a wayward department.” (quoting PAUL CHEVIGNY, *EDGE OF THE KNIFE* 101 (1995))).

⁵³ Victims of police misconduct can file civil suit in federal district court, if the officer’s conduct violated their constitutional rights. 42 U.S.C. § 1983 (2012). But in order to be successful, individuals must overcome the qualified immunity doctrine, wherein government actors are exempt from civil liability unless they are violating a “clearly established statutory or constitutional right[.]” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also* *Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002) (defining what makes a right clearly established); *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999) (providing a clearer definition of when a right is clearly established); *Harlow*, 457 U.S. at 806-08 (1982) (limiting the availability of civil suit in cases where a public official is protected by qualified immunity). Individuals can also file suit against a police department or municipality, but only if they can show that the officer’s conduct was caused by the employer’s deliberate indifference in its failure to train or oversee its employee. *See* *Canton v. Harris*, 489 U.S. 378, 387 (1989) (establishing the deliberate indifference in a failure to train as the standard for municipal liability); *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 700-01 (1978) (upholding municipal liability for § 1983 claims in some cases). Some research suggests § 1983 may bring about reform in police departments. *See, e.g.*, CHARLES R. EPP, *MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE* 95 (2009) (showing that insurance companies pushed reform in police departments in response to the expansion of municipal liability). Nevertheless, indemnification policies in municipalities seem to undermine many of the fundamental assumptions underlying the court’s doctrine on § 1983 cases. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (showing the prevalence of indemnification policies across American police departments).

⁵⁴ In my previous research, I have described each of these existing responses to police misconduct as “cost-raising” regulations. *See* Rushin, *Structural Reform Litigation*, *supra* note 50, at 1352 (“That is to say, these traditional approaches attempt to dissuade police wrongdoing by raising the potential costs of such behavior. They cannot force police departments to adopt proactive reforms aimed at curbing misconduct.”).

⁵⁵ *See, e.g.*, Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479, 495 (2009) (showing how the organization of municipal governments often means that municipalities do not properly internalize the consequences of police misconduct). *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 144 (2016) (providing a detailed empirical assessment of how many communities pay for the costs of police officer misconduct and finding that budgetary arrangements often lessen the impact of these lawsuits on police agencies).

wrongdoing.⁵⁶ And still others have recognized that, for a number of practical and structural reasons, officers are rarely subject to criminal punishment.⁵⁷

An emerging thread of scholarship has shown that police supervisors face another significant hurdle in responding to officer misconduct: a complex web of labor and employment laws that define the procedural requirements police supervisors must follow when investigating or punishing officers for misconduct.⁵⁸ These labor and employment protections come from several sources: police union contracts, law enforcement officer bills of rights, and civil service statutes. These three sources also frequently articulate the procedures used by police officers appealing internal disciplinary action. The following sections will address each in turn, while focusing specifically on how these mechanisms establish the disciplinary appeals process in American police departments.

A. Police Union Contracts

Police officers are a relatively “new addition to the labor movement.”⁵⁹ For much of American history, police officers did not have the legal right to unionize, in part because of the “disastrous Boston Police Department Strike of 1919, in which over a thousand officers—about two-thirds of Boston’s police force at the time—made a bid for higher pay and better hours by walking off the job or refusing to report for duty,” leading to riots, property damage, and

⁵⁶ See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504-27 (1996) (detailing how the Supreme Court has gradually recognized numerous exceptions to the exclusionary rule); see also *United States v. Leon*, 468 U.S. 897, 924-25 (1984) (establishing a good-faith exception to the exclusionary rule); *Nix v. Williams*, 467 U.S. 431, 449-50 (1984) (establishing the inevitable discovery exception to the exclusionary rule); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (striking down the silver platter doctrine); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 183 (2012) (explaining how the exclusionary rule only applies to public law enforcement, and not private police agents).

⁵⁷ For example, of the thousands of cases of police officers killing civilians from 2005 through 2015, the Washington Post only found evidence that fifty-four officers were charged for any crimes. Kimbriell Kelly & Kimberly Kindy, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted> [<https://perma.cc/KH47-EC66>].

⁵⁸ See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799 (2012) (describing collective bargaining as a sort of “tax” on police reform); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205-17 (2014) (discussing how labor laws and collective bargaining agreements can “frustrate attempts to discipline individual officers” by “giv[ing] line officers more authority to define the police role”).

⁵⁹ Rushin, *supra* note 30, at 1203.

numerous deaths.⁶⁰ It would be decades after the Boston riots before police began, in earnest, to win the right to unionize and collectively bargain.⁶¹

Today, the tide has turned dramatically. The majority of police officers are part of police unions,⁶² and police unionization has strong supporters on both sides of the political aisle.⁶³ State statutes on the topic generally permit police officers to bargain collectively on any matter related to wages, hours, and other conditions of employment. Terms like “wages” and “hours” give police unions the right to negotiate about anything that affects compensation or benefits, either directly or indirectly.⁶⁴ Terms like “conditions of employment” present some interpretive complexity. If read broadly, this sort of language can become a “catchall phrase into which almost any proposal may fall.”⁶⁵ To prevent such a broad interpretation, courts and state labor relations boards have found that so-called managerial prerogatives are not subject to collective bargaining as conditions of employment.⁶⁶ For all practical purposes, though, courts have held that many disciplinary procedures qualify as conditions of employment rather than managerial prerogatives.⁶⁷

⁶⁰ Stoughton, *supra* note 58, at 2206; *see also* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE: 1900–1962, at 14 (2004) (chronicling how these events led to court opinions, labor opponents, and policymakers frequently citing the Boston strike “as a cautionary tale of the evils of such [police] unions”).

⁶¹ Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017) (“Unions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s, as rank-and-file officers felt attacked by the civil rights movement’s focus on police brutality and racism and by federal court decisions limiting police officers’ investigatory and arrest powers.”).

⁶² According to one estimate, there are five states that explicitly bar police unionization under state law: Georgia, North Carolina, South Carolina, Tennessee, and Virginia. MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 4-5 (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/9LVN-RD9V>]. Four states have no clear statutory mandate on the topic: Alabama, Colorado, Mississippi, and Wyoming. *Id.* The remaining states either permit or require collective bargaining in police departments. *Id.* This means that, according to one estimate, around sixty-six percent of police officers are employed by departments that engage in collective bargaining. REAVES, *supra* note 32, at 13.

⁶³ Rushin, *supra* note 30, at 1206 (“[P]olitical leaders on both sides of the aisle who once rejected police unionization as a threat to public safety have now widely embraced it.”).

⁶⁴ Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Relations*, 84 A.L.R. Fed. 3d Art. 3, at 242, 249-50 (1978) (showing that courts have generally understood terms like “wages” to permit public employees to bargain about wages or salaries, fringe benefits, health insurance, life insurance, retirement benefits, sick leave, vacation time, and other forms of indirect compensation).

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

⁶⁶ *See* Tussey, *supra* note 64, at 249.

⁶⁷ *See, e.g., City of Casselberry v. Orange Cty. Police Benevolent Ass’n*, 482 So. 2d 336, 337-38, 340-41 (Fla. 1986) (concluding that municipalities must bargain collectively on issues of discharge and demotion as needed to provide alternative grievance procedures); *City of Reno v. Reno Police Protective Ass’n*, 653 P.2d 156, 158 (Nev. 1982) (upholding state labor relations agency’s determination that a city must negotiate in good faith with a police department over disciplinary procedures); *Union Twp. Bd. of Trs. v. Fraternal Order of Police, Ohio Valley Lodge No. 112*, 766

Some research has explored the ways that the collective bargaining process may contribute to internal policies and procedures that thwart police accountability efforts.⁶⁸ These studies have found that police union contracts frequently include language that impedes officer investigation and oversight by delaying officer interrogations,⁶⁹ limiting civilian oversight,⁷⁰ expunging records of prior officer misconduct,⁷¹ and more.⁷² At least one study has

N.E.2d 1027, 1031, 1034 (Ohio Ct. App. 2001) (holding that the department must bargain collectively over disciplinary procedures); *but c.f.* Berkeley Police Ass'n v. City of Berkeley, 143 Cal. Rptr. 255, 260 (Cal. Ct. App. 1977) (holding that a policy allowing members of a citizen review board to meet and confer with the police union any time a new civil oversight mechanism was being implemented constituted a "management level decision[] . . . not properly within the scope of union representation and collective bargaining"); Local 346, Int'l Bhd. of Police Officers v. Labor Relations Comm'n, 462 N.E.2d 96, 101-03 (Mass. 1984) (determining that use of a polygraph was not a condition of employment because of overriding policy interest in officer accountability); State v. State Troopers Fraternal Ass'n, 634 A.2d 478, 493 (N.J. 1993) (limiting the applicability to police unions of a statutory requirement that governments and public employee unions engage in collective bargaining over certain disciplinary procedures).

⁶⁸ See generally DERAY MCKESSON ET AL., CAMPAIGN ZERO, POLICE UNION CONTRACTS AND POLICE BILL OF RIGHTS ANALYSIS (2016), <https://static1.squarespace.com/static/559bf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1fo/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf> [<https://perma.cc/Q5U3-GB3V>] (analyzing the contents of police union contracts from eighty-one large American cities to show how some provisions may thwart accountability efforts); Fisk & Richardson, *supra* note 61 (providing a summary of how police unions can both thwart and promote accountability, and of the ways that police union contracts can impair reasonable accountability efforts); Rushin, *supra* note 30 (providing an analysis of labor laws that influence police internal disciplinary procedures, analyzing a dataset of 178 police union contracts, and offering normative recommendations on how to reform the law to diminish the number of barriers to accountability).

⁶⁹ See, e.g., Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, at 6 (Nov. 18, 2014), https://www.chicago.gov/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement3/FOPCBA2012-2017_2.20.15.pdf [<https://perma.cc/U339-Z865>] [hereinafter City of Chicago] (providing a minimum forty-eight hour waiting period from the time an officer is informed of a request for an interview in relation to a disciplinary investigation, with some exceptions for particular circumstances).

⁷⁰ See, e.g., Memorandum of Understanding Between the Baltimore City Police Department and the Baltimore City Lodge No. 3, Fraternal Order of Police, Inc. Unit I, at 22 (Jan. 21, 2015) (on file with author) (barring civilian participation on certain disciplinary hearing boards).

⁷¹ See, e.g., Collective Bargaining Agreement Between the City of Cleveland and the Cleveland Police Patrolmen's Association Non-Civilian Personnel, at 7 (Nov. 5, 2015) [hereinafter Cleveland Collective Bargaining Agreement] (on file with author) (requiring the removal of verbal and written reprimands of officers after six months, and mandating that "all other disciplinary actions or penalties . . . be removed after two years from the date the discipline was administered").

⁷² See generally SAMUEL WALKER, THE BALTIMORE POLICE UNION CONTRACT AND THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS: IMPEDIMENTS TO ACCOUNTABILITY (2015), <http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf> (describing how the law enforcement officer bill of rights in Maryland and the Baltimore police union contract can impede accountability); SAMUEL WALKER, POLICE UNION CONTRACT "WAITING PERIODS" FOR MISCONDUCT INVESTIGATIONS NOT SUPPORTED BY SCIENTIFIC EVIDENCE (2015), <http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf> (rejecting the need for waiting periods in cases of officer interrogations); Reade Levinson, *Across the U.S., Police Contracts Shield Officers From Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:16 PM GMT),

speculated that the structure of the collective bargaining process and the political power of police unions may be contributing to regulatory capture, whereby police unions are able to obtain unreasonably generous protections from disciplinary oversight.⁷³ And a compelling new study by Professors Dhammika Dharmapala, Richard H. McAdams, and John Rappaport has found that the introduction of collective bargaining to sheriffs' departments in Florida corresponded with a statistically significant uptick in misconduct complaints.⁷⁴ In response, some scholars have argued for more transparency in the collective bargaining process,⁷⁵ while others support the inclusion of minority unions during negotiations.⁷⁶ Overall, the existing literature seems to suggest that police union contracts may make it more difficult to bring about reform in problematic police departments.⁷⁷

Despite the growing scholarship on police unions and collective bargaining, the existing literature has given little attention to the topic of disciplinary appeals. One study observed that police union contracts frequently require the arbitration of disciplinary appeals.⁷⁸ Overall, though, disciplinary appeals flowing from union contracts have received little concerted attention from legal scholars. This is an important oversight because emerging evidence suggests that union contracts may establish particularly cumbersome disciplinary appeals procedures that seem to unfairly advantage officers facing suspensions or terminations.

Take, for example, a recent case in Cleveland, Ohio. There, the city attempted to fire six officers who jointly fired 137 shots in 19.3 seconds at two unarmed civilians inside their car.⁷⁹ The terms of the Cleveland police union

<http://www.reuters.com/investigates/special-report/usa-police-unions> [https://perma.cc/5DQB-J9XZ] (reporting on an analysis of eighty-two police union contracts from large American cities which found a "pattern of protections" for officers that also constituted "hurdles for residents filing abuse complaints").

⁷³ Rushin, *supra* note 30, at 1215-16 (describing why regulatory capture is theoretically plausible in the police union negotiation process).

⁷⁴ Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *The Effect of Collective Bargaining on Law Enforcement: Evidence from Florida* 25 (U. Chi., Pub. L. Working Paper No. 655, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095217.

⁷⁵ See, e.g., Rushin, *supra* note 30 at 1243-51 (calling for improved transparency in the negotiation of police union contracts and considering some of the limitations of such a policy position).

⁷⁶ See, e.g., Fisk & Richardson, *supra* note 61, at 777-97 (describing how policymakers could empower new labor organizations to engage in a form of limited minority union bargaining).

⁷⁷ See Rushin, *Federal Enforcement*, *supra* note 50, at 3196 (using the term "cost-raising" to describe these sorts of regulations).

⁷⁸ See Rushin, *supra* note 30, at 1238-39 (finding that 115 of 178 police union contracts analyzed "contain language that permits or requires the use of arbitration in adjudicating officer appeals of disciplinary measures").

⁷⁹ Evan McDonald, *Six Cleveland Police Officers Fired, Six Suspended for Roles in Deadly Chase and Shooting*, PLAIN DEALER (Jan. 26, 2016), http://www.cleveland.com/metro/index.ssf/2016/01/six_cleveland_police_officer_f.html [https://perma.cc/C2PM-SM4C]. The incident in question began when an officer observed the civilian driving the car, Timothy Russell, failed to use

contract gave each officer the right to challenge any termination to a third-party arbitrator, who issues a final decision that is binding on all parties.⁸⁰ The union contract also gave the arbitrator seemingly expansive authority to re-litigate all of the factual and legal determinations made by the city during earlier disciplinary proceedings.⁸¹ In that case, the assigned arbitrator ultimately ordered the city to rehire five of the six officers involved in the deadly shooting, over the fierce objections of city leaders.⁸²

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

B. Law Enforcement Officer Bills of Rights

In addition to collective bargaining agreements, law enforcement officer bills of rights (LEOBRs) also set strict limits on some types of internal disciplinary action. These are state statutes passed via the legislative process designed to provide a unique level of protection to all officers within a state.⁸³ For example, Maryland's LEOBR prevents localities from punishing officers

his turn signal, and attempted to execute a traffic stop. Ida Lieszkovszky, *Everything You Need to Know Before the Start of the Trial for Cleveland Police Officer Michael Brelo*, PLAIN DEALER (April 6, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/04/everything_you_need_to_know_be.html [<https://perma.cc/EzKR-G4ML>]. Russell failed to stop, and instead led officers on a twenty-two mile chase. McDonald, *supra*. At various points, upwards of sixty-two squad cars were involved in the case, before it ended near a local middle school. Lieszkovszky, *supra*. When one officer opened fire on the vehicle, twelve other officers joined in. *Id.* The officers fired a total of 137 shots in 19.3 seconds at the vehicle, hitting both Russell and Williams over 20 times each, killing both of them instantly. McDonald, *supra*. Later investigations confirmed that both Russell and Williams were apparently unarmed. *Id.*

⁸⁰ Specifically, the union contract states that “[d]iscipline shall fall under the grievance procedure,” meaning that officers have the right to challenge disciplinary action through up to four layers of disciplinary review, ultimately culminating in a challenge before a third-party arbitrator, selected “in accordance with the rules of the American Arbitration Association.” Cleveland Collective Bargaining Agreement, *supra* note 71, at 42-44. The decision by the arbitrator is considered “binding on the City, the Union, and the members . . .” and contract provides virtually no guidance on the limits of the arbitrator’s authority to re-review all disciplinary findings. *Id.*

⁸¹ *Id.*

⁸² Adam Ferrise, *Michael Brelo Stays Fired, Other Officers Involved in ‘137-Shots’ Chase Get Jobs Back*, CLEVELAND (June 13, 2017), http://www.cleveland.com/metro/index.ssf/2017/06/michael_brelo_stays_fired_othe.html [<https://perma.cc/2GDK-L88W>].

⁸³ These state statutes emerged in part because of the decision in *Garrity v. New Jersey* where the U.S. Supreme Court held that the state could not use compelled statements from disciplinary interviews in later criminal prosecutions. 385 U.S. 493 (1967). See Kate Levine, *Police Suspects*, 115 COLUM. L. REV. 1197, 1220-23 (2016) (discussing how LEOBRs arose as a response to police unions feeling that *Garrity* had not gone far enough, and that they still possessed fewer constitutional protections than other citizens).

for any “brutality” unless someone files a complaint within 366 days.⁸⁴ It also allows the removal of civilian complaints from officer personnel files after three years.⁸⁵ Louisiana’s LEOBR provides officers with up to thirty days to secure counsel before investigators can interview them about alleged misconduct.⁸⁶ In Florida, the LEOBR requires investigators to provide an officer under investigation with all evidence related to the investigation before beginning an interrogation.⁸⁷ This includes the name of all complainants, physical evidence, incident reports, GPS locational data, audio evidence, and video recordings.⁸⁸ In Illinois, the LEOBR bars the consideration of anonymous civilian complaints.⁸⁹ And in Delaware, the LEOBR bars municipalities from requiring officers to disclose personal assets as a condition of employment.⁹⁰ These only scratch the surface of the protective procedures offered by LEOBRs to police officers facing internal investigations.

There has been a surge of recent scholarship describing the content and policy implications of LEOBRs. Kevin M. Keenan and Professor Samuel Walker conducted the most comprehensive empirical study of LEOBRs to date. They coded the content of fourteen LEOBRs for fifty separate variables.⁹¹ Based on this coding, they concluded that a number of LEOBRs contained unreasonably protective procedures that arguably thwarted reasonable accountability and oversight.⁹² Similarly, a study by Professors Aziz Z. Huq and Richard H. McAdams identified twenty existing LEOBRs, which often establish so-called “interrogation buffers,” such as “delay privileges” that impair officer accountability by mandating a delay period before an officer may be interviewed or interrogated.⁹³ Additionally, a number of media outlets have begun to recognize the ways that LEOBRs

⁸⁴ MD. CODE ANN., PUB. SAFETY § 3-104(c) (West 2019).

⁸⁵ *Id.* § 3-110(a).

⁸⁶ LA. STAT. ANN. § 40:2531(4)(a) (2019).

⁸⁷ FLA. STAT. ANN. § 112.532(d) (2019).

⁸⁸ *Id.*

⁸⁹ 50 ILL. COMP. STAT. 725/3.8(b) (2019) (“Anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit.”).

⁹⁰ DEL. CODE ANN. tit. 11, § 9202 (2019).

⁹¹ See generally Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005).

⁹² *Id.* at 241-42 (concluding that there are five distinct provisions found in some LEOBRs, both existing and proposed, and several other identifiable problem areas, that serve as potential barriers to police accountability).

⁹³ Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. L. FORUM 213, 222 (identifying twenty states that have LEOBRs on the books that “regulate how administrative investigators can interview or interrogate police officers . . . in a disciplinary investigation,” nine of which include some form of delay privilege).

can tip the scales in favor of the officer during disciplinary cases.⁹⁴ Other scholars, like Professor Kate Levine, have argued that some components of LEOBRs—particularly limits on abusive interrogation techniques—ought to serve as a blueprint for how the law could protect the rights of criminal suspects during criminal interrogations.⁹⁵

While each of these past studies has made an important contribution to the field, the existing scholarship on LEOBRs spends little time discussing the topic of disciplinary appeals. This may be in part because, as one study found, LEOBRs often do not provide appellate procedures.⁹⁶ Instead, they tend to provide limitations on the investigation and initial adjudication of internal disciplinary matters.

C. Civil Service Statutes

Finally, the majority of states and the District of Columbia have given public employees, including police officers, additional employment protection via civil service laws.⁹⁷ These laws emerged, in part, as an attempt to ensure that government jobs were allocated based on merit, rather than political patronage.⁹⁸ While these laws initially focused on the hiring and discharge of civil servants, they now cover at least eighty percent of state and local government employees, and their focus has expanded to include “demotions, transfers, layoffs and recalls, discharges, . . . grievances, pay and benefit determinations, and classification of positions.”⁹⁹

Because they often apply equally to all large classes of government employees across an entire state, civil service laws operate as a “floor for police

⁹⁴ See, e.g., Eli Hager, *Blue Shield: Did you Know Police Have Their Own Bill of Rights?*, MARSHALL PROJECT (April 27, 2015), <http://www.themarshallproject.com/2015/04/27/blue-shield> [<https://perma.cc/RFZ9-NVPK>] (noting that “[a]s many as 11 other states are considering similar legislation, and many of the rest have written essentially the same rights and privileges into their contracts with police unions.”).

⁹⁵ Levine, *supra* note 83, at 1212.

⁹⁶ Rushin, *supra* note 30, at 1266 app. c (showing that no existing LEOBR appears to elaborate procedures for arbitration on appeal).

⁹⁷ For some representative examples of legislation establishing a civil service system for law enforcement officers, see ALA. CODE §§ 11-43-180 to 190 (2008), ARIZ. REV. STAT. ANN. §§ 38-1001 to 1007 (1956), ARK. CODE ANN. §§ 14-51-301 to 311 (2013 & Supp. 2015), COLO. REV. STAT. §§ 31-30-101 to 107 (2016), and D.C. CODE §§ 5-101.01 to 5-133-21, 5-1302 to 5-1305 (2001 & Supp. 2016). At least a few states do not appear to have civil service systems that would cover local law enforcement officers.

⁹⁸ See ROBERT G. VAUGHN, *PRINCIPLES OF CIVIL SERVICE LAW* 1-3 (1976). Historians have traced the origins of modern civil service statutes to the assassination of President James Garfield in 1881 by a “disappointed officer seeker” which contributed to the passage of the Pendleton Act two years later. *Id.*

⁹⁹ Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95, 102 (1990).

officer employment protections, which police unions can raise through collective bargaining,” or through LEOBRs.¹⁰⁰

Outside of police union contracts, LEOBRs, and civil service statutes, departmental regulations and city ordinances also commonly establish the boundaries of acceptable practices during internal investigations of police officers.¹⁰¹

II. EXISTING RESEARCH ON DISCIPLINARY APPEALS

While some studies have shed important light on how union contracts and LEOBRs establish problematic internal disciplinary procedures, there has been little research evaluating the disciplinary appeals process used in American police departments.¹⁰² And the limited existing research on police disciplinary appeals has been outcome oriented. That is to say, the existing research focuses on the *outcomes* of police disciplinary appeals, not the *procedures* that contributed to those outcomes. This small body of literature suggests that police disciplinary appeals frequently result in the reduction of officer punishment.

For example, Mark Iris conducted two important empirical examinations of the effect of appellate arbitration on disciplinary outcomes in Houston and Chicago.¹⁰³ He found that in Houston between 1994 and 1998, and in Chicago between 1990 and 1993, arbitrators regularly reduced or overturned officer suspensions and firings.¹⁰⁴ Similarly, Tyler Adams recently conducted a valuable national study of ninety-two police arbitrator decisions published by the Bloomberg Law’s Labor and Employment Law Resource Center between 2011 and 2015.¹⁰⁵ He coded these arbitration decisions to identify common justifications for arbitrators overturning police discipline on

¹⁰⁰ Rushin, *supra* note 30, at 1208.

¹⁰¹ This study does not look at these local ordinances or internal departmental policies. This means that, if anything, this study underrepresents the frequency of use of each of the elements described below. *See infra* Part IV.

¹⁰² For example, some of the existing studies have discussed the internal investigation process, or the initial disciplinary decision-making process. All of these are important subjects for scholarly consideration. But they are distinguishable from the disciplinary appeals process. One study, though, did code for the presence of arbitration clauses in collective bargaining agreements. *See* Rushin, *supra* note 30, at 1238-39 (showing that 115 of the 178 contracts examined as part of that study appeared to permit or require binding arbitration in cases of disciplinary appeals).

¹⁰³ *See generally* Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215 (1998); Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132 (2002).

¹⁰⁴ Iris, *Police Discipline in Chicago*, *supra* note 103, at 216; Iris, *Police Discipline in Houston*, *supra* note 103, at 141-43.

¹⁰⁵ *See generally* Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?* 32 A.B.A. J. LAB. & EMP. L. 133 (2016).

appeal.¹⁰⁶ He found that arbitrators often cited inadequate departmental investigations, a lack of proof about the guilt of discharged officers, failure by investigators to adhere to procedural requirements during officer investigations, and mitigating factors in an officer's personnel file to justify appellate relief from disciplinary action.¹⁰⁷

These findings are roughly consistent with a number of examinations conducted by media outlets. For example, Kimbriell Kelly, Wesley Lowery, and Steven Rich of the *Washington Post* found that, of the 1,881 officers fired for officer misconduct in the nation's largest police departments over the last several years, the disciplinary appeals process reinstated the employment of over 450 of these officers.¹⁰⁸ They found that the disciplinary appeals process forced the Philadelphia Police Department to rehire sixty-two percent of officers fired for misconduct during this time period.¹⁰⁹ Similarly, the disciplinary appeals process used by the Denver Police Department resulted in the rehiring of sixty-eight percent of terminated officers.¹¹⁰ And in San Antonio, the police department had to rehire an astounding seventy percent of officers it had fired, because of disciplinary appeals.¹¹¹ Similarly, Robert Angien and Dan Horn of the *Cincinnati Enquirer* found that between 1997 and 2001, roughly one in every four officer suspensions or terminations were reversed or reduced on appeal.¹¹²

Combined, the existing literature presents compelling evidence that the disciplinary appeals process may serve as a barrier to officer accountability. Nevertheless, there appears to be a critical gap in the existing literature. Little academic research has comprehensively examined and described the procedural process employed in disciplinary appeals across a substantial cross-section of American police departments. More specifically, the existing literature has not provided a comprehensive, descriptive account of how appeals of discipline work across the nation's 18,000 police departments. How many levels of appeal are available to police officers facing disciplinary

¹⁰⁶ *Id.* at 133-34 ("Part III identifies the factors most significant in arbitrators' decisions overturning police discharges and notes the particular importance of officers' good character in decision reversing discharges.").

¹⁰⁷ Based on these findings, Adams challenged the "Myth of the Untouchable Officer." *Id.* at 155.

¹⁰⁸ Kelly, Lowery, & Rich, *supra* note 1. I discuss this study in more depth, *infra* Section IV.D.

¹⁰⁹ Kelly, Lowery, & Rich, *supra* note 1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Robert Angien & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to Be Reduced*, CINCINNATI ENQUIRER (Oct. 21, 2001), http://enquirer.com/editions/2001/10/21/loc_police_discipline.html. Reporting out of local news outlets in Philadelphia has also exhibited concern for the ways that disciplinary appeals put problematic officers back on the streets. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILA. (Feb. 28, 2013), <http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html> [https://perma.cc/EGW2-RQUB].

sanctions? How many police departments allow arbitrators or comparable third parties to have the final say in disciplinary appeals? How do communities select the identity of an arbitrator assigned to conduct a disciplinary appeal? And do communities limit the scope of an arbitrator's authority on appeal?

The answers to these questions—that is the procedural process used to adjudicate police disciplinary appeals—likely has a significant effect on the outcome of the appeal. For example, the manner by which police departments select an arbitrator can affect the frequency by which that arbitrator will overturn disciplinary action. If police supervisors unilaterally selected an arbitrator, then that arbitrator may feel pressure to approve of any punishments handed down by those supervisors. Conversely, if a police union unilaterally selected an arbitrator, then that arbitrator may feel pressure to overturn or reduce punishment against a union member. Anecdotal evidence suggests that many communities establish a designated list of acceptable arbitrators through union contracts,¹¹³ or employ a system whereby the police union and police supervisors “alternately strike names off [a designated] list; the last name remaining gets the assignment.”¹¹⁴ Such a selection process may contribute to arbitrator decisions that split the difference between supervisor and union demands, since siding too frequently with one side or the other might endanger an arbitrator's selection in future cases through an alternate strike system.¹¹⁵

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

III. METHODOLOGY

As discussed above, it is challenging to understand fully the range of disciplinary appeals used across the thousands of decentralized American police departments. To begin understanding the kinds of disciplinary appeals procedures offered to police in the United States, this Article relies on a dataset of police union contracts.¹¹⁶ Consistent with other recent studies of

¹¹³ Iris found that Chicago is one of the communities that employs such a permanent panel of designated arbitrators. See Iris, *Police Discipline in Houston*, supra note 103, at 146.

¹¹⁴ *Id.* (identifying Houston as a city that has employed such an alternate strike system).

¹¹⁵ Interestingly, Iris found that the manner by which communities select arbitrators does not seem to predict the ways in which arbitrators later rule. *Id.* at 146-47 (“That the means through which arbitrators are selected in Houston and Chicago are so different yet produce such similar results . . .”). This Article finds more evidence to bolster this anecdotal finding by Iris, as discussed in Part V.

¹¹⁶ Because of the long process of collecting and coding these contracts, plus the long editing and publication process, some of these contracts may no longer be active by the time this Article comes out in print. Nevertheless, this should not affect the overall claims from this Article. This

police policies, this dataset focuses on municipal police departments, rather than sheriff's departments, state highway patrols, or other specialized law enforcement agencies.¹¹⁷ Public records requests, searches of municipal websites, searches of state repositories, and web searches resulted in the collection of police union contracts from 656 municipal agencies serving large and midsized communities across the country. This dataset builds on, and would not have been possible without, the important efforts of other researchers who have also collected police union contracts, including the Better Government Association, Campaign Zero,¹¹⁸ the Combined Law Enforcement Associations of Texas,¹¹⁹ the *Guardian*,¹²⁰ Labor Relations Information Systems,¹²¹ and *Reuters*.¹²² A complete list of the departments studied as part of this dataset is available in the Appendix. The dataset covers police officers in forty-two states that permit police unionization.

Approximately sixty-one percent of the contracts in this dataset come from municipal websites, eighteen percent from state websites, five percent from police association or union websites, and two percent from media reports. Another three percent of these contracts were only available through previous union contract collections by other organizations which make some contracts available online.¹²³ Finally, I obtained the remaining approximately eleven percent of contracts through open record requests, as they are not otherwise publicly available. The municipal departments covered in this

Article merely claims that a large number of municipalities utilize common disciplinary appeals processes. There is no reason to think that there has been any substantial change over the last several years in disciplinary appeals procedures across a large number of communities. And given the size of the dataset and the overwhelming consistency among jurisdictions, there is no reason to think that this inevitable limitation has skewed the overall results in any significant way.

¹¹⁷ See, e.g., Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 423-24 (2016) (coding police body camera policies from the largest 100 municipal police departments); Rushin, *supra* note 30, at 1217-19 (coding police union contracts from municipalities with at least 100,000 residents).

¹¹⁸ See MCKESSON ET AL., *supra* note 68 (collecting and coding eighty-one police union contracts from the largest one hundred municipal police departments).

¹¹⁹ See *Contracts*, COMBINED LAW ENF'T ASS'NS TEX., <https://www.cleat.org/contracts> [<https://perma.cc/37EK-347A>] (making numerous contracts from Texas available through their website)

¹²⁰ See George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016), <https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> [<https://perma.cc/V83L-Y8TJ>] (discussing the contents of sixty-seven contracts leaked as part of a hack of the Fraternal Order of Police).

¹²¹ See *Contract Library*, LABOR RELATIONS INFO. SYS., <https://www.lris.com/contracts/index.php> [<https://perma.cc/J9BA-VQDN>] (providing a database of union contracts from a number of police departments across the country).

¹²² See Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:16 PM GMT), <http://www.reuters.com/investigates/special-report/usa-police-unions> [<https://perma.cc/5DQB-J9XZ>] (collecting the coding eighty-two contracts from the largest one hundred municipal police departments in the United States).

¹²³ *Supra* notes 118-122 and accompanying text.

dataset serve a total population of around ninety-seven million Americans. The median population served by this dataset is around 68,000 residents.

This Article focuses specifically on union contracts rather than other sources of police disciplinary appeals. This Article does not code or explore the ways that law enforcement officer bills of rights (LEOBRs), civil service statutes, internal departmental policies, and municipal ordinances affect disciplinary appeals.¹²⁴ This means that, the findings described in Part IV may actually underrepresent the frequency of these appellate procedures in communities that choose not to negotiate about appellate procedures during collective bargaining, but nonetheless provide similar protections to those described in this Article through LEOBRs, civil service statutes, municipal ordinances, or internal departmental policies.

This Article also focuses specifically on mid-to-large municipal police departments. Thus, it is not necessarily generalizable to all police departments, particularly those in small, nonunionized municipalities. While a large number of police officers in the United States are members of unions, there may be reasons to believe that disciplinary appeals procedures differ in unionized and nonunionized agencies. Nevertheless, given the relative ubiquity of police unionization,¹²⁵ and given the fact that disciplinary appellate procedures are often considered appropriate topics for collective bargaining,¹²⁶ this dataset provides detailed insight into the disciplinary appellate procedures used across a large segment of unionized police departments.

Before coding the dataset for this Article, I first identified relevant coding variables and definitions. To do this in a manner consistent with prior studies of police policies, I conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability.¹²⁷ Through this iterative process, I settled on five coding variables, which I discuss in

¹²⁴ A reporter from the *Marshall Project* identified fourteen LEOBRs: California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. See Hager, *supra* note 94. In addition, based on analysis by Aziz Huq and Richard McAdams, a handful of other states appear to have statutes on the books that effectively function as LEOBRs, even if they may not be labeled as such. Huq & McAdams, *supra* note 93, at 222. Distinguishing between LEOBRs and civil service statutes can be difficult. Some LEOBRs are explicitly articulated separately from civil service statutes. Other times, it can be hard to distinguish between civil service statutes and LEOBRs.

¹²⁵ See REAVES, *supra* note 32, at 13 (finding that around two-thirds of officers are employed by departments that engage in collective bargaining).

¹²⁶ Rushin, *supra* note 30, at 1205-07.

¹²⁷ See, e.g., Fan, *supra* note 117, at 425 (describing the development of the coding book for a similar study of police body camera policies).

more detail in Part IV. Table 1 summarizes the definitions employed during the coding of the dataset.

Table 1: Coding Variables and Definitions

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

Using the definitions from Table 1, the dataset underwent two rounds of coding to determine the number of municipalities that fall into each coding category—that is, to determine whether the police union contracts provided for a disciplinary appeal procedure that was consistent with the definition listed in Table 1. Given that the dataset included 656 police union contracts coded across 5 variables identified in Table 1, I ultimately made 3,280 coding decisions as part of this analysis. There was substantial agreement in the decisions rendered through each of these rounds of coding, suggesting a

relatively high level of reliability.¹²⁸ Nevertheless, the binary nature of the coding used in this study sometimes lends itself to difficult choices. Not all contracts had provisions that neatly fit into these coding parameters. In these borderline cases, there is certainly room for reasonable disagreement. In a small percentage of cases—around one percent of all coding decisions—these two rounds of coding led to different decisions as to whether a police union contract satisfied one of the variable definitions listed in Table 1. In such cases, the union contract underwent a third and final round of coding.

Given the large size of the dataset and the relatively small number of borderline cases, I do not believe the discretionary application of the variable definitions in Table 1 to these borderline cases resulted in any systematic error that would undermine the validity of the central findings of this Article. Additionally, the goal of this Article is not to analyze the disciplinary appeals procedures of any one police department. Thus, while coding such a large dataset will almost invariably introduce occasional inconsistencies, the methodology used in this Article is designed to provide a comprehensive evaluation of broad trends in disciplinary appeals procedures across a large cross-section of American police departments. A more detailed discussion of the methodology, particularly focused on the development of variable definitions used in this Article, is available in Appendix B. As Part IV explains, this coding revealed significant similarity across the disciplinary appeals procedures.

IV. HOW POLICE DISCIPLINARY APPEALS LIMIT ACCOUNTABILITY

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

Table 2: Frequency of Police Disciplinary Appellate Procedures in Dataset of Union Contracts

Variable	Frequency
Appealable to Arbitration or Comparable Procedure	72.9%
Significant Review Authority	70.1%

¹²⁸ There was also one single coder used throughout. Thus, there is no reason for concern about the consistency of coding between multiple coders. *See, e.g., id.*

Control Over Selection of Arbitrator or Comparable Third Party	54.3%
Arbitrator or Comparable Third Party Makes Final Decision	68.8%

In total, just under half (forty-eight percent) of all union contracts included in this dataset provide officers with *all* of the procedural protections discussed in Table 2. That is, they give officers the chance to appeal to an arbitrator, they give officers or unions some significant power to select the identity of the arbitrator, they provide this arbitrator with significant power to override earlier factual or legal decisions, and they make the arbitrator’s decision final and binding on the police department. And around seventy-one percent of cities provide officers with at least three of these procedural protections on appeal.

The median police department in the dataset offers police officers up to four layers of appellate review in disciplinary cases. Some departments provided officers with as few as one layer of appellate review.¹²⁹ Others provided officers with as many as six or seven levels of appellate review.¹³⁰ The subparts that follow discuss other common procedures offered to police officers appealing disciplinary action.

A. *Binding Arbitration*

Approximately seventy-three percent of the police departments use a disciplinary appeals process that involves some sort of outside arbitration. This includes the overwhelming majority of the largest American cities,

¹²⁹ See, e.g., Memorandum of Understanding Between Representatives of the City of Chino and the Chino Police Officers Association, Exhibit A, 6 (2015) (on file with author) (describing single layer of disciplinary appeals); Memorandum of Understanding Between the City of Colton and the Colton Police Officers Association 4-10 (2017) (on file with author) [hereinafter City of Colton] (describing how appeals of suspensions in excess of three days, disciplinary salary reductions, demotions, and discharges automatically proceed to the final step of the grievance procedures—arbitration, and how appeals of minor disciplinary action involve a single layer of appeal to a head of department or designee).

¹³⁰ See, e.g., Agreement Between City of Edmond and the Fraternal Order of Police Local 136, at 10, 15-18 (2016) (on file with author) (providing for six layers of appellate review through the grievance procedure); Agreement Between City of Kettering, Ohio and Fraternal Order of Police, Kettering Lodge No. 92, Patrol Officers 13-15 (2015) (on file with author) (allowing seven stages of appeal through the city’s grievance procedures before binding arbitration occurs).

including Austin,¹³¹ Boston,¹³² Chicago,¹³³ Cincinnati,¹³⁴ Cleveland,¹³⁵ Columbus,¹³⁶ Miami,¹³⁷ and Omaha,¹³⁸ as well as smaller and mid-sized cities like Billings, Montana,¹³⁹ Edison, New Jersey,¹⁴⁰ Flint, Michigan,¹⁴¹ Green Bay, Wisconsin,¹⁴² and Menlo Park, California.¹⁴³

In most jurisdictions however, police officers appealing disciplinary action do not immediately proceed to arbitration. Instead, officers generally have the ability to seek relief on appeal at various intermediary levels.¹⁴⁴ For

¹³¹ See Agreement Between the City of Austin and the Austin Police Association 49 (2013) (on file with author) (establishing procedures for police to appeal disciplinary action to expedited arbitration).

¹³² See Collective Bargaining Agreement Between City of Boston and Boston Police Patrolmen's Association, Inc. 7-10 (2007) (on file with author) [hereinafter City of Boston] (providing police officers with the ability to appeal disciplinary action to binding arbitration at step five of the grievance procedures).

¹³³ See City of Chicago, *supra* note 69, at 17, 84-85 (2012) (articulating the standard for binding arbitration on appeal).

¹³⁴ See Labor Agreement by and Between Queen City Lodge No. 69 Fraternal Order of Police and the City of Cincinnati, Non-Supervisors 2, 5 (2016) (on file with author) (allowing officers to proceed directly to final arbitration on appeal in cases of suspensions of more than five days without pay, discharge, demotion, or termination).

¹³⁵ See Collective Bargaining Agreement Between the City of Cleveland and Cleveland Police Patrolmen's Association (C.P.P.A.), Non-Civilian Personnel 44 (on file with author) (stating that the arbitration procedures articulated in the grievance procedure shall be "final, conclusive, and binding on the City, the Union, and the members.").

¹³⁶ See Agreement Between City of Columbus and Fraternal Order of Police, Capital City Lodge No. 9 41-44 (2014) (on file with author) (allowing officers to proceed, at step five of the grievance procedure, to arbitration with the approval of the Lodge President).

¹³⁷ See Agreement Between City of Miami, Miami, Florida and Fraternal Order of Police, Walter E. Headley, Jr., Miami Lodge No. 20, 13-15 (2015) (on file with author) (establishing grievance procedures that permit arbitration at step four).

¹³⁸ See Agreement Between the City of Omaha, Nebraska and the Omaha Police Officers Association 15-17 (2014) (on file with author) (permitting arbitration on appeal at step three of the grievance procedure).

¹³⁹ See Montana, Agreement Between the City of Billings, Montana and Montana Public Employees Association, Billings Police Unit 6-9 (2015) (on file with author) (articulating arbitration procedure on appeal).

¹⁴⁰ See Memorandum of Understanding Between the Township of Edison and Policemen's Benevolent Association, Local No. 75, Inc. 49-51 (2014) (on file with author) (articulating standards for arbitration of grievances).

¹⁴¹ See Agreement Between the City of Flint and Flint Police Officers Association 23, 35-39 (2014) (on file with author) (allowing officers to pursue arbitration of disciplinary action).

¹⁴² See Agreement Between City of Green Bay and Green Bay Professional Police Association 6-7 (2016) (on file with author) (permitting binding arbitration on appeal).

¹⁴³ See Memorandum of Understanding Between the Menlo Park Police Officers' Association and the City of Menlo Park 21-22 (2015) (on file with author) (stating that officers can bring some disciplinary appeals to arbitration).

¹⁴⁴ For example, in Las Cruces, New Mexico, the union contract provides officers with the chance to first bring appeals to their immediate supervisor. See, e.g., Agreement Between the City of Las Cruces and Fraternal Order of Police, Las Cruces Police Officer's Association 49-51 (2017) (on file with author) (describing how, at step one, a grievant must first discuss their objection to disciplinary action with their immediate supervisor, and then with the Chief of Police). If the officer does not receive

example, the union contract in Midwest City, Oklahoma provides officers with the chance to first file an appeal with their supervisor.¹⁴⁵ If the employee's grievance remains unresolved after this initial step, they may next file a grievance with the Fraternal Order of Police (FOP) Grievance Committee.¹⁴⁶ Thereafter the FOP Grievance Committee may submit the appeal to the next highest supervisor.¹⁴⁷ Then, the Chief of Police has the ability to respond to the appeal, or the Chief may refer the matter to the Labor Management Review Board.¹⁴⁸ If the officer fails to get relief on appeal after these initial steps, the appeal goes before the City Manager.¹⁴⁹ And finally, if the grievance remains unresolved after review by the City Manager, the FOP may request binding arbitration.¹⁵⁰ The procedures used in Midwest City, Oklahoma are consistent with those used by a large number of police departments in the dataset. At the end of the appeals process, officers frequently have the opportunity to present their appeal to an arbitrator.

In the overwhelming majority of jurisdictions that employ arbitration on appeal, and in 68.7% of all jurisdictions analyzed as part of this study, the decision from this arbitration decision is final. Nevertheless, some communities like Independence, Missouri,¹⁵¹ and Indio, California,¹⁵² do not employ binding arbitration. Instead, these communities make arbitration advisory or permit additional review of arbitrators' decisions.

A number of scholars and media outlets have hypothesized that arbitration as an appellate mechanism may contribute to the frequent reversals of or reductions in internal disciplinary sanctions.¹⁵³ According

appellate relief through this initial layer of review, the department then permits an intermediary level of review at the level of the Chief of Police, and then the City Manager. *Id.* at 50.

¹⁴⁵ See Collective Bargaining Agreement for Fiscal Year 2017/2018 Between the Fraternal order of Police Lodge #127 and the City of Midwest City 10-15 (2017) (on file with author) (laying out the city's procedures for disciplinary appeals).

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 13 (describing this procedure and establishing a time limit for action).

¹⁴⁹ See *id.* ("If the Grievance or Disciplinary Appeal is still unresolved after receipt of the answer from the Chief of Police, the Grievance or Disciplinary Appeal may be submitted to the City Manager . . .").

¹⁵⁰ See *id.* ("If the Grievance or Disciplinary Appeal is unresolved after receipt of the answer from the City Manager, the FOP may request that the matter be submitted to impartial arbitration.").

¹⁵¹ See Working Agreement Between City of Independence, Missouri, Police Department & Fraternal Order of Police Lodge No. 1, at 22 (2017) (on file with author) (giving the City Manager the ability to "modify a decision of the Grievance Board or an arbitrator" when the "finding of fact and decision based thereon are clearly contrary to the overwhelming weight of the evidence . . . together with the legitimate inferences").

¹⁵² See Indio Police Officers' Association Comprehensive Memorandum of Understanding 44-46 (2015) (on file with author) [hereinafter City of Indio] (establishing advisory arbitration, rather than binding arbitration).

¹⁵³ See, e.g., Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L. J. 363, 365 (2016) ("And, even assuming the officer is fired for violating the Constitution or for other reasons,

to these hypotheses, arbitration is different from other forms of disciplinary appeals, in part because it limits community observation or participation. On this point, a number of jurisdictions in this study, like Colton, California,¹⁵⁴ require that all arbitration proceedings are conducted in private without public observation, while other cities like Corpus Christi, Texas,¹⁵⁵ give officers the option to make arbitration proceedings private.

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

B. Control over Selection of Arbitrator

A little over fifty-four percent of all departments in the dataset give police officers or the police union significant authority in the selection of the arbitrator that will hear a case on appeal. Major cities including Boston,¹⁵⁶ Chicago,¹⁵⁷ Detroit,¹⁵⁸ El Paso,¹⁵⁹ Fort Worth,¹⁶⁰ Honolulu,¹⁶¹

in many jurisdictions, the collective bargaining agreements provide for arbitration of the issue, and it is quite common for the officer to be put back on the job, leading to back pay and reinstatement.”).

¹⁵⁴ See City of Colton, *supra* note 129, at 7 (“Grievance arbitration hearings shall be private.”).

¹⁵⁵ See Agreement Between the City of Corpus Christi and the Corpus Christi Police Officers’ Association 20 (2015) (on file with author) [hereinafter City of Corpus Christi] (“All hearings shall be public unless requested by the appealing employee that the hearing shall be closed to the public. In any event, the final decision of the arbitrator shall be public, although public announcement may be reasonably delayed upon request of the parties.”). It is worth noting that even in cities that use a city manager or other city agent to hear appellate cases, some still allow the officer to bar public observation of the proceeding. See City of Murrieta, *supra* note 43, at 8 (“The hearing may be open to the public or closed at the employee’s option.”).

¹⁵⁶ See City of Boston, *supra* note 132, at 9 (“The arbitrator shall be selected in a manner mutually agreed upon by the parties from a rotating panel of not less than three (3) and not more than five (5) arbitrators selected by mutual agreement of the parties.”).

¹⁵⁷ See City of Chicago, *supra* note 69, at 84 (establishing a panel of agreeable arbitrators between the city and the police union).

¹⁵⁸ See Master Agreement Between the City of Detroit and the Detroit Police Officers Association 11-12 (2014) (on file with author) [hereinafter City of Detroit] (establishing an alternative striking procedure by which the union can remove potential arbitrators).

¹⁵⁹ See Articles of Agreement Between City of El Paso, Texas and El Paso Municipal Police Officers’ Association 42 (2014) (establishing a procedure for union and city to agree on panel of five individuals to serve terms as members of the hearing examiner panel).

¹⁶⁰ See Meet and Confer Labor Agreement Between City of Fort Worth, Texas and Fort Worth Police Officers Association 23-24 (2017) (on file with author) (giving the union an equal role in selecting the identity of hearing examiners, who act in a role equivalent to arbitrators, for the appeal of disciplinary actions).

¹⁶¹ See Agreement Between State of Hawaii, City and County of Honolulu, County of Hawaii, County of Maui, County of Kauai and State of Hawaii Organization of Police Officers Bargaining Unit 12, at 49-50 (2011) (on file with author) (providing for an alternate striking system empowering the union to remove names from the panel of potential arbitrators).

Jacksonville,¹⁶² Las Vegas,¹⁶³ Memphis,¹⁶⁴ Milwaukee,¹⁶⁵ Minneapolis,¹⁶⁶ and Oakland¹⁶⁷ allow officers or their union representatives to have this sort of control over the identity of an arbitrator, as do smaller and medium-sized cities like Akron, Ohio,¹⁶⁸ Boulder, Colorado,¹⁶⁹ Canton, Ohio,¹⁷⁰ Champaign, Illinois,¹⁷¹ and Fairbanks, Alaska.¹⁷²

Most of these departments fall into two different categories: First, a handful of agencies explicitly stipulate an acceptable panel of arbitrators in their union contract. For example, in Chicago, the Fraternal Order of Police and the City of Chicago have agreed on a panel of five stipulated arbitrators in the appendix to the police union contract.¹⁷³ This means that, in cities like Chicago, the identity of appellate arbitrators is a topic of negotiation during collective bargaining—a topic where the union can exert a significant influence.

Second, another group of agencies establish alternative striking procedures. For instance, in Corpus Christi, the union contract allows officers

¹⁶² See Agreement Between the City of Jacksonville and the Fraternal Order of Police, Police Officers Through Sergeants 21 (2011) (on file with author) (requiring mutual agreement between union and city for the appointment of an arbitrator to a rotating list).

¹⁶³ See Collective Bargaining Agreement Between Las Vegas Metropolitan Police Department & Las Vegas Police Protective Association 19 (2016) (on file with author) (establishing procedure for union to select two of five potential arbitrators, with two additional arbitrators selected by the city, and one selected by mutual agreement).

¹⁶⁴ See Agreement Between the Memphis Police Association and the City of Memphis, Tennessee 20 (2016) (on file with author) (establishing the alternate striking method for selecting an arbitrator, thereby giving union equal power as city).

¹⁶⁵ See Agreement Between City of Milwaukee and the Milwaukee Police Association, Local #21, I.U.P.A., AFL-CIO 12 (2012) (on file with author) [hereinafter City of Milwaukee] (using alternate striking method for selecting arbitrator).

¹⁶⁶ See Labor Agreement Between the City of Minneapolis and the Police Officers' Federation of Minneapolis, at app. H (2017) (on file with author) (establishing alternate striking methodology for selecting arbitrators).

¹⁶⁷ See Memorandum of Understanding Between City of Oakland and Oakland Police Officers' Association 36-37 (2015) (on file with author) (using an alternate striking system for selecting arbitrators).

¹⁶⁸ See Agreement Between the City of Akron and Fraternal Order of Police Lodge #7, at 8 (Nov. 15, 2016) (on file with author) (alternatively striking names from a panel of arbitrators).

¹⁶⁹ See Collective Bargaining Agreement Between City of Boulder and Boulder Police Officers Association 13 (2016) (on file with author) (describing alternative strike methodology for selecting arbitrator).

¹⁷⁰ See Collective Bargaining Agreement Between the City of Canton and Canton Police Patrolmen's Association Local 98/I.U.P.A. AFL-CIO 8-9 (2015) (on file with author) (establishing a mutually agreed panel of arbitrator provided in union contract).

¹⁷¹ See Agreement Between Illinois FOP Labor Council and City of Champaign Patrol and Sergeant 66 (2015) (on file with author) (providing for an alternative striking methodology and a confidential proceeding).

¹⁷² See Collective Bargaining Agreement Between the City of Fairbanks and the Public Safety Employees Association, Fairbanks Police Department Chapter 11 (Dec. 23, 2011) (on file with author) (establishing an alternative striking methodology from pre-agreed list of arbitrators).

¹⁷³ See City of Chicago, *supra* note 69, at 84 app. Q (describing how the city and the police union have agreed on a panel of five arbitrators to be used in expedited arbitrations).

to appeal “any disciplinary action” to an arbitrator.¹⁷⁴ To select this arbitrator, the Director of Human Resources requests seven arbitrators from the National Academy of Arbitrators, or other “qualified agencies.”¹⁷⁵ Thereafter, the police officer facing discipline and the city alternatively strike names from this panel of seven arbitrators until one name remains.¹⁷⁶

In theory, these procedures for selecting the identity of an arbitrator somewhat mirror the procedures for selecting jurors in the American justice system. The voir dire process provides both the defense and the plaintiff or prosecution with a limited number of preemptory strikes, as well as an unlimited number of strikes for cause.¹⁷⁷ Much like the procedure described above, a court will usually impanel the individuals that survive this striking process as the jury.¹⁷⁸ If this procedure is effective at impaneling impartial jurors in the American justice system, why not use a similar procedure to select an arbitrator for an appellate proceeding?

The potential problem with using such a procedure in internal disciplinary appeals is that it may incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases. Unlike a juror in the American justice system, arbitrators are often repeat players.¹⁷⁹ Arbitrators must frequently survive these selection procedures in order to obtain work in the future. An arbitrator that frequently sides with either police management or officers during appellate procedures may be unlikely to survive future selection proceedings.¹⁸⁰ From an accountability perspective, this mindset can be highly problematic if it results in arbitrators feeling compelled to frequently reduce the termination of unfit officers to mere suspensions.

C. *De Novo* Review

The majority of communities—around seventy percent—vest arbitrators with significant review authority on appeal. That is, these jurisdictions effectively give arbitrators the power to re-review all relevant issues on appeal. This means that arbitration on appeal provides officers with an opportunity

¹⁷⁴ City of Corpus Christi, *supra* note 155, at 18.

¹⁷⁵ *Id.* at 19.

¹⁷⁶ *Id.*

¹⁷⁷ Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 848-53 (2015) (providing an excellent, preliminary summary of the voir dire process).

¹⁷⁸ *Id.*

¹⁷⁹ See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-104 (1974) (distinguishing between repeat players and one shotters).

¹⁸⁰ See Iris, *Police Discipline in Houston*, *supra* note 103, at 146 (evaluating whether an arbitrator's past decisions influence whether or not he or she will be selected to preside over similar disciplinary appeals in the future).

to relitigate disciplinary matters with little deference to decisions made by police supervisors, city officials, or civilian review boards. This sort of extensive review is provided in large American cities like Anchorage,¹⁸¹ the District of Columbia,¹⁸² and Orlando,¹⁸³ as well as smaller communities like Albany, New York,¹⁸⁴ Danville, Illinois,¹⁸⁵ and New Haven, Connecticut.¹⁸⁶

Thus, even if the internal affairs division of a police department has presented sufficient evidence to convince members of a civilian review board to suspend or terminate an officer for conduct inconsistent with departmental regulations, many jurisdictions provide this officer with an opportunity to circumvent the decision by the civilian review board entirely and relitigate the matter anew before an arbitrator. For example, in New Haven, the police union contract permits officers to appeal disciplinary action to an arbitrator, who is tasked with the responsibility of conducting a “de novo hearing” in order to determine “whether said discharge or discipline was for just cause” as required by the contract.¹⁸⁷ The contract further clarifies that an arbitrator is “empowered to receive evidence of alleged misconduct by the employee involved, as well as any defense, denial, or other evidence controverting or concerning such allegation”¹⁸⁸

¹⁸¹ Collective Bargaining Agreement Between Anchorage Police Department Employees and Municipality of Anchorage 10-12, 16 (2015) (on file with author) (stating that management may punish officers for just cause, and then giving arbitrator wide latitude to review any apparent violation of the collective bargaining agreement on appeal).

¹⁸² Labor Agreement Between the Government of the District of Columbia Metropolitan Police Department and the Fraternal Order of Police MPD Labor Committee, 11 (stating that employees may appeal adverse action, defined as a fine, suspension, demotion, or termination, to arbitration; further explaining that, during this arbitration, while the arbitrator should rely on the record from the hearing below, the arbitrator may re-review any evidentiary ruling, or other evidence improperly excluded from the earlier proceeding).

¹⁸³ Agreement Between City of Orlando and Orlando Lodge #25, Fraternal Order of Police, Inc. 2, 18-21 (2016) (on file with author) (stating that all discharges and punishments must be for just cause, and further providing an arbitrator on appeal with the power to provide any remedy necessary using a wide range of evidence).

¹⁸⁴ Agreement Between the City of Albany, New York and the Albany Police Officers Union Local 2841, Law Enforcement Officers Union Council 82, AFSCME, AFL-CIO, Patrol Unit, at 11 (2008) (on file with author) (stating that an arbitrator on appeal has the power to re-adjudicate guilt or innocence and can redetermine this factual question based on a preponderance of evidence standard, with the burden on the employer).

¹⁸⁵ An Agreement By and Between City of Danville, Illinois and Policemen’s Benevolent and Protective Association, Unit #11, at 6, 8-9 (2015) (on file with author) (limiting management to only punishing officers for just cause and giving arbitrator the power on appeal to re-adjudicate whether just cause existed for punishment through the grievance process).

¹⁸⁶ Agreement Between the City of New Haven and the New Haven Police Union Local 530, and Council 15, AFSCME, AFL-CIO 4 (2011) (on file with author) (providing for de novo review of appeals to determine whether there was just cause for discharge or discipline).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

This stands in stark contrast to the limited role of appeals in the American criminal and civil justice system. As Professor Martin B. Louis observed, “[i]n America, appellate courts almost never decide cases de novo.”¹⁸⁹ While American appellate courts generally have the authority to re-review legal determinations made at the trial level, appellate courts will typically defer to factual determinations made at the trial level.¹⁹⁰ Thus, the “primary function” of appellate courts is to review for legal errors made at the trial level.¹⁹¹ Factual determinations are not always outside of the review authority of appellate courts. But appellate courts regularly adopt deferential standards when reviewing pure factual determinations made by a trial judge or jury.¹⁹²

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

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

¹⁸⁹ Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986).

¹⁹⁰ Admittedly, “[t]hese nicely compartmentalized separations of law from fact and trial level functions from appellate functions belie more complex distinctions” So-called “[u]ltimate facts,” where a trial court applies “historical facts found” at trial to “relevant general legal principles” combine law and fact and do not fit nicely into this dichotomy. *Id.* at 994.

¹⁹¹ *Id.* at 993.

¹⁹² *Id.* at 995; see also Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 (1944) (“Determinations of administrative bodies, judges, and juries on the ‘facts’ are treated by reviewing courts with considerable, though varying, degrees of, respect.”).

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

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

Despite this empirical limitation, there is a growing body of evidence to suggest that the disciplinary appeals process described in this Article may frequently impede police accountability. As discussed briefly in Part II, Kelly, Lowery, and Rich at the *Washington Post* have conducted the most comprehensive empirical analysis of the effects of disciplinary appeals on officer termination and rehiring practices.¹⁹³ Recall that these reporters acquired data on the number of officers rehired on appeal after termination for misconduct across thirty-seven large American law enforcement agencies.¹⁹⁴ They found that 451 of the 1,881 police officers fired by these agencies between 2006 and 2017 were ultimately ordered rehired on appeal, normally by arbitrators.¹⁹⁵ Table 3 reproduces the data from the *Washington Post* study, showing the number of total officers fired and rehired during this time period.¹⁹⁶

¹⁹³ Kelly, Lowery, & Rich, *supra* note 1.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ One immediate question that emerges from an analysis of the *Washington Post* data is whether the type of appellate procedures given to officers predicts the frequency of officers being rehired on appeal. A preliminary examination suggests there is no correlation between these two phenomena. This does not, however, suggest that the types of procedures offered to an officer on appeal have no effect on appellate outcomes.

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

Table 3: Frequency of Disciplinary Appeals Resulting in the Rehiring of Terminated Officers, 2006–2017

<u>Department</u>	<u>Total Fired</u>	<u>Total Rehired</u>	<u>Percent Rehired</u>
Atlanta Police Department	87	7	8.05%
Austin Police Department	30	4	13.33%
Boston Police Department	14	4	28.57%
Broward County, FL Sheriff's Office	64	13	20.31%
Charlotte-Mecklenburg Police Department	22	7	31.82%
Chicago Police Department	103	10	9.71%
Columbus Division of Police	23	2	8.70%
D.C. Metropolitan Police Department	86	39	45.35%
Dallas Police Department	120	32	26.67%
Denver Police Department	31	21	67.74%
Detroit Police Department	37	5	13.51%
Fort Worth Police Department	53	6	11.32%
Harris County, TX Sheriff's Office	143	29	20.28%
Honolulu Police Department	33	19	57.58%
Houston Police Department	107	24	22.4%
Jacksonville, FL Sheriff's Office	64	2	3.13%
Las Vegas Metropolitan Police Department	59	14	23.73%
Memphis Police Department	84	22	26.19%
Metropolitan Nashville Police Department	44	14	31.82%
Miami Police Department	28	8	28.57%
Miami-Dade Police Department	101	38	37.62%
Milwaukee Police Department	57	11	19.30%
Oklahoma City Police Department	15	6	40.00%
Orange County, CA Sheriff's Department	43	6	13.95%
Orange County, FL Sheriff's Office	28	0	0.00%
Palm Beach, FL County Sheriff's Office	31	1	3.23%
Philadelphia Police Department	71	44	61.97%
Phoenix Police Department	37	15	40.54%
Prince George's County, MD Police Department	58	1	1.72%
Riverside County, CA Sheriff's Department	109	7	6.42%

Sacramento County, CA Sheriff's Department	3	0	0.00%
San Antonio Police Department	44	31	70.45%
San Francisco Police Department	11	0	0.00%
Santa Clara County, CA Sheriff's Department	8	0	0.00%
Seattle Police Department	19	4	21.05%
Suffolk County, NY Police Department	9	4	44.44%

This data provides valuable insight into the outcomes of disciplinary appeals. It suggests that the disciplinary appeals process as currently constructed results in the reduction or reversal of disciplinary sanctions in a large number of police departments. Just under a quarter (twenty-four percent) of all officers terminated for misconduct in large American police departments are eventually rehired because of the disciplinary appeals process. This analysis, though, only focuses on the rehiring of terminated officers. While only around ten percent of terminated Chicago police officers were ordered rehired on appeal according to the data obtained by the *Washington Post*, a separate analysis by Jennifer Smith Richards of the *Chicago Tribune* and Jodi S. Cohen of *ProPublica* found that, between 2010 and 2017, the City of Chicago has reduced or reversed sanctions against eighty-five percent of all police officers during the grievance appeals process.¹⁹⁷ So, if anything, the *Washington Post* data likely underrepresents the number of officers that receive some sort of relief during disciplinary appeals.

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

Unfortunately, this Article cannot prove that these procedural protections cause an unreasonable number of police disciplinary cases to be overturned or reduced on appeal. The narrow focus of this Article can only claim to build a descriptive account of the procedural process utilized during disciplinary appeals in a large cross section of American police departments. In doing so,

¹⁹⁷ Jennifer Smith Richards & Jodi S. Cohen, *Cop Disciplinary System Undercut*, CHI. TRIB. (Dec. 14, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=bc73d166-b1f0-4d8b-9ff9-0529bad5bd7a [https://perma.cc/G2YH-L7N3].

it shows that American police departments provide officers with a remarkably consistent package of procedural protections during disciplinary appeals. The findings from this study are certainly consistent with the hypothesis that the procedures used during disciplinary appeals may contribute to the high rate of reversals or reductions in punishments. Nevertheless, more research is needed to confirm this hypothesis.¹⁹⁸

E. *Implications for Police Reform Efforts*

The findings from this Article have significant implications for the study of police reform. First, these findings suggest that arbitrators wield even more authority in internal disciplinary matters than many policing scholars have previously recognized. In fact, arbitrators are the true adjudicators of internal discipline in many police departments in this Article's dataset—even in agencies that employ civilian review apparatuses designed to increase public participation in police disciplinary matters. A recent study by Udi Ofer found that twenty-four of the nation's largest fifty police departments use civilian review boards to oversee certain police disciplinary matters.¹⁹⁹ Commentators like Ofer generally point to civilian review boards as examples of communities empowering the public with meaningful oversight of police conduct.

The findings from this Article suggest that some civilian review boards—even robust ones with full investigative, subpoena, and disciplinary authority—may be somewhat symbolic in their functional importance. Ofer's study identifies Detroit

¹⁹⁸ As a preliminary matter, it may be useful to consider the frequency that litigants receive relief on appeal in the court system. One study published in 2015 found that, of the 69,348 estimated criminal appeals in state court, around 8,226 (11.9%) were reversed, remanded, or modified. NICOLE WATERS ET AL., U.S. DEP'T OF JUSTICE, CRIMINAL APPEALS IN STATE COURTS 1 (2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/C76P-MQKT>]. Thus, it seems safe to say that police officers may more frequently receive relief than other litigants in the American justice system, despite not being nearly as limited by the exclusionary rule, the Federal Rules of Evidence, and other procedural hurdles that can contribute to reversals in the federal system. More research is needed on this point.

¹⁹⁹ Ofer, *supra* note 38, at 1041-43. Ofer also provides an excellent discussion of the history of civilian review boards and makes some important normative recommendations on how communities could improve the structure of civilian review boards to ensure long-term stability and independence. As Ofer explains, Washington, D.C. and New York were two of the earliest adopters of civilian reviews, establishing some sort of civilian oversight boards in 1948 and 1953, respectively. In both cases, though, city officials eventually dismantled these early civilian review boards after "intense lobbying" by police unions. The concept of civilian oversight of police departments would not go mainstream until the 1960s and 1970s, when highly publicized incidents of police brutality, combined with the civil rights movement, led to more widespread implementation of civilian oversight structures. *Id.* at 1040-41; see also Samuel Walker, *The History of the Citizen Oversight, in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT AGENCIES 1, 8 (Justina Cintron Perino ed., 2006) ("What brought about this profound change in public attitudes? There have been no academic studies of this question, but the evidence suggests a broad change in public attitudes toward official misconduct."). Today, there are over 100 civilian review boards across the country. Ofer, *supra* note 38, at 1041.

as a community with one of the nation's most unique and powerful civilian review boards, referred to as the Detroit Police Commission, comprised of seven members elected from each police district and four members selected by the Mayor with the approval of the City Council.²⁰⁰ The Detroit Police Commission has the authority to subpoena information during investigations²⁰¹ and the ability to discipline officers.²⁰² Detroit is one of a few large cities in the United States that gives a civilian review board such extensive authority, matched by Chicago, Milwaukee, Newark, San Francisco, and Washington, D.C.²⁰³ It would seem that Detroit is a model of civilian control over police disciplinary investigations.

And yet, Detroit's union contract establishes an appeals process that, in some cases, allows arbitrators on appeal to overrule decisions made by the Detroit Police Commission.²⁰⁴ The police union has a significant role in selecting the identity of this third-party arbitrator.²⁰⁵ The arbitrator's decision is final and binding on all parties.²⁰⁶ And based on the terms of the union contract, it appears that this arbitrator has *de novo* authority to re-examine whether just cause existed for the punishment.²⁰⁷ So while the Detroit Police Commission seems to make civilians the primary adjudicators of internal discipline for police officers, this is an illusion. The ultimate power resides with an appellate arbitrator.²⁰⁸ And Detroit is not unique. This same

²⁰⁰ Ofer, *supra* note 38, at 1055 app.

²⁰¹ See *id.* at 1043 (“[T]he only review board that has a leadership structure that is not majority nominated by the mayor and that is empowered with subpoena, disciplinary, and policy review authorities, is Detroit’s.”).

²⁰² See *id.* (“[S]ome form of disciplinary authority remains relatively rare, with only six civilian review boards having it—Chicago, Washington, D.C., Detroit, Milwaukee, San Francisco, and Newark.”).

²⁰³ See *id.* at 1053-62 (showing that all of these cities have the authority described above).

²⁰⁴ See City of Detroit, *supra* note 158, at 11-16, (establishing the right of the department to punish only for just cause; providing details on the disciplinary process; further describing the appellate process, including expedited arbitration for suspensions of more than three days in length).

²⁰⁵ See *id.* at 11-12 (permitting two methods for selecting an arbitrator: an existing panel of acceptable arbitrators, or an alternative striking system whereby the union gets a say in the identity of the arbitrator as the city management).

²⁰⁶ See *id.* at 13 (stating that the arbitrator's decision “shall be final and binding on the Association, on all bargaining unit members, and on the Department”).

²⁰⁷ *Id.* at 11-13 (appearing to provide the arbitrator with the general authority to determine if any disciplinary action violates the terms of the collective bargaining agreement, which requires just cause, and seemingly giving the arbitrator wide authority to hear evidence from both sides with little deference to any decisions made by the Police Commission).

²⁰⁸ To elaborate further, this finding may even suggest that, in most American police departments, up-front disciplinary mechanisms like civilian review boards act more akin to internal prosecutors. They can bring charges against police officers for misconduct, but the final authority on disciplinary actions generally rests with third-party arbitrators. If true, this would upend the traditional narrative of police reform articulated by many scholars, which emphasizes the importance of departmental leadership dedicated to constitutional policing. Further, if we hope to promote constitutional policing, police departments need leadership within a police department that rigorously investigates and responds to alleged officer wrongdoing. But this, in itself, will often be

general pattern holds in other large American cities with seemingly robust civilian review boards, like Chicago²⁰⁹ and Milwaukee.²¹⁰

Second, if police disciplinary appeals frequently lead to arbitrators overturning termination decisions, this has worrisome downstream effects for police reform efforts, in part because of the U.S. Supreme Court holding in *Brady v. Maryland*.²¹¹ There, the Court held that prosecutors must disclose material evidence that is favorable to the defense, including anything known to any member of the prosecution team.²¹² As Jonathan Abel has described in detail, evidence of prior misconduct by police officers can be critical pieces of *Brady* material.²¹³ This is particularly true when the evidence of misconduct suggests that the officer has a history of dishonesty,²¹⁴ theft,²¹⁵ false police reports,²¹⁶ or other wrongdoing that calls into question the officer's credibility as a witness. This has forced some police departments to develop *Brady* lists—databases of officers who have previously committed acts of misconduct that must be disclosed to defense counsel in criminal cases to avoid violating the *Brady* decision.²¹⁷ Officers placed on such *Brady* lists generally “cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand,” because if they do, the defense counsel will have access to records of the officer's prior misconduct

insufficient. Supervisors within a police department must then navigate a complex disciplinary appeals process that is structured to insulate officers from public accountability.

²⁰⁹ See City of Chicago, *supra* note 69, at 17-18, 84-85 (laying out the ground rules of arbitrations of appeals of disciplinary suspensions, including a designated panel of arbitrators selected via the collective bargaining process, making the arbitration procedure “final and binding,” and seemingly granting the arbitrator wide authority).

²¹⁰ See City of Milwaukee, *supra* note 165, at 7-14 (describing the appellate procedure for some types of disciplinary matters, which includes “final and binding arbitration” of disciplinary actions, grants the Association significant authority to select the arbitrator, and gives the arbitrator wide, seemingly de novo authority).

²¹¹ 373 U.S. 83 (1963).

²¹² *Id.* at 87-88; see also *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (further clarifying *Brady* to make clear that evidence known to the prosecution team must be disclosed).

²¹³ Abel, *supra* note 41, at 745-47.

²¹⁴ See *Fields v. State*, 69 A.3d 1104, 1110 (Md. 2013) (examining two detectives accused of deceiving law enforcement supervisors by “submitting fraudulent, daily and court overtime slips”).

²¹⁵ See *United States v. Robinson*, 627 F.3d 941, 946 (4th Cir. 2010) (involving police officers using “buy money” for personal purchases).

²¹⁶ See *Miller v. City of Ithaca*, 914 F. Supp. 2d 242, 247 (N.D.N.Y. 2012) (citing a police officer under investigation for falsifying details of vehicle stops in his reports).

²¹⁷ Abel, *supra* note 41, at 780. Additionally, as Professor Rachel Moran has observed, these *Brady* lists may only exist in some (perhaps even a minority) of police departments. In other jurisdictions with laws protecting the confidentiality of police records, prosecutors and defense attorneys may be unable to get access to these records. See generally Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339 (2018) (discussing the legal barriers that exist to accessing evidence regarding a police officer's credibility, particularly in contrast to comparable evidence regarding a defendant).

for impeachment purposes.²¹⁸ Abel states that such officers “would be well advised to start looking for a new profession,” because they can no longer perform the basic functions of a law enforcement officer.²¹⁹

But the findings from this Article present a different, and especially problematic, possibility. Because of the disciplinary appeals process, many police departments may be unable to terminate the employment of these so-called “Brady cops.”²²⁰ Instead, departments may be forced to utilize limited resources employing a police officer who cannot engage in any policing function that may lead to testimony before a court.²²¹ To accomplish this, many police departments have shuffled staff and reassigned rehired officers, so as to minimize their involvement in criminal cases.²²² This can drive up the cost of public safety services, not to mention limit the ability of a police chief to bring about real reform within an agency.

Third, this Article’s findings bolster the hypothesis that police union contract negotiations may be susceptible to regulatory capture. In the past, I have observed that police union contract negotiations often happen outside of public view.²²³ Police unions are powerful political constituencies.²²⁴ Some communities have little in the way of resources to satisfy union demands for higher salaries and more generous benefits.²²⁵ And virtually all municipalities

²¹⁸ Abel, *supra* note 41, at 746.

²¹⁹ *Id.*

²²⁰ *Id.* at 785-86.

²²¹ *See id.* at 785 (“This can create a difficult situation for police management, which may find itself stuck with an officer who cannot testify because the prosecutor does not trust her, but who also cannot be terminated because the officer fought off her termination through arbitration.”).

²²² *See, e.g.,* Pauline Repard, *The Secret List That Police Officers Don’t Want You to See*, SAN DIEGO UNION-TRIB. (Aug. 23, 2017), <http://www.sandiegouniontribune.com/news/public-safety/sd-me-brady-notebook-20170823-story.html> [<https://perma.cc/38ZR-TTRU>] (describing the use of Brady lists for officers still on the force in San Diego after serious incidents of misconduct); *see also* Craig Cheatham, Dan Monk, Joe Rosemeyer, & Brian Niesz, *Can Police Officers Still Serve After They’re Caught Being Dishonest?*, WCPO CINCINNATI (Oct. 31, 2017), <https://www.wcpo.com/longform/i-team-investigation-can-officers-still-serve-after-theyre-caught-being-dishonest> [<https://perma.cc/B2M2-6BK6>] (providing data on the number of officers serving in Cincinnati after apparent dishonesty).

²²³ *See* Rushin, *supra* note 30, at 1213 (“[T]here are thousands of decentralized police departments in the United States, and each negotiates its own collective bargaining agreements, largely outside public view.”).

²²⁴ *See, e.g.,* Lee Fang, *Maryland Cop Lobbyists Helped Block Reforms Just Last Month*, INTERCEPT (Apr. 28, 2015, 9:42 AM), <https://theintercept.com/2015/04/28/baltimore-freddie-gray-prosecute> [<https://perma.cc/DKU9-FZLV>] (detailing how police unions effectively blocked various reforms in Maryland); *see also* Michael Tracey, *The Police Lobby Has Far Too Much Power in American Politics*, VICE (Dec. 4, 2014, 2:00 PM), https://www.vice.com/en_us/article/nnqyeg/the-pernicious-power-of-police-unions [<https://perma.cc/5BDZ-3DZG>] (describing the political power of police unions).

²²⁵ *See* John Chase & David Heinzmann, *Cops Traded Away Pay for Protection in Police Contracts*, CHI. TRIB. (May 20, 2016, 8:36 AM), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html> [<https://perma.cc/5ZLK-ZP6U>] (describing how, in Chicago, the city traded off lower salaries for more generous disciplinary protections).

negotiate salaries, benefits, and disciplinary procedures as part of the same private negotiation.²²⁶ Under these conditions, I have hypothesized that municipal leaders may be incentivized to offer concessions to police unions on disciplinary procedures in exchange for lower officer salaries.²²⁷ A number of anecdotal cases suggest that such tradeoffs are commonplace.²²⁸ This Article provides further evidence that collective bargaining agreements can serve as a barrier to officer accountability—this time through the elaboration of extensive appellate protections for officers found guilty of misconduct.

Fourth, these findings have important implications for the literature on police officer decertification. Professor Roger Goldman has argued that “states can deter police misconduct by decertification of the officer, that is, by revoking the officer’s state certification for constitutional violations in evidence gathering.”²²⁹ All states other than Hawaii have some type of state-wide agency, typically known as a Peace Officer Standards and Training Commission (POST), that can hold hearings and sanction officers engaged in sufficiently serious misconduct, as defined by the requisite state statute.²³⁰ And the vast majority of state POSTs have the statutory authority to not only sanction officers but actually strip them of their legal ability to work as police officers in the state.²³¹ This process, referred to by various names including decertification, cancellation, or revocation may be “the most common state legislative and administrative approach for addressing police misconduct” even if it is “largely unknown to scholars and the public.”²³²

The story surrounding the death of twelve-year-old Tamir Rice illustrates the importance of this police accountability mechanism. Immediately after the killing, Cleveland officials learned that the officer involved “hid the fact that he had an ‘emotional breakdown’ during the state qualification course, and that his former employer” terminated his employment after concluding

²²⁶ See Rushin, *supra* note 30, at 1245 (“As currently structured, most municipalities negotiate with police unions about disciplinary procedures alongside salaries, benefits, vacation time, promotion procedures, and more.”).

²²⁷ *Id.* at 1245-46.

²²⁸ See, e.g., Chase & Heinzmann, *supra* note 225.

²²⁹ Roger L. Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 47 (1987); see also Roger Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147 (2012) (offering a model law for regulating police decertification).

²³⁰ *Legislators Seek More Law Enforcement Oversight*, HAW. NEWS NOW (Feb. 10, 2016), <http://www.hawaiinewsnow.com/story/31193633/hawaii-only-state-in-the-country-with-no-law-enforcement-standards-board> [<https://perma.cc/MV4X-3Z3T>].

²³¹ See Goldman & Puro, *supra* note 50, at 542 (explaining that at least forty-three states have the power to revoke officer certification).

²³² *Id.* at 542-43.

that “he was unable ‘to emotionally function.’”²³³ The officer’s failure to disclose his previous firing gave Cleveland officials grounds to terminate his employment.²³⁴ But the officer ultimately did not face criminal penalties.²³⁵ Under Ohio state law, an officer can only face decertification for a felony conviction or a felony that is pleaded down to a misdemeanor.²³⁶ As a result, the officer maintained his license to work as a police officer in Ohio and was hired by another police department in October of 2018.²³⁷ This incident illustrates that decertification is only effective if POSTs are legislatively empowered to decertify officers aggressively when their behavior demonstrates their lack of fitness to serve as a law enforcement officer.

This realization raises several important questions regarding police disciplinary appeals and decertification that have received insufficient attention in the existing literature. If an arbitrator overturns or reduces a penalty against an officer found responsible for serious misconduct, can a POST still decertify that officer? Or do the police disciplinary appeals effectively insulate officers from legislatively enacted decertification procedures? It appears that state POSTs have taken different positions on this issue.²³⁸

If outside arbitrators frequently order the rehiring of problematic officers, a state may need to consider whether its POST should nonetheless be statutorily authorized to conduct decertification hearings to protect the public from an individual that may nonetheless be unfit to carry out the duties of a sworn peace officer.

²³³ Safia Samee Ali, *Fired Officer Who Shot Tamir Rice Could Be Back at Another Department*, NBC NEWS (June 2, 2017), <https://www.nbcnews.com/news/us-news/fired-officer-who-shot-tamir-rice-could-be-back-another-n766921> [<https://perma.cc/DBV9-8JDP>].

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Matthew Haag, *Cleveland Officer Who Killed Tamir Rice Is Hired by an Ohio Police Department*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/timothy-loehmann-tamir-rice-shooting.html>.

²³⁸ Some state POSTs, like Washington, cannot decertify an officer if an arbitrator on appeal reverses the officer’s termination. *See* WASH. REV. CODE § 43.101.105(d) (2012) (providing that officer discharge can be the basis for a decertification, but only if the discharge is finalized). POSTs in other states, like Arizona, maintain the ability to decertify officers even if a disciplinary penalty is overturned on appeal. *See* ARIZ. REV. STAT. ANN. § 41-1822(C)(1) (2001) (describing how the state agency may conduct an independent investigation that may result in decertification based on any complaint it receives). For more information on the variation in state decertification policies, see RAYMOND A. FRANKLIN, POLICE OFFICER CERTIFICATION REVOCATION INFO. SHARING: NAT’L PUB. SAFETY OFFICER DECERTIFICATION DATABASE, 2005 SURVEY OF POST AGENCIES REGARDING CERTIFICATION PRACTICES (2005), <https://www.ncjrs.gov/pdffiles1/bja/grants/213048.pdf> [<https://perma.cc/J9NA-EPGY>].

V. REFORMING POLICE DISCIPLINARY APPEALS

Police need basic procedural protections against arbitrary and capricious punishment. This includes the ability to appeal disciplinary action. At the same time, these appellate procedures should not allow officers to circumvent democratic oversight or otherwise thwart reasonable accountability efforts. This Article shows that virtually all police departments give officers multiple layers of appellate review, often culminating in binding arbitration. In most cases, the police union has some substantial role in selecting the identity of the arbitrator. And in most of these cases, the arbitrator is given expansive authority to relitigate all decisions made by police supervisors, city officials, and civilian review boards.

While each of these appellate procedures may be individually defensible, they could theoretically combine to create a formidable barrier to accountability. These procedural protections may be problematic to the extent that they limit the ability of supervisors to punish or terminate problematic officers responsible for serious misconduct. Additionally, these protections may be troubling because they limit the role of the public in overseeing local law enforcement. Prior scholars have argued that “democratic deliberation around policing is an imperative,” as it ensures that officers are accountable to the people they serve.²³⁹

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

A. *Democratizing Disciplinary Appeals*

In my previous work, I have defended the importance of democratic participation and transparency in the development of internal disciplinary procedures in police departments.²⁴⁰ I am hardly the first to make such a claim. Prior studies have found that, without substantial democratic participation in the development of police policies, departments can become insular and unresponsive to community needs.²⁴¹

²³⁹ Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837, 1907 (2015). Professors Friedman and Ponomarenko found that democratic accountability is generally lacking, often without sufficient justification in the world of policing. *Id.* at 1843-45.

²⁴⁰ See generally Rushin, *supra* note 30 (arguing in favor of more public involvement in the development of police union contracts in hopes of preventing regulatory capture).

²⁴¹ See, e.g., Christopher E. Stone & Heather Ward, *Democratic Policing: A Framework for Action*, 10 POLICING & SOC’Y 11, 12 (2000) (posing the question, “How can police agencies create internal discipline necessary to advance public safety while treating people with respect?” and stating that this “question is as old as democratic theory”).

Scholars often disagree about the extent to which policing ought to be responsive to democratic pressures, particularly in the adjudication of disciplinary cases. For example, Professor Christopher E. Stone and Heather Ward have shown how policing advocates have widely varying opinions about where best to situate police disciplinary authority.²⁴² Police chiefs may argue that officer disciplinary decisions ought to rest in their hands alone, in order to ensure a “straight, hierarchical line” of accountability within a police department.²⁴³ Critics of such an alignment may point out that, while police chiefs are normally subject to firing by democratically accountable actors like mayors or city councils, this doesn’t always work in practice.²⁴⁴ As a result, some policing experts support more direct forms of democratic accountability in police disciplinary matter, like civilian review boards that better incorporate the opinions of generally unrepresented minorities.²⁴⁵

Regardless of where experts fall in this debate,²⁴⁶ there is nearly uniform agreement that the development of police policies and officer oversight should not be divorced from community input.²⁴⁷ This Article does not tackle the larger question of how communities ought to balance the need for democratic oversight and due process in the adjudication of internal disciplinary matters. Instead, it makes a narrower observation. The data presented in this Article suggests that the disciplinary appeals process in many departments is largely devoid of democratic participation.

If communities want to modestly reform the existing disciplinary appeals process so as to better facilitate democratic accountability, there are several ways they could do this. One of the most effective, and likely controversial, ways that communities could accomplish this is by entirely eliminating arbitration of disciplinary appeals. In its place, communities could vest

²⁴² *Id.*

²⁴³ *Id.* at 17.

²⁴⁴ *See id.* (citing the Los Angeles Police Department as an example).

²⁴⁵ *Id.* at 17-18.

²⁴⁶ In fact, as Stone and Ward point out, most experts do not believe that we must choose one model of democratic oversight or another. This need not be a “Hobson’s choice.” Instead we generally recognize that “police in a democracy must be accountable simultaneously to multiple levels of control.” *Id.* at 13.

²⁴⁷ Admittedly, there is disagreement between scholars on how democratic accountability ought to work in police departments, even if there is some uniformity in the belief that democratic accountability is an important value in police oversight generally. *See, e.g.*, Friedman and Ponomarenko, *supra* note 239 (arguing generally for the value of democratic accountability in policing); Rushin, *supra* note 30 (supporting additional democratic involvement in the development of disciplinary procedures); Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010) (arguing for better democratic incorporation of stakeholder interests in police reform efforts); David A. Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (discussing the complex relationship between police, criminal procedural, and democratic theory).

appellate review authority in more democratically accountable actors, like city councils, mayors, city managers, or civilian review boards. A number of communities already do this, like Fountain Valley, California²⁴⁸ or Lincoln, Nebraska.²⁴⁹ This may allow internal disciplinary responses by local police departments to reflect community values more accurately.

As an alternative, communities could make appellate arbitrations advisory, or at least provide an opportunity for city leaders to overturn particularly egregious decisions by arbitrators. Some cities provide such procedures on appeal. These include Peoria, Arizona,²⁵⁰ as well as many cities in California, including Buena Park,²⁵¹ Burbank,²⁵² Cathedral City,²⁵³ Costa Mesa,²⁵⁴ Delano,²⁵⁵ Fullerton,²⁵⁶ Indio,²⁵⁷ Ontario,²⁵⁸ Oxnard,²⁵⁹ and

²⁴⁸ See Memorandum of Understanding Between the City of Fountain Valley and the Fountain Valley Police Officers' Association 36-37 (2014) (on file with author) (providing officers the right to appeal disciplinary action to the police chief and then the city manager, and providing a limited option under municipal code for officers to challenge the city manager's final decision to city council under certain exceptional circumstances).

²⁴⁹ See Agreement Between Lincoln Police Union and the City of Lincoln, Nebraska 16-17 (2016) (on file with author) (permitting appeal to city's Personnel Board).

²⁵⁰ See Memorandum of Understanding Between City of Peoria and Peoria Police Officers Association, Covering Police Officers Unit 23-24 (2013) (on file with author) (providing officers the chance to bring a disciplinary grievance before an arbitrator as the third step in the grievance process, but then allowing the police department to appeal an arbitrator's grievance to the City Manager at step four).

²⁵¹ See Memorandum of Understanding Between the City of Buena Park, California and the Buena Park Police Association 39-41, 57-59 (2016) (on file with author) (stipulating that arbitration on appeal is merely advisory).

²⁵² See Memorandum of Understanding Between the City of Burbank and the Burbank Police Officers' Association 54-61 (2016) (on file with author) (establishing procedures for arbitration of disciplinary appeals and providing that "[t]he decision of the arbitrator shall be solely advisory in nature").

²⁵³ See Memorandum of Understanding Between City of Cathedral City and Cathedral City Police Officer's Association (CCPOA) 16-20 (2016) (on file with author) (explaining the procedures for hearing officers to consider appeals by officers to disciplinary action, but stating explicitly that the hearing officer's decision is not binding; instead the "City Manager or designee mutually agreeable to the City Manager and the employee shall review the Hearing Officer's recommendation, but shall not be bound thereby").

²⁵⁴ See Memorandum of Understanding Between the Representatives of the Costa Mesa Police Association and the City of Costa Mesa 17-24 (2014) (on file with author) (establishing arbitration procedures but vesting final decision-making authority with the Chief Executive Officer).

²⁵⁵ See Agreement Between City of Delano and Delano Police Officers Association 6-8 (2017) (on file with author) (authorizing advisory arbitration of disciplinary action).

²⁵⁶ See City of Fullerton, *supra* note 46, at 44 (placing the authority to review an arbitrator's decision in the hands of the city council).

²⁵⁷ See City of Indio, *supra* note 152, at 42-46 (allowing appellate arbitration but vesting final authority in hands of city manager).

²⁵⁸ See Memorandum of Understanding Between Ontario Police Officers Association and City of Ontario 30 (2014) (on file with author) (making arbitration awards subject to review by city council).

²⁵⁹ See Memorandum of Understanding Between City of Oxnard and Oxnard Peace Officers' Association 22 (2016) (on file with author) (permitting advisory arbitration).

Pasadena.²⁶⁰ Officers may find this option more procedurally just, as it would give them an opportunity to make their case before a third party that is separate from city leadership. And city leaders would maintain the flexibility to depart from decisions made by an arbitrator when it appears to run counter to the public's interest.

Or, if communities still want to use binding appellate arbitration in some disciplinary cases, they could nonetheless increase the amount of democratic accountability in this process by following the model of Oceanside, California. There, the city's police union contract permits officers to appeal relatively minor disciplinary action to binding arbitration.²⁶¹ But the contract makes arbitration decisions merely advisory for serious misconduct resulting in suspensions and terminations.²⁶² Such a compromise would allow cities to maintain the use of arbitration so as to avoid unfair punishments in some cases, while maintaining the ability of city officials to protect the public interest in police accountability in cases of serious misconduct where the continued employment of the officer could pose a public safety risk.

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

B. *Limiting the Scope of Appellate Review*

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

Thus, an alternative way that communities could improve the disciplinary appeals process is by narrowing the scope of an arbitrator's scope

²⁶⁰ See Amended and Restated Memorandum of Understanding Between Pasadena Police Officers Association 41 (2017) (on file with author) (giving the Municipal Employee Relations Officer the authority to accept, modify, or reject hearing decision on appeal).

²⁶¹ See Memorandum of Understanding Between the City of Oceanside and the Oceanside Police Officers' Association 30-35 (2017) (on file with author) (stating that appeals of non-suspensions and non-terminations go to binding adjudication by "third party neutral," but in other appeals, decisions by third party neutrals will be "advisory").

²⁶² *Id.*

of review. As discussed in Section IV.D, most communities allow arbitrators to rehear cases effectively *de novo*. This means that they need not defer to any decisions made by civilian review boards, police leaders, or city leadership. Nevertheless, not all cities use this model. Some cities explicitly limit the authority of arbitration on appeal.

For example, Fullerton, California permits advisory arbitration on appeal, but bars an arbitrator from overruling or modifying punishment handed down against an officer unless the arbitrator finds the punishment to be “arbitrary, capricious, discriminatory or otherwise unreasonable.”²⁶³ This standard of review on appeal is far more favorable to city leaders than that used in a majority of the cities in this dataset. Fullerton’s standard of review is similar to that used by Bloomington, Illinois, which states that suspensions should “be upheld unless it is arbitrary, unreasonable or unrelated to the needs of the service.”²⁶⁴ Eugene, Oregon similarly limits the authority of the arbitrator to review disciplinary matter *de novo* by only empowering them to determine whether the city’s actions were “reasonably consistent with City and departmental guidelines.”²⁶⁵

Alternatively, communities could limit arbitrators from altering punishment in cases where the facts support a finding of guilt. This is the case in Grand Rapids, Michigan, where an arbitrator on appeal can overturn a decision made by the city, but cannot reduce punishment in cases where there is evidence to support the allegation of misconduct.²⁶⁶ Similarly, the policy in Ocala, Florida states that an arbitrator on appeal cannot question the city’s judgment on the proper amount of punishment, provided that the department has demonstrated “good cause for discipline.”²⁶⁷

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

C. Possible Drawbacks

Police officers and unions may object to the proposals discussed in this Article for several reasons. First, police officers and police unions may argue

²⁶³ City of Fullerton, *supra* note 46, at 45.

²⁶⁴ Agreement Between City of Bloomington, Illinois and Police Benevolent and Protective Association, Unit No. 21, at 15 (2014) (on file with author).

²⁶⁵ Contract Between the City of Eugene and the Eugene Police Employees’ Association 45 (2016) (on file with author).

²⁶⁶ City of Grand Rapids, *supra* note 45, at 6.

²⁶⁷ Collective Bargaining Agreement Between the City of Ocala, Florida and Florida State Lodge, Fraternal Order of Police 15 (2016) (on file with author).

that the proposals in this Article would give police officers fewer procedural protections during appeal than some other public servants. If civil servants like fire fighters or teachers have similar appellate protections from disciplinary action, why should we treat police officers differently?

While understandable, this argument ignores the fact that police work is fundamentally different from the work of most public servants. As I have previously argued, “[u]nlike other public employees, police officers generally carry firearms, make investigatory stops, conduct arrests, and use lethal force when needed.”²⁶⁸ Officers also encounter “people when they are both most threatening and most vulnerable, when they are angry, when they are frightened, when they are desperate, when they are drunk, when they are violent, or when they are ashamed.”²⁶⁹ We necessarily give police officers considerable discretion in carrying out their job. With this discretion, there is a heightened risk that officers will engage in misconduct. And unlike other fields, misconduct by police officers “can leave [a] victim dead or permanently damaged, and under the right circumstances one cop’s bad call—or a group of cops’ habitual [bad behavior]—can be the spark that leaves a city like Baltimore in flames.”²⁷⁰ Given these realities of modern American policing, it is critical to ensure that police disciplinary procedures reflect not just a respect for due process, but also a respect for the opinions of the public that the police department serves.

Second, and relatedly, the removal or curtailing of arbitration provisions in police disciplinary appeals may result in significant pushback by frontline officers. Some officers may understandably argue that this would reduce job security and hurt officer morale, making police work less appealing. There is at least some empirical evidence to suggest that efforts to increase oversight and accountability among police officers can result in union opposition, reduced street-level enforcement of the law, and ultimately de-policing.²⁷¹ While this is a serious concern, it should not deter communities from establishing a disciplinary appeals process that emphasizes democratic accountability.

²⁶⁸ Rushin, *supra* note 30, at 1248.

²⁶⁹ PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf> [<https://perma.cc/6N2N-QV49>].

²⁷⁰ Ross Douthat, *Our Police Union Problem*, N.Y. TIMES (May 2, 2015), <http://www.nytimes.com/2015/05/03/opinion/sunday/ross-douthat-our-police-union-problem.html> [<https://perma.cc/MD53-3GZZ>].

²⁷¹ See, e.g., Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 758–59 (2017) (finding that the introduction of federal intervention into American police departments to reduce patterns of misconduct was associated with a statistically significant uptick in property crime rates, and also noting that this uptick in crime was frontloaded in the years immediately after federal intervention). *But cf.* Joshua Chanin & Brittany Sheats, *Depolicing as Dissent Shirking: Examining the Effects of Pattern or Practice Misconduct Reform on Police Behavior*, 43 CRIM. JUST. REV. 105 (2019) (finding that federal intervention did not result in reductions in arrests across a sample of test agencies).

Virtually any policing regulation can inspire some pushback from frontline officers. Nevertheless, there is reason to believe that such pushback and negative side effects are generally temporary in nature. Take, for example, the pushback from police officers during cases of federal intervention pursuant to 42 U.S.C. § 14141.²⁷² The Department of Justice (DOJ), mostly under Democratic presidents,²⁷³ has used this statute to force local police departments into negotiated settlements to address patterns of unconstitutional or unlawful misconduct.²⁷⁴ In many of these negotiated settlements, the DOJ has pressured police departments to improve disciplinary oversight of officers.²⁷⁵ In response, surveys have found that officers frequently complained about how these new disciplinary measures caused them to be less proactive “because of [the] fear of being unfairly disciplined.”²⁷⁶

Yet, empirical research has found that this sort of pushback and reduction in morale did not have any long-term, statistically significant effect on arrest or crime rates.²⁷⁷ Additionally, even if reforming disciplinary appeals does

²⁷² 42 U.S.C. § 14141 (2012).

²⁷³ See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 21 (2009) (attributing the weakness in the enforcement of § 14141 to lack of political commitment, particularly during the administration of President George W. Bush); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3232 fig. 3 (2014) (showing how the use of § 14141 has varied by presidential administration); Joshua M. Chanin, *Negotiated Justice? The Legal, Administrative, and Policy Implications of “Pattern or Practice” Police Misconduct Reform 335* (July 6, 2011) (unpublished Ph.D dissertation, American University), <https://www.ncjrs.gov/pdffiles1/nij/grants/237957.pdf> [<https://perma.cc/H8BC-YVR8>] (describing structural changes during the George W. Bush administration that contributed to changes in vigorousness of enforcement of § 14141).

²⁷⁴ See STEPHEN RUSHIN, *FEDERAL INTERVENTION IN AMERICAN POLICE DEPARTMENTS* 286-89, 103-59, 244-85 (2017) (providing a complete historical description of how the DOJ has enforced § 14141 over time, listing the departments subject to DOJ reform since the statute’s passage in 1994, and making recommendations for its improvement); Ivana Dukanovic, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911 (2016) (providing in part a summary of existing DOJ work under § 14141 and the mechanisms strengths and weaknesses); Rushin, *Structural Reform Litigation*, *supra* note 50, at 1367-77 (providing a summary of how the DOJ has used § 14141 over time to bring about reform in problematic police departments).

²⁷⁵ See Rushin, *Structural Reform Litigation*, *supra* note 50, at 1378-87 (providing a summary of the various portions of these negotiated settlements, including regulations of use of force, early intervention and risk management systems, overhauls of complaint and investigation procedures, new training procedures, measures to address bias in policing, and programs emphasizing community policing).

²⁷⁶ See, e.g., CHRISTOPHER STONE ET AL., *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 19-20* (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> [<https://perma.cc/V78Q-3JQL>] (finding that eighty-nine percent of officers believed that “because of fear of being unfairly disciplined, many LAPD officers are not proactive in doing their jobs”).

²⁷⁷ See Chanin & Sheats, *supra* note 271, at 117-18 (finding no effect of federal intervention on arrest rates); Rushin & Edwards, *supra* note 271, at 758-59 (finding that, if federal intervention did result in any de-policing effect, it was mostly in terms of property crime rates, and this effect was frontloaded).

have some negative effects on officer morale, this may be a necessary cost to ensure that police departments reflect the values of their constituents. Democratic accountability is an independently important goal in policing, as demonstrated by the widespread support for community policing initiatives, even if it “may sometimes require compromise.”²⁷⁸

And third, some may argue that the disciplinary appeals process in American police departments is exhaustive and undemocratic out of necessity because of the arbitrary nature of earlier disciplinary proceedings. For example, Professor Kate Levine’s important new work describes the current state of internal discipline in American police departments as “uneven, arbitrary, and entirely discretionary.”²⁷⁹ As evidence for this proposition, Professor Levine compares the way that two different police departments—the Chicago Police Department and the Philadelphia Police Department—reacted to officers claiming to exercise their free speech rights while on duty.²⁸⁰ In Chicago, two black officers received reprimands for taking a photograph with a civilian while kneeling in support of Colin Kaepernick’s protest against police brutality.²⁸¹ But in Philadelphia, a white officer received no such punishment or reprimand for displaying a tattoo of an eagle symbol allegedly used by the Nazi Party along with the word “Fatherland.”²⁸² Professor Levine cites the seemingly inconsistent treatment of these officers across two major American police departments to demonstrate the unpredictability of modern police discipline.

If we accept Professor Levine’s claim, then disciplinary appeals serve a critically important role. The appeals process may protect officers from being unfairly punished, particularly when unfair punishment is politically popular or expedient. Officers may worry that increasing public involvement in

²⁷⁸ Rushin & Edwards, *supra* note 271, at 776.

²⁷⁹ Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 842 (2018).

²⁸⁰ *See id.* at 841-42 (summarizing these two vignettes and explaining that they “reflect the state of internal discipline in police departments across the country”).

²⁸¹ Tom Porter, *Chicago Police Officers Disciplined for Taking a Knee in Solidarity with Colin Kaepernick*, NEWSWEEK (Sept. 26, 2017, 5:25 AM GMT), <http://www.newsweek.com/chicago-police-officers-disciplined-taking-knee-solidarity-colin-kaepernick-670988> [<https://perma.cc/U5N9-NUKW>]. The punishment happened after a civilian posted a picture of the event on Instagram. The Chicago Police Spokesman stated that the department reprimanded the officers for violating the city’s policy on political speech while in uniform.

²⁸² John Kopp, *Photos Surface of Philly Police Officer with Nazi Tattoo*, PHILLY VOICE (Sept. 1, 2016), <http://www.phillyvoice.com/photos-surface-philly-police-officer-nazi-tattoo> [<https://perma.cc/37UB-6FD5>] (describing the public outrage to the tattoo and showing a picture of the officer “posing with fellow Nazi reenactors”); John Kopp, *Internal Affairs Investigation Clears Philly Police Officer with Apparent Nazi Tattoo*, PHILLY VOICE (Jan. 31, 2017), <http://www.phillyvoice.com/internal-affairs-investigation-clears-philly-police-officer-apparent-nazi-tattoo> [<https://perma.cc/4KJT-SRDX>] (describing how an Internal Affairs investigation concluded that the officer did not violate any departmental policy by having the tattoo).

disciplinary appeals will put officers at risk of being unfairly fired or disciplined, particularly in communities with bias against police officers.²⁸³

No doubt, police officers deserve adequate procedure protections during internal disciplinary investigations. But none of the recommendations in this Article would strip police of their due process right to appeal disciplinary action. Instead, they would merely alter the current procedures used in some police departments to ensure a heightened level of democratic engagement and accountability in this process. Officers would retain the ability to challenge arbitrary and capricious punishments and incorrect applications of internal regulations. They would also still have the opportunity to bring such appeals before a different oversight body than that which levied the original disciplinary decision, ensuring that no officer could face severe punishment without multiple layers of oversight. And a number of police departments across the country already employ many of the recommendations in this Article. At a minimum, this demonstrates that these procedures represent a feasible path forward.

CONCLUSION

Few stories better illustrate the importance of police disciplinary appeals than that of an officer in Florida. An investigation by the *Miami Herald* found that, over his nineteen year career, a single sergeant faced misconduct accusations for allegedly “cracking the head of a handcuffed suspect, beating juveniles, hiding drugs in his police car, stealing from suspects, defying direct orders and lying and falsifying police reports.”²⁸⁴ At one point, he allegedly called in sick to take a vacation to Cancún.²⁸⁵ He engaged in a series of police chases that violated departmental policy, killing four civilians in the process.²⁸⁶ He has been arrested and jailed multiple times.²⁸⁷ And his employer has attempted to suspend and fire him more than any other officer in the state.²⁸⁸ Despite all of this, each attempt to fire the sergeant has failed, thanks in part to the disciplinary appeals process.

²⁸³ See generally HEATHER MAC DONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* (2016) (claiming, controversially, that the current antipolice political environment causes police to reduce aggressiveness, resulting in effects on crime rates).

²⁸⁴ Julie K. Brown, *The South Florida Cop Who Won't Stay Fired*, *MIAMI HERALD* (Sept. 8, 2014), <http://www.miamiherald.com/latest-news/article1940924.html> [<https://perma.cc/6M6J-TC7J>].

²⁸⁵ *Id.*

²⁸⁶ *Id.* (describing how he “has engaged in a rash of unauthorized police chases, including one in which four people were killed”).

²⁸⁷ *Id.*

²⁸⁸ *Id.* (explaining that the department has attempted to fire him six times).

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

Many communities have established appeals procedures that may hamper reform efforts, contribute to officer misconduct, and limit public oversight of police departments. Most of the agencies discussed in this study permit officers to appeal disciplinary action to binding arbitration. Many agencies allow the police union or the aggrieved officer to have a substantial role in selecting the arbitrator. And agencies often give this arbitrator expansive review authority that offers no deference to decisions made by other disciplinary agents, like civilian review boards, police chiefs, or city officials. While each of these procedural protections may be individually defensible, they may combine to create a formidable barrier to officer accountability.

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

APPENDIX A: AGENCIES STUDIED

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Anchorage	AK	Citrus Heights	CA
Fairbanks	AK	Clovis	CA
Juneau	AK	Colton	CA
Little Rock	AR	Concord	CA
Chandler	AZ	Corona	CA
Glendale	AZ	Costa Mesa	CA
Goodyear	AZ	Culver City	CA
Lake Havasu	AZ	Cypress	CA
Mesa	AZ	Daly City	CA
Peoria	AZ	Davis	CA
Phoenix	AZ	Delano	CA
Tempe	AZ	Downey	CA
Tucson	AZ	El Cajon	CA
Alameda	CA	El Monte	CA
Anaheim	CA	Elk Grove	CA
Antioch	CA	Escondido	CA
Arcadia	CA	Fairfield	CA
Azusa	CA	Folsom	CA
Bakersfield	CA	Fontana	CA
Baldwin Park	CA	Fountain Valley	CA
Berkeley	CA	Fremont	CA
Brea	CA	Fresno	CA
Brentwood	CA	Fullerton	CA
Buena Park	CA	Garden Grove	CA
Burbank	CA	Gardena	CA
Carlsbad	CA	Gilroy	CA
Cathedral City	CA	Glendale	CA
Ceres	CA	Glendora	CA
Chico	CA	Hanford	CA
Chino	CA	Hawthorne	CA
Chula Vista	CA	Hayward	CA

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Hemet	CA	Petaluma	CA
Huntington Beach	CA	Pittsburg	CA
Huntington Park	CA	Placentia	CA
Indio	CA	Pleasanton	CA
Inglewood	CA	Pomona	CA
Irvine	CA	Redding	CA
La Habra	CA	Redlands	CA
La Mesa	CA	Redondo Beach	CA
Lincoln	CA	Redwood City	CA
Livermore	CA	Rialto	CA
Lodi	CA	Richmond	CA
Long Beach	CA	Riverside	CA
Los Angeles	CA	Rocklin	CA
Madera	CA	Roseville	CA
Manhattan Beach	CA	Sacramento	CA
Manteca	CA	Salinas	CA
Menlo Park	CA	San Bernardino	CA
Merced	CA	San Diego	CA
Milpitas	CA	San Francisco	CA
Modesto	CA	San Jose	CA
Monterey Park	CA	San Leandro	CA
Mountain View	CA	San Luis Obispo	CA
Murrieta	CA	San Mateo	CA
Napa	CA	San Rafael	CA
National City	CA	San Ramon	CA
Newport Beach	CA	Santa Ana	CA
Novato	CA	Santa Barbara	CA
Oakland	CA	Santa Clara	CA
Oceanside	CA	Santa Cruz	CA
Ontario	CA	Santa Maria	CA
Orange	CA	Santa Monica	CA
Oxnard	CA	Santa Rosa	CA
Palm Springs	CA	Simi Valley	CA
Palo Alto	CA	South Gate	CA
Pasadena	CA	South San Francisco	CA

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Stockton	CA	Meriden	CT
Sunnyvale	CA	Middletown	CT
Torrance	CA	Milford	CT
Tracy	CA	Naugatuck	CT
Tulare	CA	New Haven	CT
Turlock	CA	Norwalk	CT
Tustin	CA	Norwich	CT
Union City	CA	Stamford	CT
Upland	CA	Stratford	CT
Vacaville	CA	Torrington	CT
Vallejo	CA	Waterbury	CT
Ventura	CA	West Hartford	CT
Visalia	CA	District of Columbia	DC
Walnut Creek	CA	Dover	DE
Watsonville	CA	Newark	DE
West Covina	CA	Wilmington	DE
West Sacramento	CA	Aventura	FL
Westminster	CA	Boca Raton	FL
Whittier	CA	Boynton Beach	FL
Woodland	CA	Bradenton	FL
Yuba City	CA	Cape Coral	FL
Aurora	CO	Clearwater	FL
Boulder	CO	Coconut Creek	FL
Commerce City	CO	Coral Gables	FL
Denver	CO	Coral Springs	FL
Fort Collins	CO	Davie	FL
Greeley	CO	Daytona Beach	FL
Pueblo	CO	Delray Beach	FL
Thornton	CO	Doral	FL
Bridgeport	CT	Fort Lauderdale	FL
Bristol	CT	Fort Myers	FL
Fairfield	CT	Fort Pierce	FL
Greenwich	CT	Gainesville	FL
Hartford	CT	Greenacres	FL
Manchester	CT	Hallandale	FL

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Hialeah	FL	Ames	IA
Hollywood	FL	Ankeny	IA
Jacksonville	FL	Bettendorf	IA
Jupiter	FL	Cedar Rapids	IA
Kissimmee	FL	Council Bluffs	IA
Lakeland	FL	Davenport	IA
Largo	FL	Des Moines	IA
Lauderhill	FL	Dubuque	IA
Margate	FL	Iowa City	IA
Melbourne	FL	Sioux City	IA
Miami	FL	West Des Moines	IA
Miami Beach	FL	Boise	ID
Miami Gardens	FL	Pocatello	ID
Miramar	FL	Addison	IL
North Miami	FL	Algonquin	IL
North Miami Beach	FL	Arlington Heights	IL
Ocala	FL	Aurora	IL
Ocoee	FL	Bartlett	IL
Orlando	FL	Belleville	IL
Ormond Beach	FL	Berwyn	IL
Oviedo	FL	Bloomington	IL
Palm Bay	FL	Bolingbrook	IL
Palm Beach Gardens	FL	Buffalo Grove	IL
Pembroke Pines	FL	Calumet City	IL
Pensacola	FL	Carol Stream	IL
Plantation	FL	Carpentersville	IL
Port Orange	FL	Champaign	IL
Port St. Lucie	FL	Chicago	IL
Saint Petersburg	FL	Chicago Heights	IL
Sarasota	FL	Cicero	IL
Sunrise	FL	Crystal Lake	IL
Tampa	FL	Danville	IL
Titusville	FL	Decatur	IL
West Palm Beach	FL	DeKalb	IL
Honolulu	HI	Des Plaines	IL

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Downers Grove	IL	Springfield	IL
Elgin	IL	Tinley Park	IL
Elk Grove	IL	Urbana	IL
Elmhurst	IL	Waukegan	IL
Evanston	IL	Wheaton	IL
Galesburg	IL	Wheeling	IL
Glendale Heights	IL	Woodridge	IL
Glenview	IL	Carmel	IN
Gurnee	IL	Evansville	IN
Hanover Park	IL	Fort Wayne	IN
Hoffman Estates	IL	Gary	IN
Joliet	IL	Indianapolis	IN
Lombard	IL	Lafayette	IN
Moline	IL	Muncie	IN
Mount Prospect	IL	South Bend	IN
Mundelein	IL	Terre Haute	IN
Naperville	IL	Kansas City	KS
Normal	IL	Lawrence	KS
North Chicago	IL	Topeka	KS
Northbrook	IL	Wichita	KS
Oak Lawn	IL	Bowling Green	KY
Oak Park	IL	Covington	KY
Orland Park	IL	Lexington	KY
Oswego	IL	Louisville	KY
Palatine	IL	Alexandria	LA
Park Ridge	IL	Baton Rouge	LA
Pekin	IL	Boston	MA
Peoria	IL	Brockton	MA
Plainfield	IL	Cambridge	MA
Rock Island	IL	Chicopee	MA
Rockford	IL	Fall River	MA
Romeoville	IL	Fitchburg	MA
Saint Charles	IL	Framingham	MA
Schaumburg	IL	Haverhill	MA
Skokie	IL	Lowell	MA

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Medford	MA	Saginaw	MI
New Bedford	MA	Southfield	MI
Newton	MA	Sterling Heights	MI
Plymouth	MA	Taylor	MI
Revere	MA	Troy	MI
Somerville	MA	Warren	MI
Taunton	MA	West Bloomfield	MI
Waltham	MA	Westland	MI
Watertown	MA	Wyoming	MI
Worcester	MA	Blaine	MN
Baltimore	MD	Bloomington	MN
Bowie	MD	Coon Rapids	MN
Frederick	MD	Duluth	MN
Lewiston	ME	Mankato	MN
Portland	ME	Minneapolis	MN
Ann Arbor	MI	Moorhead	MN
Battle Creek	MI	Rochester	MN
Bay City	MI	Saint Cloud	MN
Dearborn	MI	Saint Paul	MN
Detroit	MI	Shakopee	MN
East Lansing	MI	Woodbury	MN
Eastpointe	MI	Blue Springs	MO
Farmington Hills	MI	Columbia	MO
Flint	MI	Independence	MO
Grand Rapids	MI	Kansas City	MO
Jackson	MI	O'Fallon	MO
Kalamazoo	MI	Saint Charles	MO
Lansing	MI	Saint Joseph	MO
Lincoln Park	MI	Saint Louis	MO
Livonia	MI	Springfield	MO
Madison Heights	MI	University City	MO
Midland	MI	Billings	MT
Novi	MI	Bozeman	MT
Portage	MI	Butte	MT
Roseville	MI	Great Falls	MT

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Helena	MT	Union City	NJ
Missoula	MT	Vineland	NJ
Bellevue	NE	West New York	NJ
Grand Island	NE	Westfield	NJ
Lincoln	NE	Woodbridge	NJ
Omaha	NE	Albuquerque	NM
Concord	NH	Hobbs	NM
Dover	NH	Las Cruces	NM
Manchester	NH	Rio Rancho	NM
Nashua	NH	Santa Fe	NM
Rochester	NH	Henderson	NV
Atlantic City	NJ	Las Vegas	NV
Brick	NJ	North Las Vegas	NV
Camden	NJ	Reno	NV
Clifton	NJ	Sparks	NV
East Orange	NJ	Albany	NY
Edison	NJ	Binghamton	NY
Elizabeth	NJ	Buffalo	NY
Fair Lawn	NJ	Cheektowaga	NY
Fort Lee	NJ	Cicero	NY
Garfield	NJ	Freeport	NY
Hackensack	NJ	Hempstead	NY
Hamilton	NJ	Irondequoit	NY
Hoboken	NJ	Ithaca	NY
Jersey City	NJ	Jamestown	NY
Kearny	NJ	Long Beach	NY
Linden	NJ	Mount Vernon	NY
Long Branch	NJ	New Rochelle	NY
New Brunswick	NJ	New York	NY
Passaic	NJ	Niagara Falls	NY
Paterson	NJ	Oyster Bay	NY
Perth Amboy	NJ	Poughkeepsie (City)	NY
Plainfield	NJ	Poughkeepsie (Town)	NY
Sayreville	NJ	Riverhead	NY
Trenton	NJ	Rochester	NY

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Syracuse	NY	Lima	OH
Tonawanda	NY	Mansfield	OH
Troy	NY	Marion	OH
Utica	NY	Mason	OH
White Plains	NY	Massillon	OH
Yonkers	NY	Mentor	OH
Akron	OH	Middletown	OH
Beavercreek	OH	Newark	OH
Boardman	OH	North Olmstead	OH
Bowling Green	OH	North Ridgeville	OH
Brunswick	OH	North Royalton	OH
Canton	OH	Reynoldsburg	OH
Cincinnati	OH	Springfield	OH
Cleveland	OH	Stow	OH
Cleveland Heights	OH	Strongsville	OH
Colerain	OH	Toledo	OH
Columbus	OH	Upper Arlington	OH
Cuyahoga Falls	OH	Warren	OH
Dayton	OH	Westerville	OH
Delaware	OH	Westlake	OH
Dublin	OH	Youngstown	OH
Elyria	OH	Broken Arrow	OK
Euclid	OH	Edmond	OK
Fairborn	OH	Lawton	OK
Fairfield	OH	Midwest City	OK
Findlay	OH	Moore	OK
Gahanna	OH	Norman	OK
Grove City	OH	Oklahoma City	OK
Hamilton	OH	Shawnee	OK
Hilliard	OH	Stillwater	OK
Huber Heights	OH	Tulsa	OK
Kent	OH	Albany	OR
Kettering	OH	Beaverton	OR
Lakewood	OH	Bend	OR
Lancaster	OH	Corvallis	OR

<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>
Eugene	OR	Brownsville	TX
Grants Pass	OR	Cedar Park	TX
Gresham	OR	Corpus Christi	TX
Hillsboro	OR	Dallas	TX
Keizer	OR	Del Rio	TX
Lake Oswego	OR	Denton	TX
McMinnville	OR	Edinburg	TX
Medford	OR	El Paso	TX
Oregon City	OR	Fort Worth	TX
Portland	OR	Galveston	TX
Salem	OR	Georgetown	TX
Springfield	OR	Harlingen	TX
Tigard	OR	Houston	TX
Allentown	PA	Laredo	TX
Bethlehem	PA	Lufkin	TX
Erie	PA	McAllen	TX
Philadelphia	PA	McKinney	TX
Pittsburgh	PA	Mesquite	TX
Reading	PA	Pharr	TX
Scranton	PA	Port Arthur	TX
Cranston	RI	Round Rock	TX
Newport	RI	San Angelo	TX
East Providence	RI	San Antonio	TX
Pawtucket	RI	San Marcos	TX
Warwick	RI	Temple	TX
Woonsocket	RI	Waco	TX
Rapid City	SD	Salt Lake City	UT
Sioux Falls	SD	Burlington	VT
Memphis	TN	Auburn	WA
Nashville	TN	Bellevue	WA
Abilene	TX	Bellingham	WA
Amarillo	TX	Bothell	WA
Austin	TX	Bremerton	WA
Baytown	TX	Des Moines	WA
Beaumont	TX	Everett	WA

<u>City</u>	<u>State</u>
Federal Way	WA
Issaquah	WA
Kennewick	WA
Kent	WA
Lacey	WA
Lake Stevens	WA
Lakewood	WA
Lynwood	WA
Marysville	WA
Puyallup	WA
Redmond	WA
Renton	WA
Richland	WA
Seattle	WA
Spokane	WA
Tacoma	WA
Vancouver	WA
Walla Walla	WA
Wenatchee	WA
Yakima	WA
Appleton	WI
Brookfield	WI
Fond du Lac	WI
Green Bay	WI
Janesville	WI
Kenosha	WI
Madison	WI
Menomonee Falls	WI
Milwaukee	WI
New Berlin	WI
Oshkosh	WI
Wausau	WI
Wauwatosa	WI
West Allis	WI

APPENDIX B: METHODOLOGICAL DISCUSSION

In the methodology portion of this Article, I outlined how I “conducted a preliminary examination of the dataset and surveyed the existing literature discussed in Part II to identify recurring procedural elements of the disciplinary appeals process that may reduce democratic accountability or insulate officers from accountability.”²⁸⁹ For the purposes of brevity and readability, I provided only a brief discussion of how I defined the variables used in this study. In this Methodological Discussion, I will elaborate on the identification and definition of variables.

First, I included a variable to identify when departments offered arbitration for officers appealing disciplinary action. This posed two methodological challenges. Some union contracts permit arbitration for some, but not all, disciplinary appeals. Others permit the use of hearing officers or other third parties that are the functional equivalent of arbitrators. Given that a large number of researchers have argued that may serve as a barrier to officer accountability, I defined this variable broadly so as to include any time contract that permits an officer to appeal any disciplinary action to an arbitrator, or a comparable third-party.

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

The selection of who will serve as an arbitrator depends upon the willingness of both parties to a dispute (or in this study, series of disputes) to accept that individual as an arbitrator. Those arbitrators whom labor perceives as strongly pro-management, or vice versa, will over time find themselves not being selected to serve as arbitrators.²⁹⁰

In Chicago and Houston, Iris found that arbitrators frequently split the difference between union and management demands during disciplinary appeals, despite the fact that the two cities used somewhat different selection procedures. Houston used an alternative strike system that permitted both labor and management to strike potential arbitrators from a panel, while Chicago used a panel of arbitrators stipulated in their union contract that

²⁸⁹ See *supra* Part III.

²⁹⁰ Iris, *supra* note 103, at 240.

gave them “quasi-permanent status.”²⁹¹ Iris ultimately found that both selection processes were associated with similar rates of arbitrators overturning disciplinary decisions.²⁹² Thus, I included in my definition of this variable any selection methodology that allowed officers to have a role in selecting an arbitrator that was equal to or greater than management. This would include the methodologies employed by both Houston and Chicago from Iris’s prior studies. I did not, however, include in this definition union contract provisions that defer to the selection process recommended by national associations or arbitrators or mediators—even if those associations recommend a similar approach. It is important to explicitly clarify that this Article does not take the position that these selection methodologies are, in and of themselves, problematic. Rather, it makes a narrower argument, similar to that made by other previous researchers like Professor Iris, that this sort of a selection methodology may theoretically create unintended incentives to compromise on disciplinary action because police disciplinary arbitrators are repeat players—particularly when this variable is present with other variables considered in this study.

Third, I included a variable to determine whether a police union contract made arbitration decisions binding on the municipality. I coded an arbitration procedure as binding if the contract explicitly said as much, or if it was the final step of an appellate procedure, even if some states may permit limited judicial review of arbitrator’s decisions. But such situations are relatively rare. Most states make arbitration decisions binding and limit judicial review of arbitration decisions.²⁹³ The Supreme Court has also held that the “refusal of courts to review the merits of an arbitration award is . . . proper,”²⁹⁴ meaning that an arbitrator “can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator’s opinion.”²⁹⁵

Finally, I included a variable to determine the standard of review used by arbitrators on appeal. The vast majority of contracts simply articulated the acceptable conditions under which a police department could discipline an officer (often for “just cause,” “legitimate cause,” or “good cause”). Most contracts then gave an arbitrator expansive authority to determine whether a police chief, city manager, or civilian review board had such sufficient cause to punish an officer, and to decide whether the punishment was proportional to the alleged offense. I attempted to be as judicious as possible in coding contracts under this variable. If a union contract placed

²⁹¹ Iris, *Police Discipline in Houston*, *supra* note 103, at 146.

²⁹² *Id.* at 146-47.

²⁹³ Stoughton, *supra* note 58, at 2210.

²⁹⁴ *Id.* (quoting *Steelworks v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

²⁹⁵ *Id.* (quoting WILL AITCHISON, *THE RIGHTS OF LAW ENFORCEMENT OFFICERS* 98 (6th ed. 2009)).

any limit on an arbitrator's authority to re-review factual or legal findings handed down earlier in the disciplinary proceeding, I coded that contract as not falling into this category. Thus, I tried to only capture in this definition those contracts that provide arbitrators with something akin to de novo review authority of disciplinary decisions.