

DISCIPLINE AND POLICING

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ABSTRACT

A prime focus of police-reform advocates is the transparency of police discipline. Indeed, transparency is one of, the most popular accountability solutions for a wide swath of policing problems. This Article examines the “transparency cure” as it applies to Police Disciplinary Records (“PDRs”). These records are part of an officer’s personnel file and contain reported wrongdoing from supervisors, Internal Affairs Bureaus, and Citizen Complaint Review Boards.

This Article argues that making PDRs public is worthy of skeptical examination. It problematizes the notion that transparency is a worthy end goal for those who desire to see police-reform in general. Transparency is often seen as a solution with no downside, but this Article argues that, in the realm of PDRs, it comes with at least two major tradeoffs. First, making PDRs public will may lead to the accountability that advocates seek, and in fact may cause retrenchment from police departments. Second, transparency on an individual level necessarily comes with major privacy tradeoffs.

The problem with individualized transparency is not theoretical. In fact, it has been much critiqued by scholars in a different but comparable realm: the wide dissemination of criminal records. PDRs and criminal records have similar problems: due process issues,

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inaccuracy, arbitrary and discriminatory enforcement, and permanent reputational harm. Indeed, the rhetoric used by law enforcement to defend their privacy rights sounds almost identical to the critiques that scholars make of criminal record transparency.

This Article argues that the comparison of PDRs and criminal records is instructive because it allows us to view criminal records through a new lens. As with criminal record publication, forced PDR transparency will likely not solve the problems advocates hope it will. Thus, this Article concludes that a more nuanced regime should be put in place for PDRs, and that advocates should use law enforcement rhetoric to support a more privacy-protective regime for criminal records.

TABLE OF CONTENTS

Introduction	840
I. Problematizing the Transparency Cure	849
II. PDRs.....	858
A. The Current State of PDRs	859
1. <i>What Is a PDR?</i>	859
2. <i>The State of Privacy-Transparency for Disciplinary Records</i>	868
B. Privacy Is a Primary Concern for Police Officers.....	870
C. The Problematic Promise of Publicizing PDRs	872
III. Police Records as Criminal Records	880
A. The Rhetoric Surrounding PDR Transparency Reveals Important Similarities Between Police Records and Criminal Records	882
1. <i>Law Enforcement Rhetoric</i>	882
2. <i>PDR-Transparency Rhetoric</i>	886
B. The Lived Experience of Those with Criminal Convictions	889
IV. Using Police Arguments to Protect More Vulnerable Citizens	896
V. Balancing Transparency and Privacy for Police PDRs.....	900
Conclusion.....	905

INTRODUCTION

On September 22, 2017, Donald Trump roused a crowd in Alabama by calling for the firing of football players who knelt during the national anthem in protest of police brutality: “Wouldn’t you love

to see one of these NFL owners, when somebody disrespects our flag . . . say . . . Get that son of a bitch off the field right now, out. He's fired. He's fired!"¹ Two days later, a woman posted a photo of herself kneeling with two black Chicago police officers to her Instagram account. Her caption said, "That Moment when you walk into the police station and ask the Men of Color are they Against Police Brutality and Racism & they say Yes... then you ask them if they support Colin Kaepernick... and they also say yes... then you ask them to Kneel.![sic]"²



The Chicago Police Department acted quickly, not to condemn police brutality, but to assure the public that these two officers would be disciplined for making “political statements while in uniform . . .”³ These disciplinary charges will appear without context on the officers’ disciplinary records.

Meanwhile, in 2016, a Philadelphia police officer made news for his tattoo, visible when he wears his short-sleeve uniform, that depicts

1. Adam Serwer, *Trump’s War of Words with Black Athletes*, ATLANTIC (Sept. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/09/trump-urges-nfl-owners-to-fire-players-who-protest/540897> [<https://perma.cc/9EEJ-QM42>].

2. Aleta Clark (@englewoodbarbie), INSTAGRAM (Sept. 24, 2017), <https://www.instagram.com/p/BZbxm-rnNv0> [<https://perma.cc/6TCR-LY3X>]. The photo above is also from this source.

3. Katherine Rosenberg-Douglas & John Byrne, *Emanuel Declines to Criticize Police Officers Facing Reprimand for Kneeling*, CHI. TRIBUNE (Sept. 27, 2017, 6:25 AM), <http://www.chicagotribune.com/news/local/breaking/ct-officers-reprimanded-instagram-taking-the-knee-20170925-story.html> [<https://perma.cc/GB3R-E6UQ>].

an eagle known as the “emblem adopted by the Nazi party,” though without the trademark swastika between the bird’s talons. Just above the wings, he inked the word “Fatherland.”⁴ The Philadelphia Police Department opened an investigation in the wake of public uproar but cleared the officer of any charges, stating that “he didn’t commit any violations,” and that “[o]fficers . . . have First Amendment protections like anyone else.”⁵ This officer’s disciplinary record is thus free of any mention of his permanent and highly visible political statement glorifying Nazi Germany.



These two anecdotes reflect the state of internal discipline in police departments across the country: uneven, arbitrary, and entirely discretionary.

The issues presented by police discipline have impact far beyond the individual officers who are subject to such discipline. Indeed, questions about how police are disciplined, and what the public knows about their police disciplinary records (“PDRs”), are revealing themselves as central to issues surrounding policing and, as this paper will argue, to the longstanding critique of criminal records. PDRs are taking center stage in police-accountability debates in states like New York and California where police enjoy a strong privacy right in such

4. Albert Samaha, *A Cop with a Tattoo He Swears Isn't a "Nazi Tattoo" Says A Lot About Police Free Speech*, BUZZFEED NEWS (Sept. 22, 2017), https://www.buzzfeed.com/albertsamaha/they-cant-fire-you-for-whats-in-your-head?utm_term=.yoK6yK9l#.rmZN3JjG [<https://perma.cc/H5UQ-ZLUP>]. The photos above are also from this source.

5. *Id.*

records.⁶ Until recently, the privacy of PDRs in these states was relatively uncontroversial, despite the fact that many other states already make PDRs public.⁷ Now, police-reform advocates have begun to call for disclosure of police records.⁸ Police officers and their unions, who have fought hard for privacy and won it in the form of state statutes and collective bargaining agreements, oppose such calls.⁹

As can be said for many arguments surrounding policing, this debate pits central legal and theoretical principles against one another. On the one hand is the importance of accountability to ensuring a working democratic system. The police should be accountable to the public they serve, and many believe that there cannot be accountability without transparency.¹⁰ On the other hand is the profound and ever-growing issue of privacy and control over one's personal and professional information in a world where we are increasingly surveilled, exposed, and outed by government, social media, and corporate data-collecting entities.¹¹

And yet, transparency and privacy in policing are not described in these terms. Although very few scholars have written about PDR publication,¹² many have written about policing problems and proposed solutions. Surveying the literature and policymaking on

6. See Radley Balko, Opinion, *New York, California bills look to hold police, prosecutors more accountable*, WASH. POST (Aug. 17, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/08/17/new-york-california-bills-look-to-hold-police-prosecutors-more-accountable/?utm_term=.82dd9baf9bc0 [https://perma.cc/W6UC-JEZP].

7. See *infra* Part II.B.

8. See Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1085 (2016) (arguing in favor of more transparency for PDRs both in and out of the courtroom); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1202–03 (2017) (arguing that lack of transparency about police misconduct is a major obstacle to reform).

9. See *infra* Part III.A.

10. See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012) (arguing generally that the criminal justice system should be more transparent).

11. Cf. Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 161 (2015) (arguing that there are constitutional limitations on the ability of the government to out or disclose intimate information). See generally BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* (2015) (discussing the ways in which modern behavior exposes us to surveillance).

12. The few who have written in depth about PDRs come down firmly on the side of making these records available to the public. See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 776 (2015) [hereinafter Abel, *Brady's Blind Spot*]; Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 141–42 (2017); Conti-Cook, *supra* note 8, at 1085; Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 843–44 (2016).

policing, one would not be remiss in believing that transparency is a golden ticket to police reform. In fact, transparency has become one of the most often called-for police-reform suggestions from scholars, politicians, and even police chiefs.¹³ Scholars posit that transparency is a partial or total cure for community-engagement issues, legitimacy, racial disparities in arrests, the use of more invasive technology, false confessions, problematic plea bargains, and much more.¹⁴ Moreover, politicians and police departments have embraced what this Article will call the “transparency cure” with open arms.¹⁵

One reason for transparency’s popularity in police reform is that it is rarely viewed as having any downsides.¹⁶ Scholars see little need to defend their transparency suggestions, beyond remarking that visibility is not necessarily a solution by itself.¹⁷ Policy suggestions to increase transparency seem to need little evidence to back up the transformative power of greater police visibility,¹⁸ and more-transparent police departments have received tremendous public relations boosts without needing to show a causal connection between transparency and actual reform.¹⁹ In the world of police reform, transparency, it would seem, is all sunlight and no shadow.

Yet that perspective shifts for many if we focus the transparency narrative on a different group of individuals: those accused and convicted of crime. Indeed, criminal record transparency has long been a policy with many critics.²⁰ This Article aims to show how similar the debate over PDRs is to the rationales for and against criminal record publication. The police defend their privacy using similar rhetoric to critiques of criminal record publication.²¹ And advocates of PDR transparency may undermine larger criminal justice reform by using

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part I.

16. *See infra* Part I.

17. *See infra* Part I.

18. *See infra* Part I.

19. *See infra* Part I.

20. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) (noting the collateral consequences facing the “tens of millions” with criminal records); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1198 (2016) (noting that “the consequences of having a criminal record can far outstrip any penalty imposed by criminal law”); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265 (2018) (highlighting the employment consequences of having a criminal record).

21. *See infra* Part III.A.

the same public-safety and anecdotal rationales employed to promote criminal record transparency in order to bolster their arguments regarding PDRs. Like many solutions to police brutality, little thought appears to be given to the larger systemic context and the consequences of removing procedural privacy protections from individual police officers, either for officers themselves or for the criminal justice system more generally.²²

While transparency may well play a role in some solutions to policing issues, it is not the panacea—the transparency cure—its advocates claim it to be.²³ And while deidentified information may come with few downsides, the same cannot be said for publicizing the information of individuals. Indeed, individualized transparency comes with at least two major tradeoffs. First, without thinking through the instrumental goals of transparency, there is no reason to believe that visibility alone will solve complex, institutional, and organizational problems that have plagued police departments for decades.²⁴ Second, transparency, at least at the level of individuals, comes with clear and significant privacy tradeoffs.²⁵

This Article aims to complicate the transparency-cure narrative so popular in police-reform circles. It brings a more nuanced perspective to the table, arguing that we should place the harms of surveillance and exposure side by side with the benefits resulting from public disclosure of findings of police misconduct. Doing so results in a more sophisticated understanding not only of PDRs, but also, and significantly, of the dissemination of criminal records and records of wrongdoing more broadly.

PDR publication is, at the very least, worthy of skeptical examination.²⁶ The downside to this kind of transparency has simply

22. I have made this point in two other articles, arguing that calls to remove procedural protections from police in the pre-charge stage of the criminal process continue to legitimize an overall flawed vision of the criminal justice system, one that hurts ordinary defendants. See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 750 (2016); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1201–02 (2016).

23. See David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 102–03 (2018) (“Progressives . . . have unwittingly enabled [a problematic shift in the use of transparency for private and corporate ends] by embracing a vision of transparency as a universal tenet of ‘good governance,’ even a primary virtue worth attaining for its own sake.” (citations omitted)).

24. See *infra* Part II.C.

25. See *infra* Parts I, II.C, III.B.

26. See Kate Levine, *We Need to Talk About Police Disciplinary Records*, FORDHAM URB. L.J. ONLINE 2 (Aug. 2017), http://urbanlawjournal.com/files/2017/08/WeNeedtoTalkAboutPoliceDisciplinaryRecords_KateLevine-2.pdf [<https://perma.cc/C4LL-QKHS>] [hereinafter Levine, *We*

not been accounted for beyond reflexive arguments by law enforcement advocates and unions.²⁷ Yet, without a more thoughtful publication regime, there is little reason to think that public knowledge about individual officer misconduct will do much for citizens exposed to police violence. There is also good reason to believe that if police know that disciplinary actions will become public, that knowledge would add perverse incentives to the already-problematic internal disciplinary regime within many current departments. For example, senior officers may be less likely to report truly problematic behavior, and officers may be even more likely to close ranks behind fellow officers that are accused by citizens of misconduct.²⁸

Transparency's overemphasis within the police-reform discussion is only one way in which an inquiry into PDRs is instructive. Another major unaccounted for reason to closely analyze, and perhaps retain some skepticism about, the release of PDRs is the downstream implications for individuals with criminal convictions, whose lives are constantly affected by the specter of public outing.²⁹ Whether, how, and for how long to publicize the criminal records of those who have served their sentences and are attempting to reintegrate into society are questions that are the subject of much current scholarship and legal policy.³⁰ These are questions that should be considered again, particularly as we debate the privacy owed to police who commit misconduct.

In past articles, I have argued that, for numerous reasons, the revealed preferences of the police—through laws, collective bargaining agreements, and norms—have much to tell us about how the law

Need to Talk] (arguing that “the release of police disciplinary records requires balancing privacy and transparency values”).

27. See *infra* Part III.A.

28. Indeed California police departments are destroying records after a new transparency law was passed earlier this year. See Liam Dillon & Maya Lau, *California Police Unions Are Preparing to Battle New Transparency Law in the Courtroom*, L.A. TIMES (Jan. 9, 2018), https://www.latimes.com/politics/la-pol-ca-police-records-law-challenges-20190109-story.html?outputType=amp&__twitter_impression=true&fbclid=IwAR0U3A97f8JkLelle3SIpf4jb-bdUNK9TJdX3vT2L3d8Uhu9uogA7KB4Dwc [https://perma.cc/4DRN-GM96]. Cf. Levine, *We Need to Talk*, *supra* note 26, at 7 (“Police departments are already notoriously hesitant to fire bad officers, and will be even less likely to do so if incentives exist for an officer’s misconduct to go unrecognized.” (citations omitted)).

29. Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 505 (2013) (“There is no single NGO or interest group dedicated exclusively to protecting the privacy of the policed poor.”).

30. See *supra* text accompanying note 20.

operates for ordinary suspects and defendants. And I have argued that calls for increased harshness toward police are misguided, especially when such calls come from those who would like to see the criminal justice system reformed for ordinary suspects.³¹ Indeed, the focus should be on highlighting how the two-tiered system of justice—one track for police, and one for ordinary suspects—reflects the harshness of our system toward the many, rather than a problematic leniency toward a manifestly favored few.³² Here, I take the same theoretical stance as in my previous works, and focus it on another area of law—the permanent, public stain of a record of wrongdoing. While at first blush, the connection between disciplinary records and arrest records is attenuated, this Article makes the case that the arguments in favor of record publication for both groups are very similar, as are the arguments against their publication.³³

Advocates for public disciplinary records use reasoning very similar to those who defend public criminal records. They point to public safety, the punishment of “bad” people, and the deterrent effect of potential public shaming as reasons to override police privacy.³⁴ Meanwhile, the police, when they defend their privacy, make many of the same points that scholars have been making for years on behalf of the formerly incarcerated who must go through life with the permanent stain of a criminal record.³⁵ These arguments include the problem of inaccurate records, the arbitrariness of criminal or disciplinary enforcement, the outsized reputational harm that comes from a permanent and public record, and the institutional incompetence of the public to make rational choices based on the information contained in a criminal or disciplinary record.³⁶ There are other dynamics not mentioned by advocates for or against publicizing disciplinary records that may be even more troubling. These include the threat that

31. See *supra* text accompanying note 22.

32. See generally Levine, *How We Prosecute the Police*, *supra* note 22 (showing that the way prosecutors and grand juries carefully consider charging decisions when police freedom is on the line is a model for how such decisions should be made for each and every criminal suspect); Levine, *Police Suspects*, *supra* note 22 (showing that the way police protect themselves during interrogations mirrors and highlights the way defense advocates have argued that ordinary suspects should be treated, both to preserve the legitimacy of the process, and, perhaps more importantly, to ensure that vulnerable suspects do not give false confessions).

33. See *infra* Part III.

34. See *infra* Part III.A.

35. See *infra* Part III.A.1.

36. See *infra* Part III.A.

misconduct might be enforced along racial lines,³⁷ and the fact that officers are disfavored within departments for reasons other than the misconduct that actually affects the public.³⁸ Such problems add both to the credence that should be given to those who desire more privacy for ex-criminal offenders and to the skepticism with which we should treat calls to publicize disciplinary records. Although there are arguments that may suggest that some police misconduct should be made public,³⁹ this Article concludes that, for many reasons, before making any large-scale reform effort, we must first develop a more nuanced understanding of what such publication entails.

This Article proceeds in five parts. Part I develops the theory that transparency has become a simplistic and underexamined cure for a wide swath of policing problems. It looks at recent scholarship, national policy, and individual police department reform to show how prevalent the notion of transparency has become in police-reform circles. Part I then problematizes this transparency cure by noting the autonomy and privacy tradeoffs that accompany transparency. While privacy scholars have grappled with these issues for decades, these issues are rarely considered in police-reform conversations.⁴⁰

Part II then turns to the specific transparency-privacy question at issue here—the publication of PDRs. It describes what PDRs contain, the internal disciplinary processes police undergo, and the current state of privacy for PDRs throughout the United States. It also addresses some reasons, heretofore unexplored by scholars, why police officers might consider privacy among the most important job-related protections they can achieve. Part II then argues that, as suggested in Part I, forced transparency on the part of individual officers may not achieve the reforms that police-accountability advocates seek. In fact, forced transparency may lead to further retrenchment on the part of police departments—through refusing to record or discipline officers—further shrouding disciplinary processes, and ignoring the very real possibility that it is not the most problematic but rather the most vulnerable officers who are disciplined.

37. See *infra* Parts II.C, III.B.

38. See, e.g., Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 586–89 (2016) (describing several cases where officers were disciplined for, among other things, nonmarital sex and intra-office dating between officers of different ranks).

39. See Levine, *We Need to Talk*, *supra* note 26, at 1.

40. See *infra* Part I.

Parts III and IV then address the very real concerns that animate arguments by police in favor of their privacy. It shows that these concerns—including false allegations, due process, inaccuracy, the public’s inability to understand these records, and permanent reputational harm—mirror the arguments that scholars and advocates have made on behalf of the formerly incarcerated, who currently suffer under a regime of high visibility of their criminal records. These two debates mirror and amplify one another: if we are serious about protecting those with convictions from a permanent stigma of a criminal record, we should also take police concerns about their individual privacy seriously. Conversely, those who advocate for police privacy must also recognize the similarities in the arguments they make when it comes to the privacy of criminal defendants. Put simply, such arguments are two sides of the same coin.

Finally, Part V moves toward an appropriate balance for transparency and privacy for PDRs. It suggests that while PDRs should be made more available to litigants in criminal and civil cases, serious thought should be given to the types of information made generally available to the public.

Calls for more transparency from police and or more prosecutions against individual officers are similar to calls for more criminal law or harsher sentencing to resolve a perceived problem with criminality.⁴¹ These are often the most easily accessible and appealing solutions, but they rarely solve the problems they aim to rectify. In a time when policing problems continue to roil our nation, we must recognize how systemic, institutional, and baked into the fabric of our grossly bloated criminal justice system these problems are. Transparency may be part of the solution, but it comes with serious tradeoffs that must be acknowledged, discussed, and weighed.

I. PROBLEMATIZING THE TRANSPARENCY CURE

Transparency is among the most prevalent buzzwords in the conversation on reforming problematic police culture. Almost every

41. A particularly salient example is the national outrage in response to the light sentencing of Brock Turner, the “Stanford Rapist,” including calls for both a harsher sentence and the recall of the sentencing judge—the latter of which was ultimately successful. *See, e.g.*, Katie Reilly, *Brock Turner Prosecutor Calls for Harsher Penalties for Sexual Assault*, TIME (June 23, 2016), <http://time.com/4379272/brock-turner-sexual-assault-new-legislation> [https://perma.cc/UFQ3-MGA6]; RECALL JUDGE AARON PERSKY, <http://www.recallaaronpersky.com> [https://perma.cc/Q898-3HWH] (campaigning to recall Judge Aaron Persky because of his perceived light sentence of Turner).

piece of scholarship, reform suggestion, and legislation over the past several years includes transparency as a whole or partial solution to perceived problems with policing.⁴²

At first glance, it is hard to argue with the notion that transparency is an unqualified good when it comes to public officials, particularly those public officials with the power to violently impact the lives of so many citizens.⁴³ Citizen video has brought home to the public the brutal and unnecessary behavior that the police would rather keep a secret—an officer shooting a fleeing man in the back,⁴⁴ choking a man to death,⁴⁵ shooting a legal gun owner in his car while a child watches,⁴⁶ or body slamming a black teenage girl at a pool party, just to name a few recent and lurid examples.⁴⁷

And in some of these cases, public video has contradicted lies that were carefully constructed by police officers to cover up clear violations of policy and public trust, if not criminal law, as in the case of the shooting of Laquan McDonald in Chicago.⁴⁸ It is not surprising that these revelations have led to a marked increase in calls for more visibility into the official decision making of police departments and

42. See *infra* notes 55–67.

43. Rushin, *Police Union Contracts*, *supra* note 8, at 1247–48 (“[B]ecause of the power wielded by frontline officers and the high social cost of officer misconduct, the public [should] have greater input in the development of police disciplinary procedures. Unlike other public employees, police officers generally carry firearms, make investigatory stops, conduct arrests, and use lethal force when needed.”).

44. The Post and Courier, *Walter Scott Shooting*, VIMEO (Apr. 7, 2015, 2:48 PM), <https://vimeo.com/124336782> [<https://perma.cc/P596-3Y53>].

45. ‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD Officer – Video, GUARDIAN (Dec. 4, 2014, 2:46 PM), <https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video> [<https://perma.cc/G5EV-ZKXH>].

46. *Woman Streams Graphic Video of Boyfriend Shot by Police*, CNN (July 7, 2016), <http://www.cnn.com/videos/us/2016/07/07/graphic-video-minnesota-police-shooting-philando-castile-ryan-young-pkg-nd.cnn/video/playlists/philando-castile-shot-in-minnesota> [<https://perma.cc/QC9U-KAP8>].

47. Coreshift, *Brandon Brooks (filmed McKinney Pool Video) on New Day June 10, 2015*, YOUTUBE (June 10, 2015), <https://www.youtube.com/watch?v=3leCfP8WT0s> [<https://perma.cc/4NRD-E9GP>].

48. Before contradictory video was released to the public, the officers involved in the Laquan McDonald shooting told an untruthful, exculpatory version of the night’s events. See, e.g., Megan Crepeau et al., *Three Chicago Cops Indicted in Alleged Cover-Up of Laquan McDonald Shooting Details*, CHI. TRIB. (June 28, 2017), <http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-shooting-charges-20170627-story.html> [<https://perma.cc/QW56-X5AH>]; see also Rushin, *Police Union Contracts*, *supra* note 8, at 1193–94 (arguing that the officer who shot McDonald might not have been on the force if the public had been aware of the past allegations of brutality against him).

the individual actions of police officers.⁴⁹ This Part examines the way scholars, politicians, and even police departments themselves believe transparency will solve a large swath of policing problems. This Part then theorizes that our focus on the transparency cure for policing ignores both the limitations of visibility and its potential negative consequences.⁵⁰

Policing scholars and reform advocates have taken Louis Brandeis's famous adage that "[s]unlight is said to be the best of disinfectants" as gospel when it comes to police reform.⁵¹ The highest-profile example of the transparency cure has been the proliferation of policies requiring police to wear body cameras.⁵² And while a debate continues about when and what footage should be publicly disseminated,⁵³ body cameras are unquestionably part of policing reform, and they are a high-profile advertisement for police departments who aim to show a commitment to visibility.⁵⁴ Beyond

49. See *infra* Part II.C.

50. See *infra* Part I.

51. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY. (Dec. 20, 1913), reprinted in LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92, 92 (1914).

52. MAJOR CITIES CHIEFS & MAJOR COUNTY SHERIFFS, *SURVEY OF TECHNOLOGY NEEDS – BODY WORN CAMERAS 2* (2015) (reporting that 97 percent of survey responders said they used or planned to use body-worn cameras).

53. Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 400–01 (2016) (“Only a few states have succeeded in enacting legislation defining the rules for public disclosure of body camera footage containing private information. Other state legislatures have explicitly delegated the job of fleshing out the details of body camera policies to law enforcement officials.” (citations omitted)); Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 476 (2017) (“Many well-meaning lawmakers, activists, and members of the general public do not seem particularly attentive to the fact that no matter how benign or socially useful, police cameras are a powerful form of surveillance that have the potential to jeopardize the privacy of individuals at their most vulnerable.”).

54. A prominent example of the press exposure that a police chief can achieve by promising and delivering on certain aspects of transparency is the breathless coverage of the Dallas Police Chief's transparency promises. See Radley Balko, *What the Dallas Police Department Does Right – And Why Doing Those Things Could Now Be More Difficult*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/07/08/what-dallas-pd-does-right-and-why-doing-those-things-could-now-be-more-difficult/?utm_term=.695a76bc1a66 [https://perma.cc/4EFH-ANFN]; Christopher I. Haugh, *How the Dallas Police Department Reformed Itself*, ATLANTIC (July 9, 2016), <https://www.theatlantic.com/politics/archive/2016/07/dallas-police/490583> [https://perma.cc/SQV2-YHRM]. But see George Joseph, *Is the Dallas Police Department a Model for Reform? Depends on Which Part of Dallas You're From*, CITYLAB (July 14, 2016), <https://www.citylab.com/equity/2016/07/is-the-dallas-police-department-a-model-for-reform/490610> [https://perma.cc/9X5L-FY43] (citing a police reform advocate for noting that “[t]he problem with the nature of most of the Dallas police reforms being discussed . . . is that it is an attempt to build trust with better public relations without actually addressing the problem of over-policing in communities of color”).

body cameras, transparency is a core reform suggestion in almost every recent scholarly proposal regarding policing problems.

Policing scholars have embraced transparency with open arms. Much prominent scholarship of the last several years makes transparency a central tenet of reform, no matter which particular policing problem the article addresses.⁵⁵ Numerous scholars have written about transparency's ambitious potential when it comes to police governance and oversight; they suggest open rulemaking,⁵⁶ recommend greater transparency for civilian oversight,⁵⁷ urge state and federal review of policing practices,⁵⁸ collect data on the police to ensure they know the public is watching,⁵⁹ and call for the regulation of private police forces.⁶⁰ Transparent policing policies are also considered a partial antidote to the "legal estrangement" that historical policing practices have created in overpoliced communities of color.⁶¹ In addition, transparency is also suggested as a cure for collective bargaining agreements that many see as too protective of police interests⁶² and as contributing to violent police-citizen encounters.⁶³ Similarly, Fourth Amendment scholars contend that the public must come up with "new transparency and accountability mechanisms" to

55. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1835 (2015).

56. *Id.* at 1832.

57. 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, 504 (2008).

58. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1140 (2017) ("[T]he executive branch should institute direct review of . . . [the] police from the highest levels of the executive branch and create transparency of broad—not case-specific—criminal justice data to the public.").

59. Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 129 (2012) ("When police are subject to the watchful gaze of courts, the public, and self-surveillance, they behave in better conformity with expectations." (citation omitted)).

60. Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 162 (2012) ("[L]egislatures should create laws that mandate private police transparency, afford aggrieved parties with an efficient means of redress, and ensure public accountability.").

61. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2144–45 (2017) ("Transparency measures, including data collection and 'hot ticket' reforms such as police officer body cameras, can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement." (citation omitted)).

62. Rushin, *Police Union Contracts*, *supra* note 8, at 1204.

63. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 160 (2016) (arguing that data collection on police shootings could help improve the efficacy of federal prosecutions of police).

keep up with police department acquisition of new technologies to surveil citizens.⁶⁴

Scholars who focus on the process of arrests and prosecutions also see a major role for transparency in reforming problematic aspects of these processes. These include ensuring that interrogations are videotaped in order to reduce coerced confessions⁶⁵ and promoting greater transparency about “when officers choose to get involved in a plea [bargain]” in order to understand the major role police play in this process.⁶⁶ Former President Barack Obama has also touted transparency in his renewed turn as a legal academic. In his 2017 *Harvard Law Review* article, he suggests that transparency must be a major pillar of reforming police practices.⁶⁷ A full accounting of transparency’s appearance in policing scholarship would be impracticable and unproductive, but the above list exemplifies the myriad problems transparency is thought to address and the many prominent scholars who have embraced the transparency cure for policing.

Many police departments seeking increased legitimacy in the neighborhoods they serve also embrace the values of transparency.⁶⁸ And, even more than the scholars who initially theorized these ideas, police departments appear to believe that transparency is an end in and of itself, rather than a helpful but incomplete tool of reform.⁶⁹ It is

64. Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15, 32 (2016) (“When the police can watch many more people and activities with increasing sophistication and at lower cost, we need new transparency and accountability mechanisms.”).

65. Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1, 47 (2016) (“Greater access to cheap technology could considerably improve police transparency, at little cost. In particular, requiring audiovisual recording of all interrogations would not only help establish actual coercion in some cases, it would reinforce *Miranda*’s ‘civilizing’ effect on police behavior.” (citation omitted)).

66. Jonathan Abel, *Cops and Pleas: Police Officers’ Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1734 (2017) (suggesting that transparency about “when officers choose to get involved in a plea” bargain is essential to understanding the “normative implications of police influence on plea bargaining”).

67. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840–41 (2017) (noting that his policing task force unanimously “recommended steps for transparency” (citation omitted)).

68. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 730 (2017) (“Today, most departments claim that they are engaged in community policing.” (citation omitted)).

69. Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 795 (2016) (“Under the Obama administration, almost all consent decrees signed with a police department include a ‘community engagement’ section. These provisions, numbering anywhere from seven to forty

possible that police departments want to undertake transparency measures to actually increase trust with communities. However, such statements also have an enormous side benefit: police departments that undertake “transparency” measures have received important public relations boosts from such promises. This is imperative for an institution that has been under fire from the popular media in recent years.⁷⁰ It is not surprising, then, that police departments all over the country are taking up the rallying cry of transparency as the cure for police brutality, racism, and other systemic problems. Whether committed to reform or not, there appears to be no downside to touting increased transparency for these departments.

One could be forgiven for believing that all policing problems start with secrecy and are solved by visibility.⁷¹ Certainly, transparency *is* an essential feature of good governance. That said, there are theoretical and practical problems with the notion that transparency can cure policing problems or even that it is an unqualified good in all aspects of policing. In particular, there are significant issues with transparency as it relates to individuals.

While policing scholars see transparency as an unqualified good, scholars in other areas have argued that there are serious tradeoffs that come with overreliance on visibility. In the context of forcing more transparency from financial institutions, Frederick Schauer notes that Brandeis’s sunlight mantra “provided a slogan that has subsequently been deployed by countless advocates in urging what appear to them to be the self-evident virtues of openness and full disclosure, and thus of transparency.”⁷² Not even Brandeis himself, however, saw transparency as an unmitigated good. In fact, it was he who theorized our “modern right to privacy.”⁷³ This conception of privacy has as one of its “most important dimensions . . . a right *against* transparency.”⁷⁴ While our modern conception of privacy is multifaceted, the importance of protecting ourselves from transparency can be seen in

paragraphs, require community engagement as part of the respective police department’s reform process.” (citations omitted)).

70. *Id.* at 793–95.

71. Pozen, *supra* note 23, at 20 (“As a norm of public administration, transparency’s stature has only grown. Groups on all sides of the political spectrum swear fealty to it.” (citation omitted)).

72. Frederick Schauer, *The Mixed Blessings of Financial Transparency*, 31 YALE J. ON REG. 809, 809 (2014) (citations omitted).

73. *Id.* at 814 (citation omitted); *see also* Pozen, *supra* note 23, at 7 (noting that Brandeis’s focus was not governmental transparency but corporate transparency).

74. Schauer, *supra* note 72, at 814.

the tort of invasion of privacy:

At the heart of this version of the right to privacy is the right to control the facts about one's own life and thus a right against the publication of essentially accurate but non-newsworthy information. Insofar as the typical violation of this aspect of the right to privacy can be understood as the making transparent of that which the right-holder wishes to keep secret, the claim of the right to privacy is at the same time a claim against transparency.⁷⁵

More globally, Schauer begins to problematize the notion that transparency is always a goal worth pursuing: "Once we realize that few of us wear transparent clothes, live in transparent houses, or have transparent bathroom doors, we can begin to glimpse the possibility that transparency is not necessarily something to be pursued at all times and in all contexts."⁷⁶

Transparency should not be a goal in and of itself. Rather, it must be in service to some higher goal.⁷⁷ This is because transparency necessarily means a loss of privacy—a problem ignored by the many advocates of transparency. There is always a tradeoff. This tradeoff is implicit, if not explicit, in legislation designed to protect personal information in the digital age. Julie Cohen identified the core theoretical difficulty with dissemination of personal information almost two decades ago: "[T]he idea that 'privacy' might encompass an enforceable right to prevent the sharing of (certain kinds of) personally-identified data seems to conflict with deeply held social values that elevate choice over constraint, freedom of speech over enforced silence, and 'sunlight' over shadow."⁷⁸ Privacy-protection efforts have ramped up as data collection and dissemination has become seamless and instant due to modern computing databases. The dozens of privacy-related statutes that have been passed in the last quarter century or so "seem to share one galvanizing interest: technology."⁷⁹

Privacy scholars in a number of different areas are grappling with what exactly dissemination of personal data does to long-cherished

75. *Id.* at 815 (citations omitted).

76. *Id.* at 814.

77. Pozen, *supra* note 23, at 3 (arguing that transparency should not be seen "as an end in itself, but rather as a means to achieve particular social goods" (citation omitted)).

78. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1375 (2000).

79. Murphy, *supra* note 29, at 499.

notions of self-determination and individuality.⁸⁰ Among the most salient concerns with the technological capability to collect and disseminate personal data is that it leads to judgments based on partial information: “[T]he information in databases often fails to capture the texture of our lives. Rather than provide a nuanced portrait of our personalities, databases capture the stereotypes and the brute facts of what we do without the reasons.”⁸¹ To describe the problems with basing judgments of individuals on incomplete information, scholars often turn to criminal records as exemplifying such problems. Daniel J. Solove notes that “a record of an arrest without the story or reason is misleading.”⁸² He notes that an arrest for “civil disobedience in the 1960s” is likely to be recorded with “some vague label, such as disorderly conduct, slapped onto it.”⁸³ Arrest records leave a person “reconstituted in databases as a digital persona composed of data . . . distort[ing] who we are.”⁸⁴

Of course, the right to privacy for an individual private citizen is not the same thing as the right to privacy for elected government officials or, perhaps, even for individuals, like the police, who work for an elected government.⁸⁵ But before calling for transparency from individual police officers regarding their employment history, we

80. See, e.g., Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433 (2014) (arguing that a “right to erasure” is justified by the permanency of personal data on the internet and the lack of control individuals have over use of their personal information); Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559 (2015) (arguing that information shared in “trust” should be protected and that this concept of privacy is best for protecting individual privacy in the internet age); Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 733 (2016) (noting that government access to private data is a global problem).

81. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1425 (2001); see also Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. 547, 552 (2017) (“[I]t is not the corporal person, alone, that deserves protection, but also the information about the person. It is not the sheaf of papers, but the revealing personal details in those words that matter.”).

82. Solove, *supra* note 81, at 1425.

83. *Id.*

84. *Id.*

85. See generally, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (arguing that democratic policing *requires* transparency). But see David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1829 (2005). Sklansky agrees with Luna that transparency is currently important to democratic policing, but he notes that “always, there are trade-offs. Sometimes effective law enforcement depends on a degree of secrecy . . . Less obviously, there are trade-offs here between different components of democracy. Deliberative self-governance often requires a degree of confidentiality. That is why the Constitutional Convention met behind closed doors.” *Id.*

should at least have a sense of whether the publicized information will lead to the reforms we seek; in doing so, we should consider the privacy and policy implications of insisting on such disclosure.⁸⁶

While much of the scholarship touting transparency as a cure for policing problems concerns itself with data-level information, rather than with publicizing facts about individual officers, advocates around the country would like to see this change. This is not surprising given the public attention to violent citizen-police encounters and the highly publicized inability to hold such officers criminally accountable. Advocates are now calling for a very granular, individual level of forced transparency—that of individual PDRs.⁸⁷ Advocates for more transparency in policing see PDR secrecy as leading to the protection of bad police officers and the avoidable deaths of civilians.⁸⁸ To hear advocates tell it, publicizing PDRs has no downside and is a powerful tool in the fight against bad police officers and the departments that shield them from just consequences.⁸⁹

This Article calls for caution regarding publicizing PDRs and regarding transparency as a cure for policing problems more generally. As David E. Pozen writes—when discussing transparency as a global solution to many perceived governmental ills—we should “engag[e] with transparency in more skeptical, instrumental, and institutionally sensitive terms.”⁹⁰ As the next parts describe, PDR transparency is not a panacea, nor does it necessarily solve the problems its advocates believe it will. This Article instead argues that the move to make police discipline transparent should not proceed without serious consideration of the ways in which PDR transparency mirrors the publication and wide dissemination of criminal records.⁹¹ As I have argued in the past, what the police desire for themselves can and should serve as an aspirational model for a reformed criminal justice system.⁹² Thus, we should take police calls for privacy seriously, not only because they may have legitimate reasons to desire privacy for themselves, but also because these calls parallel and amplify the years of scholarship critiquing the many problems with criminal record transparency.

86. *See infra* Parts II.C & III.B.

87. *See infra* Part III.A.2.

88. *See infra* Part III.A.

89. *See id.*

90. Pozen, *supra* note 23, at 3.

91. *See infra* Part III.B.

92. *See supra* note 22.

II. POLICE DISCIPLINARY RECORDS

Police officers are under tremendous scrutiny. They are often blamed for systemic issues in the criminal justice system when culpability is equally assignable to prosecutors, judges, and legislators.⁹³ While police suffer, arguably unfairly, from this scapegoating, they do have a good deal of control—through their unions and lobbying power—over how they are treated by employers and other governmental bodies.⁹⁴ Even more apparent is the control officers, through powerful unions, possess over internal discipline. It turns out that keeping demands for informational transparency at bay is one of the most frequently demanded police protections.⁹⁵ This little-studied protection has come under scrutiny recently in New York and California, two states that are among the most protective in the country.⁹⁶

93. A good example of this phenomenon is the outcry over marijuana arrests. Although legislators are responsible for criminalizing marijuana possession—as are prosecutors for continuing to pursue charges against marijuana possession—the media and public tend to focus outrage on the police. *See, e.g.*, Jesse Wegman, Editorial, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html> [https://perma.cc/75HU-PBCU] (“[P]olice departments that presumably have far more important things to do waste an enormous amount of time and taxpayer money chasing a drug that two states have already legalized and that a majority of Americans believe should be legal everywhere.”).

94. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1472–1477 (2016).

95. Collective bargaining agreements supplement considerable statutory and constitutional protections of police officers:

In at least sixteen states, police additionally have statutory rights to certain procedures in the investigation of misconduct under Law Enforcement Officers Bills of Rights (“LEOBORs”) as well as civil service protections in many other states. Supplementing these constitutional and statutory protections are police union contracts, which contain additional procedural and substantive protections against discipline.

See Fisk & Richardson, *supra* note 68, at 718–19 (citations omitted); *see also* Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 307–09 (2017) (“[P]olice union contracts in many cities contain provisions requiring purges of disciplinary files.” (citation omitted)); Rushin, *Police Union Contracts*, *supra* note 8, at 1211 (“Police officers have secured . . . extensive protections [for] disciplinary procedures . . .”).

96. In New York, a bill has been introduced in the state assembly to repeal the law that protects police PDRs, *see* Assemb. B. A03333, 2017–2018 Reg. Sess. (N.Y. 2017), and several lawsuits with the same aim are working their way through the New York court system. *See* Colby Hamilton, *State Court of Appeals Declines to Hear Police Officer Record Shield Suit*, N.Y. L.J. (Dec. 19, 2017), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/19/state-court-of-appeals-declines-to-hear-police-officer-record-shield-suit> [https://perma.cc/NU2U-TT89] (noting that several other cases are also pending in the courts). In California, a bill to make PDRs more public was introduced but ultimately defeated in the legislative assembly. S.B. 1286, 2015–2016 Reg. Sess. (Cal. 2016). In 2018, a modified bill to release records only in use-

PDRs are rarely addressed in the scholarly literature.⁹⁷ They are, however, a major part of police collective bargaining agreements and lobbying.⁹⁸ In short, how police officers are disciplined and who has access to PDRs is a key issue to individual officers and their unions. Once an understanding of how discipline works and what might be included in a PDR is achieved, it becomes easy to see why police officers might care about their privacy in this realm. Accordingly, it also becomes harder to suggest that making PDRs public has no drawbacks.

This Part begins by explaining what PDRs are and how police discipline works. It addresses the status of privacy and transparency for PDRs in different states, and examines how the importance of privacy to police officers is reflected in collective bargaining agreements privacy-protective state statutes. It then turns to the arguments made in favor of full transparency for PDRs—including that publication will lead to fewer civilian fatalities—while raising both theoretical and practical questions about such claims.

A. *The Current State of PDRs*

There is no standard for PDRs, as they differ from jurisdiction to jurisdiction, and state to state, but some generalizations may be made. This Section describes generally what PDRs are, and it explains how such records are treated in all fifty states.

1. *What Is a PDR?* The question posed as the heading for this Section seems simple. The answers, however, are far more complicated and technical than one might imagine. Moreover, even attempting to describe these records generally suggests a coherence throughout

of-force and sexual assault cases was introduced and signed into law. S.B. 1421, 2017–2018 Reg. Sess. (Cal. 2018); CAL. PENAL CODE §§ 832.7–8 (West 2018).

97. There are few articles that address PDRs, either directly or as part of a larger discussion. See generally Abel, *Brady's Blind Spot*, *supra* note 12 (addressing prosecutor access to misconduct files for *Brady* purposes); Bies, *supra* note 12; Conti-Cook, *supra* note 8 (arguing that records should be made available to litigants); Fisk & Richardson, *supra* note 68 (mentioning PDRs, though primarily addressing police unions more generally); Moran, *supra* note 12 (arguing that misconduct investigations should be more transparent); Rushin, *Police Union Contracts*, *supra* note 8 (discussing PDRs as part of a larger argument about problems with collective bargaining negotiation over disciplinary procedures).

98. Levine, *Police Suspects*, *supra* note 22, at 1220–27 (discussing the procedural protections many police officers receive during interrogations); Rushin, *Police Union Contracts*, *supra* note 8, at 1191, 1196–98 (discussing collective bargaining agreements that have “laundry list[s]” of protections from internal investigations).

states, counties, cities, and towns that simply does not exist. Police departments and governance vary widely. That said, for the purposes of this paper, some generalizations about disciplinary records must suffice.

PDRs are part of an officer's personnel file. That file contains everything about the officer's employment history, including commendations, promotions, and demotions. Illinois, for example, describes a "personnel record" as "documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action."⁹⁹ Access to the personnel files of government employees is the subject of statutes in all fifty states.

Depending on the state, or even the locality, a police officer's disciplinary record may contain reports from many different sources. The many ways an officer can acquire a disciplinary file are demonstrated by an unsuccessful bill to make California disciplinary records more transparent. The bill describes disciplinary records as emanating from

[I]nvestigations or proceedings conducted by civilian review agencies, inspectors general, personnel boards, police commissions, civil service commissions, city councils, boards of supervisors, or any entities empowered to investigate peace officer misconduct on behalf of an agency, conduct audits of peace officer discipline on behalf of an agency, adjudicate complaints against peace officers or custodial officers, hear administrative appeals, or set policies or funding for the law enforcement agency.¹⁰⁰

Some charges, like those from civilian complaint review boards ("CCRBs"), must be investigated and substantiated before disciplinary action is recommended.¹⁰¹ Such investigations may be quite thorough and lengthy.¹⁰² Additionally, in many jurisdictions, officers have the

99. See 820 ILL. COMP. STAT. 40/2 (2018).

100. S.B. 1286, 2015–2016 Reg. Sess. (Cal. 2016).

101. See *Frequently Asked Questions*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD, <https://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page> [https://perma.cc/JAG8-B4LW] (noting that the CCRB substantiates charges and then recommends discipline to police chiefs, but that it cannot discipline officers itself).

102. For instance, New York's CCRB substantiated charges against Daniel Pantaleo for misconduct during the killing of Eric Garner more than three years after the event took place. See Matt Taibbi, *Civilian Review Board Substantiates Charges Against Policeman in Eric Garner Case*, ROLLING STONE (Sept. 8, 2017, 2:47 PM), <https://www.rollingstone.com/politics/features/ccrb-substantiates-charges-against-policeman-in-eric-garner-case-w501745>

right to appeal many, if not all, disciplinary charges or actions against them, whether that discipline be supervisory or stemming from an independent review.¹⁰³ Thus, at any given moment, an officer's personnel record may have charges that are "unsubstantiated," meaning either that they have not been investigated or have been investigated and found to be without merit.¹⁰⁴

It is easy to think that disciplinary records contain only the most serious, and civilian-related, complaints, but this is simply untrue. Disciplinary records can, and inevitably will, contain charges of a much less serious nature: lateness, not wearing the proper uniform, or poor driving on a training day, for example. The punishments, too, range from minor—"verbal counseling" or a "memo of correction"—to severe, as with termination. The variety of potential infractions and the sanctions resulting from them are far more complex than the casual observer might imagine.

To understand how byzantine internal police discipline is, one need only look at attempts by police departments to explain and simplify their processes. Madison, Wisconsin, publishes on its website a simplifying matrix that shows all possible infractions, the level of sanction each infraction may occasion, and what each sanction means.¹⁰⁵ The purpose of the matrix is to make clearer to officers and the public what Madison's disciplinary process looks like. These infractions are representative of possible infractions for any officer in any police department, though they are not necessarily standardized across departments.¹⁰⁶ Madison's matrix is reproduced here to show that even when an agency tries to simplify discipline, the varying complaints, procedures, and sanctions are numerous, and the sanctioning process varied and complex.

[<https://perma.cc/HC8X-AV95>] (noting that brutality charges often take a long time to substantiate).

103. See Fred Grimm, *Arbitration Allows Shabby Cops to Escape Real World Consequences*, MIAMI HERALD (June 15, 2017), <http://www.miamiherald.com/news/local/news-columns-blogs/fred-grimm/article156447984.html> [<https://perma.cc/MPP7-JGQR>] (noting that in Florida, police officers may appeal departmental decisions to fire them, and that often the arbitrators deciding those appeals overturn the firings).

104. See *supra* note 101.

105. CITY OF MADISON POLICE DEP'T, STANDARD OPERATING PROCEDURE, PROFESSIONAL STANDARDS AND INTERNAL AFFAIRS DISCIPLINE MATRIX 10–12 (2018), <https://www.cityofmadison.com/police/documents/sop/PSIAdiscMatrix.pdf> [<https://perma.cc/V2C7-LCMK>].

106. See Darrel W. Stephens, *Police Discipline: A Case for Change 3–4* (Papers from the Harv. Exec. Session on Policing & Pub. Safety, June 2011).

Sanction Categories

Category A	Category B	Category C	Category D	Category E
<p>Conduct violation in a single incident that has a minimal negative impact on the operations or reputation of the MPD. Sanctions listed in the below categories are not considered discipline. Sanction guidelines may include:</p> <ul style="list-style-type: none"> • Verbal Counseling • Mediation • Documented Counseling <p>A single sanction or a combination of the above listed sanctions may be deemed appropriate. Training and/or Work Rules can also be ordered in conjunction with any sanctions listed above.</p>	<p>Violations that have more than minimal impact on the operations or reputation of the MPD or that negatively impacts relationships with other officers, agencies or the public. This includes repeated acts from Category A within time frames listed below. Sanction guidelines may include thereof:</p> <ul style="list-style-type: none"> • Verbal Counseling • Mediation • Documented Counseling • Letter of Reprimand (First Level of Discipline) <p>A single sanction or a combination of the above listed sanctions may be deemed appropriate. Training and/or Work Rules can also be ordered in conjunction with any sanctions listed above.</p>	<p>Violations that have a pronounced negative impact on the operations or reputation of the MPD or on relationships with employees, other agencies or the public. This includes repeated acts from Category B within time frames listed below. Sanction guidelines may include:</p> <ul style="list-style-type: none"> • Letter of Reprimand • Suspension without pay for one to five days <p>A single sanction or a combination of the above listed sanctions may be deemed appropriate. Training and/or Work Rules can also be ordered in conjunction with any sanctions listed above.</p>	<p>Violations that are contrary to the core values of the MPD or that involve a substantial risk of officer or public safety. This includes repeated acts from Category C within the time frames listed below. Sanction guidelines may include:</p> <ul style="list-style-type: none"> • Suspension without pay for five to fifteen days <p>Training and/or Work Rules can also be ordered in conjunction with any sanctions listed above.</p>	<p>Violations that are contrary to the core values of the MPD. This includes acts of serious misconduct or acts of criminal conduct. This also involves any conduct that will effectively disqualify an employee from continued employment as a law enforcement officer. Sanction guidelines may include:</p> <ul style="list-style-type: none"> • Suspension without pay for fifteen days or more • Reduction in rank • Separation from service <p>Training and/or Work Rules can also be ordered in conjunction with any sanctions listed above.</p>

Discipline Matrix

Corresponding Code of Conduct Manual Listing <i>Categories skipped have not had recent previous discipline associated.</i>		Category				
		A	B	C	D	E
2.	Truthfulness					
	Failure to be truthful.					X
	Employees shall not make false reports or knowingly enter false information into any record.					X
3.	Performance of Duties					
	Failure to respond to dispatch.		X			
	Failure to properly perform duties assigned.		X			
	Failure to respond to subpoena or scheduled training.	X				
	Failure to comply with SOPs (excludes property handling code of conduct).	X				
	Failure to meet expectations of special initiatives.	X				
	Failure to notify supervisor of custodial arrest.	X				
	Failure to obtain supervisor approval for strip search.			X		
	Failure to assist backup officers.			X		
	Failure to make an effort to check email and mailbox once per shift and respond accordingly.		X			
	Failure to pursue flagrant law violations that they are aware of.		X			
	Engaging in activity on duty that does not pertain to MPD business.		X			
	Employees shall not sleep, idle or loaf while on duty.		X			
	Supervisors shall not knowingly allow employees to violate any law, code of conduct or procedure.			X		
	All employees shall report fit for duty.				X	
All MPD members shall not be impaired as a result of any drug usage or alcohol. All employees are prohibited from having any measurable amount of alcohol in their system while on-duty. No MPD member shall consume or purchase any intoxicants while in uniform. No MPD member shall consume intoxicants while armed except with the approval of the Chief of Police. It is the responsibility of the employee to consult with their physician to determine their fitness for duty based on their medical condition and/or prescribed treatment.				X		
4.	Absence from Duty					
	Employees shall not be late or absent from duty without prior permission from a supervisor or the Officer in Charge (OIC).		X			

Corresponding Code of Conduct Manual Listing <i>Categories skipped have not had recent previous discipline associated.</i>		Category				
		A	B	C	D	E
5.	Unlawful Conduct					
	Employees shall not engage in conduct that constitutes a violation of criminal law, or ordinance corresponding to a state statute that constitutes a crime.					X
	Employees convicted of first offense OWI.			X		
	Failure to immediately notify a supervisor whenever investigating an incident involving a law enforcement officer who is a suspect in any criminal activity or OMVWI.			X		
6.	Notification Required of Law Enforcement Contact					
	Failure to notify of contact by any law enforcement agency regarding their involvement as a suspect, witness, victim or contact in criminal conduct, violation of municipal ordinance for which a corresponding state statute exists (ex. OWI or Hit and Run). The employee SHALL report the incident to their commanding officer or the OIC within 24 hours of the contact, or their return to duty, whichever comes first. This must be done in person or via telephone.		X			
7.	Equal Protection					
	Employees shall not show bias based on relationships in investigative decisions, or assist in investigations or enforcement decisions.		X			
	Employees are prohibited from interfering in the normal processing of traffic/parking citations or otherwise disrupting enforcement of the law by other members of the MPD. If a supervisor orders a change in an enforcement decision and a subordinate feels it is wrong, it should be reported to a commanding officer.		X			
9.	Harassment					
	Employees shall not engage in harassment or to retaliate against an employee who reports such harassment. (For definition of harassment, see APM 3-5.)			X		
	Supervisors shall not allow employees under their command to engage in harassment or permit retaliation against an employee who reports such harassment.			X		
	Employees shall not engage in sexual harassment, this includes unwanted sexual advances.			X		
10.	Courtesy, Respect and Professional Conduct					
	Failure to be courteous to the public and to coworkers and shall avoid the use of profane language or gestures. Employees shall also avoid actions that would cause disrespect to the MPD.		X			
	Employees shall not act so as to exhibit disrespect for a supervisor.		X			
	Employees shall not speak derogatorily to others about orders or instructions issued by supervisors.		X			
	Employees shall use police communications systems, email, radio only for official police business and shall exhibit courtesy during the transmission of all messages.		X			
11.	Public Criticism					
	Employees shall not publicly criticize the operations or personnel of the MPD if such criticism undermines the discipline, morale or efficiency of the MPD. This applies both on duty and off duty.		X			
12.	Use of Force					
	9A Employees shall not use deadly force when a lesser degree of force was reasonable.					X
	9B Employees shall not use excessive force when a lesser degree of force was objectively reasonable.			X		
13.	Vehicle Operation					
	Employees shall operate city vehicles with due regard for safety.			X		

Corresponding Code of Conduct Manual Listing <i>Categories skipped have not had recent previous discipline associated.</i>		Category				
		A	B	C	D	E
14.	Insubordination			X		
	Failure to promptly obey lawful orders from any supervisor. This includes violations of work rules. If these orders conflict with code of conduct or procedure, the ordered member shall call attention to this conflict. Any unlawful orders shall be promptly reported to the Chief of Police.			X		
16.	Criminal Association			X		
	Failure to avoid regular or continuous associations or dealings with persons known to be engaged in ongoing criminal activity, under indictment, on probation, parole, house arrest or Huber. Association consists of more than a single occurrence.			X		
20.	Cooperation with Investigations Required					X
	Failure to cooperate in internal investigations of alleged misconduct, illegal activity or code of conduct violations. This includes failure to answer questions or submit to proper investigative techniques.					X
21.	Access to Police Records			X		
	Employees shall not access MPD official records for any reason inconsistent with their professional duties.			X		
	Employees shall not release official records of the MPD for reasons inconsistent with their professional duties.			X		
	Employees shall not tamper with any MPD records system.			X		
STANDARD OPERATING PROCEDURES						
SOP	Transportation and Treatment of Prisoners		X			
	Failure to take all reasonable precautions necessary to secure and safely transport prisoners in accordance with SOP.		X			
SOP	Status Changes		X			
	Failure to report changes in address or telephone number within 24 hours after making such changes by submitting in writing the changes to the Chief of Police's Office, their commanding officer and the shift OIC. All employees shall maintain a working telephone number. Officers shall promptly notify their commanding officer if their drivers license status changes.		X			
SOP	Search and Seizure		X			
	Failure to obtain Command Approval for search warrants for any building or dwelling. This does not include search warrants for property or vehicles that are already in MPD custody. Tactical execution of warrants will only be performed by personnel with appropriate training and who are in uniform or otherwise clearly identifiable as police officers.		X			
SOP	Police Weaponry		X			
	Failure to adhere to the specifics of this procedure as described in the SOP.		X			
SOP	Firearms Safety			X		
	Employees who have been trained in MPD firearms safety shall strictly adhere to all safety guidelines when handling firearms to prevent unintentional discharges. This applies both on and off duty.			X		
	Unintentional discharge on the range line (no injury or horseplay).		X			
	Failure to ensure the security and safe storage of MPD approved weapons. This applies both on and off duty.		X			

This representative sample of a document aimed at clarifying discipline paints a picture of the many sanctions—ranging from minor to serious—that a PDR could contain. It is worth noting here that the Madison Police Department's matrix and explanation represents the lodestar of what experts in police discipline consider clarity. In a report authored by Darrel W. Stephens of Harvard's Kennedy School that criticizes the complex nature of discipline for officers, he discusses a similarly simplified matrix as an example of a clarified disciplinary system.¹⁰⁷

107. *Id.* at 11.

To illustrate the discretion and arbitrariness that such rules might engender, let us return to the Chicago Police officers disciplined for making a political statement while in uniform by kneeling in support of athletes who protest police brutality.¹⁰⁸ What sanctions from the above list could apply to these officers if they worked for the Madison, rather than the Chicago, Police Department? At least nine Category B sanctions, which include a “letter of reprimand,” could be read to apply to the behavior of these kneeling officers and the subsequent posting of the photograph on Instagram:

1. “Engaging in activity on duty that does not pertain to MPD business”;¹⁰⁹
2. “Employees shall not publicly criticize the operations or personnel of the MPD if such criticism undermines the discipline, morale or efficiency of the MPD. This applies both on and off duty”;¹¹⁰
3. “Employees shall not use any MPD property for private purposes [without permission]”;¹¹¹
4. “Failure to be courteous to the public and to coworkers . . . avoid actions that would cause disrespect to the MPD”;¹¹²
5. “Employees shall not act so as to exhibit disrespect for a supervisor”;¹¹³
6. “Employees shall not speak derogatorily to others about orders or instructions issued by supervisors”;¹¹⁴
7. “Failure to adhere to personal appearance code of conduct described in the SOP [Standard Operating Procedure]”;¹¹⁵
8. “Failure . . . to appropriately represent MPD honestly, respectfully, and/or legally while on- or off-duty through the use of social media. Personnel are expected to represent the Core Values of the MPD at

108. See Clark, *supra* note 2.

109. CITY OF MADISON POLICE DEP’T, *supra* note 105, at 2.

110. *Id.* at 3.

111. *Id.* at 5.

112. *Id.* at 3.

113. *Id.*

114. *Id.*

115. *Id.* at 5.

all times even when using the internet for personal purposes.”¹¹⁶

Category B sanctions themselves are not particularly onerous, but any and all of these infractions would presumably appear in these officers’ personnel files, without the context of the events appearing alongside them. More to the point, the choice of which, if any, of these charges should be brought against the officers is entirely up to their supervisors. These decisions may be made fairly and evenhandedly, or they may be based on how seriously the supervisor adheres to the MPD code of conduct, or they may even be made based on a supervisor’s preference, explicit or implicit, for certain officers or types of officers.

It is not difficult to draw an inference, then, that an officer’s disciplinary file may have as much to do with his supervisor’s attitude and biases as it does with his adherence to the code—let alone his quality as an officer, as defined by those of us who are policed, rather than those who are doing the disciplining.¹¹⁷ Anecdotal evidence bears this speculation out. In Columbus, Ohio, where the population is 40 percent people of color but the police command is entirely white, a black sergeant named Melissa McFadden faced possible termination over alleged favoritism toward a black officer. She also, it turns out, has helped subordinates file racial-discrimination claims against the department. On the other hand, a white officer who referred to two black colleagues with the N-word received no more than a written sanction.¹¹⁸ In another example, a New York transit officer filed a federal lawsuit in 2015, charging that he was disciplined for *not* racially profiling subway riders. In a secret recording, his supervisor was heard to say that the people jumping over turnstiles were largely black and Hispanic, while the officer had more arrests for “women and whites.” The supervisor then reprimanded him for being “fully aware of it and . . . not targeting those people.”¹¹⁹ These anecdotes support the

116. *Id.* at 6. Presumably, this last potential violation would apply only if the officers knew their images were being used on Instagram.

117. I say this because the advocates for publicizing records are individuals who care about how police treat the public, not police officers concerned about fellow officers violating police codes of conduct.

118. George Joseph, *An Inside Look at an Ohio Police Force’s Race Problem*, APPEAL (Aug. 13, 2018), <https://theappeal.org/columbus-ohio-police-department-racism-retaliation-discrimination> [https://perma.cc/9WWA-4GQE].

119. John Marzulli, *Exclusive: NYPD Cop Claims He Was Punished for Not Stopping Enough Black, Hispanic Teens in Subways*, N.Y. Daily News (Jan. 7, 2016), <http://www.nydailynews.com/news/politics/nypd-admits-quotas-summons-article-1.2488316>

admittedly speculative concern that when discipline is so discretionary and police command is so often homogeneous, disciplinary actions may be unevenly enforced against officers who are not part of the dominant, white, male, heterosexual group. Such concerns are bolstered by the many lawsuits alleging racial bias in police departments throughout the country.¹²⁰

Scholars have long noted the complexity of our criminal codes and vagueness of criminal laws, and the arbitrary enforcement made possible by such complexity.¹²¹ The very same criticism could be lodged about police discipline: there are innumerable possible ways to violate police procedures and many ways for a supervisor or outside agency to interpret an action by an officer. Whether an officer is disciplined has as much to do with the personal preferences of those doing the disciplining as it does with the officer's actual behavior toward civilians or with the kind of professionalism that most concerns the public.¹²² When one begins to consider the amount of discretion on the part of supervisors, managers, and agencies that can go into making up a police officer's disciplinary file, it becomes easier to understand why police officers might legitimately worry about such records becoming public.

[<https://perma.cc/75LL-6BN4>]. A later article notes that the supervisor responsible for these racist statements has been promoted rather than disciplined. See Edwin Raymond, *The Racist NYPD Captain Who Ruined My Career for Not Targeting Enough Blacks and Hispanics Got Promoted*, N.Y. Daily News (June 23, 2016), <http://www.nydailynews.com/new-york/joins-class-action-suit-nypd-article-1.2685918> [<https://perma.cc/2VMU-3RCJ>].

120. One author describes the racial disparity in police disciplinary action in New York, as well as official explanations for that disparity that, of course, are racially neutral:

The discipline of black and Hispanic officers brought up on departmental charges has been a simmering issue in New York for years, spurred in part by the Latino Officers Association's complaints of a double standard. Last year, a task force . . . concluded that minority officers were more likely than white officers to face punishments in the police discipline process, but that the disparity was not the result of discrimination. The department has contended that more minority officers have been disciplined because they were involved more often in serious infractions that carry mandatory penalties.

Benjamin Weiser, *14 Minority Officers Sue Police Force, Alleging Bias in Disciplinary Practices*, N.Y. TIMES (1999), <http://www.nytimes.com/1999/09/10/nyregion/14-minority-officers-sue-police-force-alleging-bias-in-disciplinary-practices.html> [<https://perma.cc/5PW2-8DN9>].

121. See, e.g., Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1145 (2016) (describing how "the enactment of broad, overlapping criminal codes and the significant enforcement discretion given to prosecutors . . . result in a lack of notice [and] permit arbitrary and discriminatory enforcement").

122. See, e.g., Murray, *supra* note 38, at 586–89 (describing several cases where officers were disciplined for, among other things, nonmarital sex and intra-office dating between officers of different ranks).

2. *The State of Privacy-Transparency for Disciplinary Records.*

This Section gives a general overview of the complicated and varied states of privacy and transparency for PDRs. It then addresses how privacy of disciplinary records, in states where it exists, represents a major feature of collective bargaining negotiations or lobbying by police unions.¹²³

Whether or not disciplinary records are public is primarily a matter of state law. All states have laws that dictate what records from government agencies and their employees are public, but these laws have many exceptions. PDRs are often among the records exempted from public disclosure, except upon a motion in a criminal or civil case.¹²⁴ One can categorize the states' records into private, limited access, and public, but among these categories, there are significant variations across states and even across jurisdictions within each state.¹²⁵

Three states—California, Delaware, and New York—have statutes that make PDRs private.¹²⁶ In twenty other states, including the District of Columbia, records are confidential, either by policy or practice.¹²⁷ In some of these states, like Colorado, all public-employee personnel records are confidential;¹²⁸ in others, police are given a presumption of privacy.¹²⁹ In the latter group of states, there are

123. See Rushin, *Police Union Contracts*, *supra* note 8, at 1228–32.

124. See N.Y. CIV. RTS. LAW § 50-a (McKinney 2014).

125. COLO. REV. STAT. § 24-72-240 (2017) (providing that police personnel records only be made available upon court order); *see also* Abel, *Brady's Blind Spot*, *supra* note 12, at 745 (describing the range of availability of disciplinary records, and noting that in some jurisdictions, even prosecutors cannot access these records).

126. WNYC, an NPR affiliate, has an easy-to-use tool that lists all the state statutes pertaining to whether disciplinary records are available through public record request. See WNYC, *Is Police Misconduct a Secret in Your State?*, <https://project.wnyc.org/disciplinary-records> [<https://perma.cc/L5X7-C69E>]. Although I cite at times to the WNYC tool, all state statutes reported by the tool have been independently verified for accuracy.

127. See CAL. PENAL CODE § 832.7 (West 2004); DEL. CODE ANN. tit. 29, § 10002(1)(1) (2015); N.Y. CIV. RTS. LAW § 50-a.

128. WNYC, *supra* note 125; *see, e.g.*, COLO. REV. STAT. § 24-72-240.

129. COLO. REV. STAT. § 24-72-240.

129. See MD. CODE ANN., General Provisions § 4-311 (LexisNexis 2018).

procedures for accessing these records for litigation purposes.¹³⁰ In Maryland, records remain private even from the officer herself.¹³¹

Fifteen states have a mixture of public disclosure and confidentiality for police records.¹³² Publication in some states depends on the severity of the infraction, while the case law and policies of other states allow publication to vary by police department. For example, in Arkansas, records remain private unless the person requesting them can show a “compelling public interest in their disclosure.”¹³³ In Texas, charges that trigger only minor forms of discipline—a “written reprimand” or less—remain private.¹³⁴

In twelve states, records are considered public,¹³⁵ but “public” means very different things. For example, a Connecticut statute makes PDRs private if disclosure would constitute an “invasion of personal privacy.”¹³⁶ The Connecticut Supreme Court, however, has interpreted this provision very narrowly, so that most records are accessible.¹³⁷ Some of these “public” records states do not make unsubstantiated charges public.¹³⁸ States like Florida, Georgia, and Maine, on the other hand, make all disciplinary decisions public; privacy is given only to charges under open investigation.¹³⁹

Privacy regimes vary from state to state and from jurisdiction to jurisdiction. There has been no study to date of what effect each regime has on police accountability, use of force, or any other reform issue. Despite this paucity of knowledge, advocates on both sides are confident that PDRs are either a necessary accountability measure, or a dangerous and unwise invasion of police privacy.

130. In California, for instance, such requests are known as *Pitchess* motions, named for the case that set out the standards for requesting such records. *See Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974). For a typology of access to state disciplinary records for *Brady* purposes, see Abel, *Brady's Blind Spot*, *supra* note 12, at 762–79.

131. MD. CODE ANN., General Provisions § 4-311.

132. WNYC, *supra* note 125.

133. ARK. CODE ANN. § 25-19-105(c)(1) (2018).

134. TEX. LOC. GOV'T CODE ANN. §§ 143.1216, 143.123 (2017).

135. WNYC, *supra* note 125.

136. CONN. GEN. STAT. § 1-210 (2018).

137. *See Perkins v. Freedom of Information Comm'n*, 635 A.2d 783, 787, 791 (Conn. 1993) (construing narrowly exemptions to the state Freedom of Information Act's (“FOIA”) general rule of disclosure).

138. *See, e.g., UTAH CODE* § 63G-2-301(3)(o) (2018).

139. FLA. STAT. § 119.071(2)(k)(1) (2017); GA. CODE ANN. § 50-18-72(a)(8) (2018); ME. STAT. tit. 5, § 7070(2)(E) (2013).

B. Privacy Is a Primary Concern for Police Officers

In most states where the police have privacy in their disciplinary records, such privacy is the product of either collective bargaining between the union and government or of intense legislative lobbying.¹⁴⁰

As Stephen Rushin notes, police unions are singularly powerful among unions, drawing support from both sides of the aisle:

A majority of American states now permit or require municipalities to bargain collectively with police unions. According to the best estimates, around two-thirds of American police officers are part of a labor union. Police unions generally benefit from broad, bipartisan support—even from conservative politicians who have fought against unionization for other government employees.¹⁴¹

Discipline is a major part of negotiations in many jurisdictions. How officers are disciplined, what kind of appeals they are entitled to, and, importantly for this Article, control over publication of disciplinary records are spelled out in contracts. These rights for officers are a major part of the Law Enforcement Officers Bill of Rights (“LEOBOR”) in the sixteen states that have these laws.¹⁴² These statutes are largely devoted to the rights of officers in terms of disciplinary procedures. Delaware’s LEOBOR, in particular, is clear that privacy is paramount: “All records compiled as a result of any investigation subject to the provisions of this chapter and/or a contractual disciplinary grievance procedure shall be and remain confidential and shall not be released to the public.”¹⁴³

But even states where disciplinary records are subject to much more public scrutiny have protections for officer privacy built into their LEOBORs. West Virginia, for instance, allows publication of disciplinary records as long as the request does not invade personal

140. New York does not have a state “LEOBOR” but lobbying in the 1970s by police and advocates led to one of the most privacy-protective state statutes in the country. *See Levine, We Need to Talk*, *supra* note 26, at 2–3, 6.

141. Rushin, *Police Union Contracts*, *supra* note 8, at 1204 (citations omitted).

142. *See* ARIZ. REV. STAT. ANN. §§ 38-1102–1116 (2017); CAL. GOV’T CODE §§ 3300–3313 (West 2017); DEL. CODE ANN. tit. 11, §§ 9200–9209 (2018); FLA. STAT. § 112.532; 50 ILL. COMP. STAT. 725/1–7.5 (2018); IOWA CODE § 80F.1 (2018); KY. REV. STAT. ANN. § 15.520 (West 2018); LA. STAT. ANN. §§ 40:2531–2535 (2017); MD. CODE ANN., Public Safety §§ 3-101–113 (West 2018); MINN. STAT. §§ 626.84–.863 (2017); NEV. REV. STAT. §§ 289.020–.120 (2017); N.M. STAT. ANN. §§ 29-14-1–29-14-11 (West 2018); 42 R.I. GEN. LAWS § 42-28.6 (2017); VA. CODE ANN. §§ 9.1-500–507 (2017); W. VA. CODE §§ 8-14A-1–5 (2017); WIS. STAT. § 164.01–.06 (2018).

143. DEL. CODE ANN. tit. 11, § 9200(c)(12).

privacy.¹⁴⁴ The West Virginia Supreme Court of Appeals has ruled that disclosure of on-the-job conduct does not invade privacy.¹⁴⁵ Thus, it would appear that in West Virginia, officer records are mostly made available to the public. However, a closer look at the state's exemptions from open record laws suggests otherwise. One exemption is for "internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement."¹⁴⁶ This relatively ambiguous phrase may contain multitudes, depending on who determines what information is considered internal. More to the point, the officer and the union still have control, to some extent, over what goes into the personnel file that is made public.¹⁴⁷ It is certainly not hard to imagine that in states where personnel files are made public to any degree, there is much that is kept out of the file.

LEOBORs are useful because they make negotiations between unions and jurisdictions plain. It is easy to see from these statutes what the police feel they need, in terms of discipline and privacy. Discipline and privacy also feature in far less visible contracts. This fact was discovered when a hacker broke into the website of the largest police union in the country and leaked sixty-seven negotiated contracts to the *Guardian*, which reported that 30 percent of these contracts provided for privacy from publication of disciplinary records.¹⁴⁸

In New York, where the state's highest court has specifically ruled that disciplinary actions may not be a subject of the New York Police Department's ("NYPD") collective bargaining agreement,¹⁴⁹ privacy was won through legislative lobbying. An intense effort by advocates to remove this privacy from police has led to an equally intense effort on the part of the police to keep it, an effort which—like many issues

144. See W. VA. CODE § 29B-1-4.

145. See generally *Charleston Gazette v. Smithers*, 752 S.E.2d 603 (W. Va. 2013) (denying a newspaper's request for a declaratory judgment under West Virginia's FOIA for police records on officer misconduct complaints that the court deemed exempt from disclosure).

146. See W. VA. CODE § 29B-1-4.

147. *Id.*

148. George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, *GUARDIAN* (Feb. 7, 2016, 12:00 GMT), <https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> [<https://perma.cc/8PTU-AQ4V>].

149. *In re Patrolmen's Benevolent Ass'n of N.Y., Inc.*, 848 N.E.2d 448, 449 (N.Y. 2006) ("We hold that police discipline may not be a subject of collective bargaining . . .").

law enforcement unions care about—seems to be winning the day so far in New York’s appellate courts.¹⁵⁰

In sum, police use their considerable bargaining and lobbying power to ensure their personal privacy and to control how their disciplinary information is disseminated. While certainly not a reason in itself to be cautious about publicizing PDRs, inquiry into why privacy is considered so vital to rank and file officers is useful. Moreover, while advocates for police reform are attacking the privacy of PDRs as central to police brutality issues, the next Section suggests that stripping police of this privacy may have little impact on the way officers are disciplined, and also may have unintended consequences that will further entrench police discipline problems, rather than solving them as advocates hope.

C. *The Problematic Promise of Publicizing PDRs*

In the wake of notorious killings by police, legislators and police-reform advocates are attempting to make PDRs a matter of public record in states where police PDRs have robust privacy protections. In California, a new statute makes PDRs relating to officer use of force and other serious charges public. Earlier bills that would have weakened police PDR privacy further were not successful,¹⁵¹ but advocates have ramped up media campaigns to rally citizens over the issue. And a bill to entirely repeal the statute that protects the privacy of PDRs in New York was introduced in the State Assembly in 2017.¹⁵²

Advocates extol the benefits of transparency and fiercely critique the privacy that police have over their disciplinary records.¹⁵³ The theory behind such critiques is that privacy in PDRs is a major impediment to police accountability, keeps bad or “rogue” police officers on the force, and even contributes to police brutalizing citizens.¹⁵⁴ What is often missing from their accounts, however, is the mechanism by which transparency would lead to accountability. This is so with many transparency-related arguments about policing and other

150. *See In re Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 51 N.Y.S.3d 46, 58 (N.Y. App. Div. 2017) (holding that the CCRB summary of a police officer’s record is exempt from disclosure under New York statute), *motion for leave to appeal denied*, 30 N.Y.3d 908 (N.Y. 2017).

151. *See supra* note 96.

152. Assemb. B. 3333, 2017–2018 Reg. Sess. (N.Y. 2017).

153. *See infra* Part III.A.2.

154. *See infra* Part III.A.1 2.

areas of governance.¹⁵⁵ But, transparency in PDRs not only comes with significant privacy tradeoffs—ones that have systemic effects beyond the police, as discussed in the next Part¹⁵⁶—but this transparency also may actually lead to *less* accountability, given the way police discipline functions and the discretion that police command has over who is disciplined and for what.¹⁵⁷

Some of the suggested reforms refer to record dissemination in in-court proceedings.¹⁵⁸ As I have argued before, making such records available to criminal defense counsel is wise, useful, and equitable.¹⁵⁹ Many advocates, however, aim to publicize PDRs far more widely, to make them publicly available.¹⁶⁰ In this Section, I look at the core objectives advocates seek from PDR publication, arguing that these aims are unlikely to be achieved, at least without other systemic reforms, due to the organizational structure of police departments and the way internal discipline functions. Forcing PDR transparency may cause police departments to circle the wagons more tightly, producing the unintended consequence of fewer reported disciplinary problems for officers.¹⁶¹ Conversely, when an officer is publicly condemned, police departments label her a “bad apple,” allowing the department to ignore the systemic problems that lead to police abuses. Finally, because of the arbitrary nature of discipline, public PDRs may scapegoat officers based on racial or other biases far more often than officers who pose a risk to the communities they serve.

Advocates for PDR publication see PDR transparency as a partial, if not total, solution to a perceived lack of accountability for officers who misuse their power. Advocates believe that PDR publication will accomplish at least two vital things: pressuring the police into holding violent officers accountable¹⁶² and warning the

155. See *infra* Part III.A.1.

156. See *infra* Part III.A.1.

157. See *infra* Part III.A.1.

158. See generally, e.g., Conti-Cook, *supra* note 8 (arguing the necessity of PDRs for litigation).

159. Levine, *We Need to Talk*, *supra* note 26, at 6–8.

160. See generally Conti-Cook, *supra* note 8 (arguing for publication of PDRs).

161. In the wake of California’s legislation to make police records more transparent, one department shredded its records of police shooting investigations. See Dillon & Lau, *supra* note 28.

162. See, e.g., Ben Fractenberg, *Legal Aid Appeals Court Decision to Keep NYPD Records Secret*, DNAINFO (Oct. 6 2017, 1:35 PM), <https://www.dnainfo.com/new-york/20171006/civic-center/legal-aid-nypd-records-appeal> [<https://perma.cc/YDB8-YV9S>] (quoting Tina Luongo, Attorney-in-Charge, as saying, “[s]o long as acts of police brutality continue to proliferate in black

public about potentially problematic officers.¹⁶³ Yet, forcing transparency from individual officers is unlikely to do either of these things. In fact, such transparency measures have the potential to scapegoat officers who do not comply with how the police hierarchy thinks they should behave, while making any discipline less likely for officers who are favored by police departments. Importantly, how police want their officers to police will likely diverge, sometimes radically, from how the community wants them to behave.

An example should help illuminate the unreality of the presumed promise of PDR transparency. When Officer Daniel Pantaleo choked Eric Garner to death in 2015, Legal Aid attempted to gain access to his records.¹⁶⁴ New York courts denied access to these records.¹⁶⁵ A member of the CCRB in New York, however, leaked Pantaleo's record, and it became available for the public to see in March of 2017.¹⁶⁶ The *New York Times* reported that the record was inconclusive, as Pantaleo had a number of infractions, but not more than many other officers in the NYPD.¹⁶⁷ ThinkProgress, on the other hand, suggested that Pantaleo's record, including a substantiated charge for an "abusive" stop and frisk, should have resulted in more disciplinary action than he had received.¹⁶⁸ These varying news reports and the different experts they consulted suggest two things. First, it is unclear that an examination of Pantaleo's record would have warned anyone that he might resort to a violent chokehold. Second, news outlets, depending on the purpose of the articles they publish, will draw

and brown neighborhoods, proof that the NYPD's accountability system responds remains critical if we're going to have true transparency and accountability").

163. See, e.g., CATO INSTITUTE, *Transparency in Law Enforcement*, POLICEMISCONDUCT.NET, <https://www.policemisconduct.net/explainers/transparency-in-law-enforcement> [https://perma.cc/8VUD-EDVM] (explaining that in states that do not publicize PDR's, "[t]his lack of transparency manifests itself in... the public [being] unable to discover... a [problematic] track record among the officers exercising power over them").

164. See *In re Luongo v. Records Access Officer*, Civilian Complaint Review Bd., 51 N.Y.S.3d 46, 50 (N.Y. App. Div. 2017), *motion for leave to appeal denied*, 30 N.Y.3d 908 (2017).

165. See *In re Luongo*, 51 N.Y.S.3d at 57–58 (holding that a CCRB summary of police officer's record is exempt from disclosure under New York statute).

166. See Levine, *We Need to Talk*, *supra* note 26, at 1; Carimah Townes & Jack Jenkins, *Exclusive Documents: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINKPROGRESS (Mar. 21, 2017, 2:09 PM), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3#.rrhh7jyep> [https://perma.cc/M8P2-VAN9].

167. Al Baker & Benjamin Mueller, *Records Leak in Eric Garner Case Renews Debate on Police Discipline*, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/nyregion/nypd-eric-garner-daniel-pantaleo-disciplinary-records.html> [https://perma.cc/RJJ2-QYGL].

168. Townes & Jenkins, *supra* note 166.

conclusions that do little to helpfully inform the citizenry. Most relevant here, however, the leak of this record has not led to Pantaleo's dismissal.¹⁶⁹ He is still employed by the NYPD, which brought internal charges against him this summer, after waiting for criminal investigations to conclude.¹⁷⁰ Those charges will surely be filed at some point, but it is clear that whatever public pressure has been gained from the leak of his internal file has not had any impact on the speed with which the department will administer discipline. Moreover, using Pantaleo as an example, it is difficult to understand how his personnel file has any bearing on either public sentiment or the NYPD's process. He choked a man to death on video; if the outcry over this event does not lead to the accountability that Legal Aid seeks, it is very hard to imagine what releasing his record could add.

More broadly, even in states like Florida, where records are public,¹⁷¹ officers who commit terrible abuses, even crimes, are often not held accountable, at least not to the extent that many wish to see. Florida's experience suggests one major reason that PDR publication may not have the impact its advocates desire—the internal disciplinary process has multiple levels of appeal for officers accused of misconduct. These appeal outcomes appear to greatly favor the accused officer.¹⁷² First of all, in Florida, as in many states, the ultimate decision about discipline is left to the police chief. Even when she decides to terminate or sanction an officer, however, the officer may appeal to an arbitrator.¹⁷³ A surprising number of officers terminated in Florida for serious misconduct, or even criminal offenses, have been reinstated after this appeals process.¹⁷⁴ As discussed in Part I, transparency is

169. See Kashana Cauley, Opinion, *Eric Garner and How America Destroys Black Families*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/opinion/eric-garner-black-families.html> [<https://perma.cc/6A6A-VEQM>] (“The Garner family continues to be disrespected. Officer Pantaleo is still employed by the New York Police Department.”).

170. See Dale Eisinger & Nancy Dillon, *Eric Garner's Mother Calls on Local Officials to Push Chokehold Cop Punishment: 'We Still Should Get Justice'*, N.Y. DAILY NEWS (Sept. 18, 2017), <http://www.nydailynews.com/news/politics/garner-mom-calls-officials-push-chokehold-punishment-article-1.3504531> [<https://perma.cc/8RUM-AEKP>] (“[T]he NYPD and Mayor de Blasio fail to act in deference to a seemingly stalled federal investigation.”).

171. See *supra* Part II.A.2.

172. See, e.g., David Ovalle, *When Miami Fires Cops, They Usually Get Their Jobs Back – Even if They're Murder Suspects*, MIAMI HERALD (June 10, 2017, 7:00 AM), <http://www.miamiherald.com/news/local/crime/article155412784.html> [<https://perma.cc/K93C-NH7E>] (“Heard by state circuit judges, appeals are rarely successful because Florida law restricts the reasons why an arbitration decision can be reversed.”).

173. *Id.*

174. See *id.* (noting that nine Miami police officers have been fired in the past three years, but

simply not a solution in its own right for police abuse. Without attacking the process for police discipline, advocates have little hope of ensuring accountability through forced transparency.

Second, police solidarity is unusually high in comparison to other occupations. But this solidarity often takes particular forms that are antithetical to the goals of those who wish for police reform.¹⁷⁵ Because of this solidarity, it is not difficult to imagine anti-accountability consequences arising from forced transparency.¹⁷⁶ As discussed above, whether or not to charge an officer with a given type of infraction is a decision very often left to his or her supervisor.¹⁷⁷ This decision to charge may well be affected by a supervisor's knowledge that the discipline will not simply be seen by other members of the department but by the entire public. Similarly, the final decision about internal discipline is often left to the chief of police,¹⁷⁸ and knowledge that the

that eight of them got their jobs back through arbitration); see also Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm_term=.e30d1189aa40 [<https://perma.cc/5LB3-7C3C>] (“Since 2006, the nation’s largest police departments have fired at least 1,881 officers for misconduct that betrayed the public’s trust, from cheating on overtime to unjustified shootings. . . . The Washington Post has found that departments have been forced to reinstate more than 450 officers after appeals required by union contracts.”); Jennifer Smith Richards & Jodi S. Cohen, *Chicago Police Win Big When Appealing Discipline*, PROPUBLICA (Dec. 14, 2017, 5:00 AM), <https://www.propublica.org/article/chicago-police-grievances> [<https://perma.cc/XZ22-72EM>] (“The investigation found that, of 314 disciplinary appeals the police union pursued [after officer discipline had been approved by internal affairs] between February 2010 and February 2017, 266 led to favorable outcomes for officers. Police had their punishments reduced or—in 58 of those cases—had them overturned entirely.”).

175. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 453–54 (2004) (“The cultural self-definition of policing is exemplified by such terms of solidarity as the ‘brotherhood in blue’ and the ‘thin blue line.’”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1009 (1999) (noting that police have unusually high levels of organizational solidarity); cf. David Alan Sklansky, *Not Your Father’s Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1240 (2006) (noting that diversity in police departments has started to weaken solidarity).

176. See Armacost, *supra* note 175, at 454 (noting that police are notorious for “circling the wagons” when one of their own is accused of misconduct); Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1055 (1996) (suggesting that officers who out other officers for perjury should be rewarded significantly, given how much the code of silence diminishes the likelihood of this happening).

177. See *supra* Part II.A.1.

178. See Ovalle, *supra* note 172 (noting that the final termination decision rests with the chief of police but that arbitration can overturn this decision); *Deitch v. City of N.Y.* (*In re Deitch*), No. 8707/09, 2009 WL 4263349, at *4 (N.Y. Sup. Ct. Nov. 30, 2009) (“The Committee unanimously recommended to Chief of Personnel Pineiro that petitioner be terminated As stated above, Chief Pineiro recommended petitioner’s termination on November 13, 2008. This was endorsed

discipline will be public could affect her decision too. Making the stakes of a sanction higher through publicity can also affect how other officers determine whether or not to report infractions.¹⁷⁹ Police are already famous for circling the wagons, and the way that further PDRs will impact this “code of silence” must be considered by those hoping for police reform.¹⁸⁰

As Barbara E. Armacost notes, however, police solidarity is a double-edged sword: while the typical reaction to an accusation of misconduct is for officers to close ranks behind the accused, “[i]f the misconduct is found to be true . . . [officers’] departments deem the miscreants ‘rogue cops’ whose conduct does not reflect negatively on the organization from which they came.”¹⁸¹ In other words, if the police find that they cannot deflect an officer’s misconduct, they single that officer out rather than admit that his or her behavior is reflective of a systemic cultural problem. Police brutality is, as anyone who has watched recent events knows, an organizational problem.¹⁸² Police are taught from the moment they enter the doors of the academy that they must protect themselves at all costs,¹⁸³ that they are facing constant danger,¹⁸⁴ that they must conform to the militaristic standards of the department,¹⁸⁵ and that they should carry with them an “us versus

by First Deputy Commissioner Grasso on November 20, 2008 and approved by Police Commissioner Raymond V. Kelly on December 9, 2009 . . .”), *rev’d*, 935 N.Y.S.2d 79 (2011).

179. As one author reports:

From the time he or she enters the police academy, a police cadet is introduced to the concept that it is unacceptable to report the misconduct of other officers. The ubiquitous nature of this code of silence in police culture and its impact on police accountability is virtually undisputed. Several courts have even recognized the existence of a code of silence within police culture, noting that the code of silence facilitates police corruption and misconduct.

See Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 382–83 (2010) (citations omitted).

180. *Id.* at 383.

181. Armacost, *supra* note 175, at 454.

182. See Simmons, *supra* note 179, at 381 (“In recent years, police experts examining the nature and causes of police misconduct have concluded that the roots of police misconduct rest primarily within the organizational culture of policing.” (citation omitted)).

183. See *id.* at 382 (noting “the widespread belief among various levels and ranks of police officers that some violence or brutality is a necessary part of effective policing” (citation omitted)).

184. See, e.g., John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 179 (2016) (noting that “an overestimation of the potential dangers facing law enforcement may . . . contribute to excessive use of deadly force by police officers”).

185. The militaristic characteristics in American police departments are substantial:

them” mentality. While a few incidents may indeed be the actions of an officer gone “rogue,” most are merely an overreaction or extension of the fear and power police are taught to carry with them every day.¹⁸⁶ Police brutality is a complex, systemic problem that demands a complex and systemic solution.¹⁸⁷ Scapegoating “bad” officers by outing them as having a “bad” record not only ignores the systemic problems of police violence, but also allows police departments to continue crafting the narrative that the department is a well-functioning organization with a few bad apples.¹⁸⁸

This narrative is particularly problematic when one considers the racial and other biases that pervade the policing profession.¹⁸⁹ Indeed, racial biases—so well documented by the ways police departments police communities of color—are not left at the station house door. Racism, nativism, and militaristic expectations of conformity are features, not bugs, of policing that have been addressed by numerous scholars. More practically, such issues have played out in hiring decisions, termination decisions, and other employment issues.¹⁹⁰ On the racial front, there is evidence that black officers are disciplined

The military and police forces have a lot in common, including hierarchical organization, a reliance on coercive techniques, and a professional dependence on physical skill and strength. Nevertheless, their missions and the legal frameworks in which they operate are distinct. Especially in the context of the “wars” on drugs and terrorism, which have been largely funded by federal grants, American police departments have been infused with military structure, culture, and techniques.

Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 927 (2015) (citations omitted).

186. Simmons, *supra* note 179, at 386.

187. See Armacost, *supra* note 175, at 456 (arguing that scapegoating leads to fewer questions about how “the officer came to be in that particular situation in the first place and whether there is anything to be learned by examining the organizational norms and policies that framed his judgment” (citation omitted)).

188. As one author explains:

The officer-gone-bad explanation . . . assumes that the misbehaving cop is off on a ‘frolic and detour’ for which he alone is accountable. This explanation allows the department to distance itself from incidents of misconduct by labeling the perpetrators “rogue cops,” deviants who are wholly unlike their fellow officers. Moreover, it allows police leadership to declare to the rest of the rank and file, “this incident is not about you.”

Id.

189. See Sklansky, *supra* note 85, at 1826 (“Affirmative action programs succeeded in opening the doors of police departments to large numbers of Blacks, Latinos, and women. But it failed, often, at fully integrating them into the social fabric of those departments.”).

190. See Armacost, *supra* note 175, at 493 (“Law enforcement organizations have cultures – commonly held norms, social practices, expectations, and assumptions – that encourage or discourage certain values, goals, and behaviors.”).

more often and more harshly than their white counterparts.¹⁹¹ Numerous lawsuits have been filed by nonwhite officers alleging that their careers have been negatively impacted due to racial bias in their departments.¹⁹² And this may be a particular problem for those who want PDR transparency to enforce accountability. The same black officers who are disciplined more regularly are also the most likely to welcome community input and reform suggestions.¹⁹³ In fact, black officers who protest police brutality may face internal discipline.¹⁹⁴ And, these officers, worried about their disciplinary records, are unlikely to protest abuses that they see for fear of retaliation. Sergeant McFadden makes this point, saying, “If I’m retaliated against as an officer, and it goes unchecked . . . of course I’m not going to complain about citizens getting mistreated.”¹⁹⁵ Making PDRs public may serve to magnify the racial biases that are already impacting officers of color.

Bias does not stop at race in police departments; it also affects officers who do not conform to the dominant culture of departments.¹⁹⁶ As discussed above, this can lead to discipline of officers who *do not* police in a biased manner.¹⁹⁷ It also applies to officers who question the wisdom of supervisors, call out other officers for bad behavior, and generally object to the command structure. If PDRs reflect cultural biases as much as they reflect actual disciplinary problems, records may

191. See, e.g., Tanveer Ali, *Black Officers Twice as Likely To Be Punished by CPD: Data*, DNAINFO (Nov. 10, 2015, 8:57 AM), <https://www.dnainfo.com/chicago/20151110/bronzeville/repeat-excessive-force-offenders-within-cpd-rarely-punished-data-shows> [<https://perma.cc/VAH6-S7SJ>] (“Black officers are disproportionately found guilty of offenses and suffer higher punishments. Black officers with sustained findings are punished more than twice as often as white officers.”).

192. See, e.g., Elicia Dover, *Black Police Officers Association Sends Complaint Letter Against Chief Buckner*, KATV (July 6, 2017), <http://katv.com/news/local/black-police-officers-association-send-complaint-letter-against-chief-buckner> [<https://perma.cc/3AX9-A3V2>] (stating that the complaint included allegations of discrimination in promotion, transfers, and discipline).

193. See Sklansky, *supra* note 85, at 1827 (“Organizations representing Black officers . . . have often parted company with older, more established police unions in welcoming civilian review, . . . lobbying for restrictions on racial profiling, . . . supporting the reimposition of residency requirements, and more generally . . . calling on police departments to pay more attention to the needs and interests of minority residents.” (citation omitted)).

194. See *supra* note 3.

195. Joseph, *supra* note 118.

196. See Sklansky, *supra* note 85, at 1826 (“[P]atterns of friendship and informal networks of mentoring and trust have broken down along lines of race and gender. Similar . . . divides have emerged between openly gay officers and officers who, for religious or other reasons, are uncomfortable around gays or who suspect that gays have received preferential treatment in promotions.” (citation omitted)).

197. See *supra* Part II.A.1.

well fail to flag officers whose problems are those that advocates for police accountability worry about; rather, PDRs are more likely to document problems that police supervisors worry about—problems that likely do not necessarily align.

Thus, for numerous reasons, forced PDR transparency may not lead to the accountability its proponents seek. Furthermore, it may actually impede both inquiry into organizational problems and efforts by minority officers to verbalize their reform-minded critiques of the departments for which they work. Moreover, as addressed next, the race and bias problems that pervade police discipline are distinctly similar to the race and bias problems that pervade the criminal justice system more generally. A PDR may reflect racism and scapegoating much like a criminal record often does. Real systemic criminal justice and police reform must take account of these similarities.

III. POLICE RECORDS AS CRIMINAL RECORDS

Anyone serious about criminal justice reform should take police seriously when they advocate for their rights for two reasons. First, the connection between police under investigation and ordinary criminal defendants is actually quite powerful. And second, the police are criminal justice insiders who set and enforce criminal law and policy; they know what rights an individual needs to protect herself from investigation. Here, we see the police using their special knowledge to retain a semblance of privacy in a world all too comfortable with stripping it.¹⁹⁸ The pushback from police officers against the publication of PDRs is no exception. While, at first blush, the disciplinary record of a police officer may seem entirely different from a civilian's criminal record, deeper inquiry reveals numerous critical similarities.

This Part argues that the debate over PDRs mirrors and amplifies the debate over the publication of criminal records—a debate that has decidedly been won by those favoring transparency.¹⁹⁹ Scholars and advocates for criminal defendants have lamented for decades the

198. See Levine, *Police Suspects*, *supra* note 22, at 1208–09 (“Police are the central players in this group of unchecked insiders who control power and knowledge in the criminal justice system. . . . [T]hose with knowledge and control will, without checks, do everything they can to maintain their favored status” (citations omitted)).

199. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 1 (2015) (noting that “federal and state criminal record repositories contain criminal records for approximately 25 percent of the U.S. adult population” (citation omitted)).

myriad ways in which criminal record publication affects the lives of those convicted of crimes,²⁰⁰ while police and law enforcement groups have maintained the importance of transparency for the safety of the public, among other things.²⁰¹ However, when it comes to PDRs, the sides are reversed—criminal defense advocates insist that PDRs should be public, while the police maintain that such publication would be harmful to officers and not helpful to the public.²⁰² This Part shows how the debate over PDRs sounds very much like a debate over the publication of criminal records. It then details the harms that each type of informational transparency may occasion, including false allegations, due process problems, arbitrary and inaccurate records becoming public, the institutional incompetence of the public in reading such records, and the lifelong reputational stains that may accompany disclosures. This Part concludes that the debate over PDR transparency adds a new dimension to the ongoing scholarly and policy debate over the publication of criminal records and suggests that the resolution of the PDR debate has implications for the future of criminal record publication and its regulation.

200. See, e.g., Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45, 47 (2015) (noting obstacles to employment for those with a criminal record); James B. Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177–78 (2008) (arguing that wide-ranging use of criminal records is a result unmoored from original intent); Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 542 (2016) (explaining the problems with inaccurate databases); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 501 (2010) (documenting the disproportionate impact of criminal records on people of color, and comparing the American criminal record regime to that of other countries). See generally Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315 (2017) (explaining the need for integrated criminal record reform).

201. See, e.g., Alison Knezevich, *New State Laws To Help Marylanders Clear Arrest Records*, BALT. SUN (Sept. 26, 2015, 11:02 PM), <http://www.baltimoresun.com/news/maryland/bs-md-expungement-changes-20150926-story.html> [<https://perma.cc/UPZ2-9USC>]. The article quotes several people opposed to legislation that would help individuals clear their arrest records. One interviewee, a retired police sergeant, said that “the . . . law went too far.” *Id.* The sergeant added, “It goes to character, whether you can trust that person My concern is that people are going to be trusting people [when] they really don’t know their full background.” *Id.* A lobbyist for the Maryland Chamber of Commerce, which also opposed the legislation, said that “businesses should be able to gather as much information about prospective employees as possible for liability and safety reasons.” *Id.*

202. See *infra* Part III.A.

A. *The Rhetoric Surrounding PDR Transparency Reveals Important Similarities Between Police Records and Criminal Records*

A very interesting phenomenon occurs when one studies the statements of law enforcement advocates who are concerned about the privacy of PDRs and the statements of those who believe officer PDRs should be public. The debate sounds remarkably similar to the debate over criminal records. Law enforcement officers and officials worry about PDR publication along many of the same axes as criminal defense advocates who raise concerns about criminal record transparency: false allegations, due process rights, arbitrary and inaccurate records becoming public, the institutional incompetence of the public to read such records, and the lifelong reputational harms that may come with disclosure.²⁰³

Meanwhile, those advocating the publication of PDRs—many of whom work for organizations that also advocate for the rights of criminal defendants—deploy similar rhetoric to those who would justify the current state of publication for criminal records and for harsh criminal justice policies more generally.²⁰⁴ They appeal to public safety, tell stories of victimization to illustrate the danger of nonpublication, and suggest that public PDRs are necessary to rid society of rogue or “bad” officers. Putting both strands of rhetoric together helps crystalize the need for careful parsing of publication policies surrounding both police and civilian records.

1. *Law Enforcement Rhetoric.* Law enforcement advocates who denounce the publication of PDRs make a number of rhetorical moves that echo scholarly critiques of the publication of criminal records. Indeed, when police advocates defend their right to privacy, they sometimes make the comparison to criminal defendants explicit. For example, a California district attorney referred to “police officer privacy rights under sunshine legislation as less than the privacy rights of ‘murderers, pedophiles, and other criminals.’”²⁰⁵ He made the comparison even more clear when he defended police privacy by claiming that legislators should not bring the “privacy rights of ‘good’ guys (police officers) down to the same level of ‘bad’ guys (criminal defendants).”²⁰⁶ Police unions also compare their concerns about false

203. See *infra* notes 204–24 and accompanying text.

204. See *infra* notes 226–45 and accompanying text.

205. Bies, *supra* note 12, at 141 (citation omitted).

206. *Id.* at 141–42.

allegations against police officers to the fate of wrongly accused citizens. In a statement to the *Los Angeles Times* regarding a California lawsuit about disclosure of police misconduct, a union representative said, “[N]obody wants to be wrongly accused of anything. That applies to everyone else in the world, so it should apply to [police officers] too.”²⁰⁷

Beyond the explicit comparisons, police advocates fear the same bad outcomes from the publication of PDRs as those that plague the formerly incarcerated.²⁰⁸ One major concern is that false charges may be filed against an officer. In New York, where advocacy groups have been fighting to make police misconduct public, the president of the Albany Police Officers Union defended the secrecy of disciplinary records, saying that “the law helps shield officers from having ‘unfounded allegations’ against them from being made public.” He explained that “[i]nvestigations are allegations,” and that “[i]t is an allegation until there is an outcome.”²⁰⁹ Darrell Stephens, an expert on police discipline, has noted that this is a continual concern for officers: “They are concerned that unsubstantiated misconduct allegations could damage their reputations and careers if open to the public.”²¹⁰ A police advocate made this concern clear when he stated, “[W]e shouldn’t be painting someone before all the information has come out. A lot of these things turn out to be not sustained or unfounded.”²¹¹

There is also a fear that civilians will concoct allegations against officers to minimize the consequences in their own cases. Law enforcement advocates “point out that officers are sometimes the subject of false allegations made by people trying to get back at them simply for doing their job.”²¹² An attorney who represents officers in misconduct allegations noted that “people often make up complaints to back officers off of investigations or to try to prevent them from

207. Maya Lau, *A Court is Blocking L.A. County Sheriff from Handing Over a List of 300 Problem Deputies*, L.A. TIMES (Feb. 20, 2017, 4:00 AM), <http://www.latimes.com/local/california/la-me-sheriff-deputies-misconduct-list-20170219-story.html> [<https://perma.cc/PB9P-4BA5>].

208. *See infra* Part III.B.

209. Dartunorro Clark, *State Law Keeps Police Files Shrouded in Secrecy*, TIMES UNION (Mar. 15, 2015, 8:53 AM), <http://www.timesunion.com/tuplus-local/article/State-law-keeps-police-files-shrouded-in-secrecy-6134788.php> [<https://perma.cc/62GU-GPHK>].

210. Stephens, *supra* note 106, at 8–9.

211. Jim Miller, *California Has Tightest Restrictions on Law-Enforcement Records, Access Advocates Say*, SACRAMENTO BEE (Mar. 17, 2014, 12:00 AM), <https://www.sacbee.com/news/politics-government/article2593232.html> [<https://perma.cc/R9FW-5T3J>]. This sentiment is echoed by police advocates in New York. *See infra* note 217 and accompanying text.

212. Stephens, *supra* note 106, at 9.

testifying. And there is no consequence for making a false complaint.”²¹³ The fear of unjust or unfounded allegations is not just from civilians, but also from internal department complaints: “[E]ven [charges] by internal affairs[] are not conclusive and false claims are often made”²¹⁴

Police officers and their advocates are also concerned about the due process rights of officers. This is both because of false or unprovable complaints and because of more general process worries. Officers argue that they are “entitled to due process through the Police Department’s internal disciplinary process. Officers who face charges are offered punishment or can fight the charges through a trial board, a three-member panel of fellow officers and commanders.”²¹⁵ Police advocates also specifically equate “officers who prevail before a trial board to criminal defendants who are acquitted by a jury.”²¹⁶ The president of the Albany Police Officers Union argues that privacy serves the crucial purpose of shielding officers from being judged in public before charges against them have been sustained by the internal disciplinary process: “Investigations are allegations . . . until there is an outcome.”²¹⁷

Police advocates also argue that officers already incur punishment for their bad actions and should not face further scrutiny in the press. They explain that “rule-breaking officers already face tough investigations from within their own departments, as well as possible federal inquiries. There is no need to inject the public into the process”²¹⁸ In other words, police advocates believe that the internal process is already difficult enough for officers, without splashing their results in public: “If the point is to hold officers accountable, there’s a process that weighs the right and the need to that information to the protection of their rights. You don’t need to cart blanche release them.”²¹⁹

213. Justin Fenton, *Attorneys for 20 Defendants Seek Release of City Police Officer’s Personnel File*, BALT. SUN (Mar. 9, 2017, 7:33 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-donato-file-20170309-story.html> [<https://perma.cc/3ESH-9TP4>] (quotation marks omitted).

214. *Id.*

215. *Id.*

216. *Id.*

217. Clark, *supra* note 209.

218. Jim Miller, *California Has Tightest Restrictions on Law-Enforcement Records, Access Advocates Say*, MODESTO BEE (Mar. 17, 2014, 12:00 AM), <http://www.modbee.com/news/state/article3162015.html#storylink=cpy> [<https://perma.cc/K82R-W66M>].

219. Gene Maddaus, *Should Misbehaving Cops Be Shielded from Public Scrutiny?*, L.A.

Another concern for police and their advocates is the damage that release of disciplinary records might do to an officer's reputation.²²⁰ Defending police privacy more generally, Rick Weisman, director of labor services at the National Fraternal Order of Police, made clear that "[o]ur job isn't to keep bad officers in this profession. Our job is to make sure that due process is given to the officers"²²¹ They believe that the media wants access to records, not for accountability, but for "shock and awe . . . salacious things."²²² There is fear that "[t]ransparency equates to more sensationalism and higher sales for the [media]. It does not equate to developing public trust."²²³ Opposing a bill to make internal disciplinary hearings public, Rusty Hicks, the head of the L.A. County Federation of Labor, wrote that "[h]olding these hearings in public will open the door to creating a media and public circus, and will not further the cause of justice."²²⁴ In Maryland, the Fraternal Order of Police argued against an assembly bill to make PDRs more public, claiming that "disclosure of records of misconduct would lead to public embarrassment of the officers."²²⁵

The concern appears to be not only that the media will sensationalize misconduct, but also that releasing officer disciplinary information without context could lead to unfair judgments about an officer's reputation. One specific reputational concern is that an old allegation or sustained charge of misconduct might besmirch the reputation of an otherwise good officer. Union representatives voice concern that "disclosure would . . . draw unfair scrutiny on deputies whose mistakes might have happened long ago."²²⁶

A related concern is that minor charges might stigmatize otherwise good officers. There is concern that disclosure could bring a "negative stigma" to an individual officer, no matter how minor the

WKLY. (Apr. 18, 2016, 6:30 AM), <http://www.laweekly.com/news/should-misbehaving-cops-be-shielded-from-public-scrutiny-6832927> [<https://perma.cc/2AAM-Y7LC>].

220. See Stephens, *supra* note 106, at 8–9 ("They are concerned that unsubstantiated misconduct allegations could damage their reputations and careers if open to the public.").

221. Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:18 PM), <https://www.reuters.com/investigates/special-report/usa-police-unions> [<https://perma.cc/HKC8-6F3V>].

222. Maddaus, *supra* note 219.

223. *Id.*

224. *Id.*

225. David A. Plymyer, *Shining a Light on Police Misconduct*, BALTIMORE SUN (Jan. 19, 2016, 1:39 PM), <https://www.baltimoresun.com/news/opinion/oped/bs-ed-police-transparency-20160119-story.html> [<https://perma.cc/57TX-MVFP>].

226. Lau, *supra* note 207.

violation.²²⁷ An attorney for one police group made the argument very plain, citing an example of an officer with an “otherwise spotless reputation” who was found to have “fibbed about what time he came into work one morning.”²²⁸ Arguing that this officer should not face the stigma of publicized misconduct, he said, “We shouldn’t try to cut off their heads for the rest of their lives”²²⁹

In sum, police advocates are concerned about false allegations, due process rights, reputational harm, unfair stigma, and the institutional competence of the public to read PDRs in the correct context. These arguments mirror the way scholars and advocates discuss the problems with the widespread publication of criminal records.²³⁰ If we are to take one group seriously, it follows we should also respect the privacy concerns of the other group. This is especially true because criminal record publication verifies that police privacy concerns are legitimate. Still, those who often advocate in favor of criminal defendants sound just like “law and order” politicians or victim’s rights groups when they talk about PDRs.

2. *PDR-Transparency Rhetoric.* Advocates for publicizing PDRs appeal to issues of public safety, personal accountability, and ensuring that bad police officers are no longer employed; each category is easily analogous to arguments about criminal record publication. Indeed, PDR-transparency advocates use rhetoric to describe the police that is strikingly similar to the way law enforcement groups talk about the dangers posed by people with criminal convictions.²³¹

Sometimes the comparison between criminal records and PDRs is made explicitly. The New York Civil Liberties Union, in its brief on behalf of those who wished to make Officer Pantaleo’s record public, laid bare the aptness of the comparison. The brief rightly noted the unfairness that Pantaleo’s record remained private, while “a quick Google search reveals an extensive detailing of Eric Garner’s history

227. *Id.*

228. *Id.*

229. *Id.*

230. *See generally* Levin, *supra* note 20.

231. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 135 n.122 (2007) (explaining that among law enforcement, policy makers, and the public, “the public’s right to know trumps the right to privacy, and the stigma of a criminal record is generally viewed as deserved punishment”).

with the criminal justice system.”²³² The brief contended that “[t]here cannot be true accountability when publicly-available information is so one-sided.”²³³ Yet, rather than focusing on the problem with public access to Garner’s record, the brief focused on treating Pantaleo’s privacy with a similar disregard. More generally, advocates disregard arguments that the police have a privacy interest in the process and result of disciplinary actions because the accused officers have “broken the law. They’ve breached their trust with the public, and they shouldn’t have this cloak of confidentiality.”²³⁴

Less explicitly, advocates allege a number of reasons that PDRs should be made public. First, they argue that the privacy interests of individual officers must be outweighed by “the immense interest of the citizenry to have access to information about the men and women policing their communities.”²³⁵ Even if individual officers have a privacy interest, advocates argue that “there is also a public interest in identifying officers who go beyond the standards of accepted police conduct.”²³⁶ This “immense” interest is put in the direst terms: the publication of PDRs is literally a matter of life and death. A California bill was touted as a path to “potentially life-saving information to citizens.”²³⁷

To powerfully bring home this notion of life or death, advocates tell stirring stories of victims of police brutality, underscoring the importance of publicizing PDRs. However, advocacy often fails to explain how such publication could have aided these victims. Testifying in favor of legislation aimed at making certain PDRs public in California, a supporter of the bill shared the story of the killing of a young, unarmed black man.²³⁸ She went on to tell the legislature that on the day the young man was killed, her own one-year-old daughter and four-year-old nephew witnessed the killing.²³⁹ She then stated, “We must pass the bill, because we are fighting for a day when . . . California

232. Brief of Amici Curiae Communities United for Police Reform and 33 Organizations in Support of Petitioner-Respondent at 7, *Luongo v. Records Access Officer*, Civilian Complaint Review Bd., 51 N.Y.S.3d 46 (2017) (No. 100250/2015).

233. *Id.*

234. Maddaus, *supra* note 219.

235. CATO INSTITUTE, *supra* note 163.

236. Miller, *supra* note 218.

237. David Greenwald, *Commentary: SB 1286 Would Provide Transparency to Police Complaints*, DAVIS VANGUARD (May 26, 2016), <http://www.davisvanguard.org/2016/05/commentary-sb-1286-provide-transparency-police-complaints> [<https://perma.cc/L7J6-EZFB>].

238. *Id.*

239. *See id.*

will not lead the nation in police shootings, for a day when ‘to protect and serve’ doesn’t mean to protect property and serve the rich.”²⁴⁰ Regardless of the horror of the story or the salience of her plea, the connection between public PDRs and justice for young men of color remains nebulous.²⁴¹

According to advocates, public safety depends on police departments ridding themselves of “bad” or rogue officers: “Police should focus on rooting out officers guilty of egregious conduct. Opening disciplinary records would help make this happen.”²⁴² In California, advocates allege that “officers with serious misconduct records that should have disqualified them from duty have gone on to harm city residents.”²⁴³ And advocates warn that “[u]nder current law, the public can’t know who are the rogue officers, and it can’t assess whether law enforcement is disciplining them or firing them when serious misconduct persists.”²⁴⁴ According to the American Civil Liberties Union, if PDRs are public, “the media and the community can tell when a particular officer is responsible for a string of shootings or when a department seems not to notice that the same officers are shooting again and again.”²⁴⁵ Advocates also see the threat of publication as a deterrent to bad behavior by officers, noting that the threat “sends a powerful message to officers on the streets: If you commit misconduct, you are certain to face punishment, and the public will learn about it.”²⁴⁶

Advocates for the publication of PDRs argue using terms like public safety, victimization, “bad” officers whose rogue conduct must be curtailed, and the deterrent effect of public shaming. As the rest of this Part develops, these are very similar to the arguments made by advocates of criminal record publication; those with a criminal conviction are dangers to public safety, threats to the innocent, and

240. *Id.*

241. *See supra* Part II.C.

242. Susan Sward, Opinion, *Open Police Disciplinary Records*, SACRAMENTO BEE (Aug. 8, 2015, 5:01 PM), <http://www.sacbee.com/opinion/california-forum/article30010635.html> [<https://perma.cc/4MHD-YVTC>].

243. *New Legislation Increases Transparency in Law Enforcement Records*, AM. CIV. LIBERTIES UNION N. CAL. (Feb. 19, 2016), <https://www.aclunc.org/news/new-legislation-increases-transparency-law-enforcement-records> [<https://perma.cc/4ARG-SMA9>].

244. Sward, *supra* note 242.

245. Peter Bibring, *California Supreme Court Rules for Police Transparency*, AM. CIV. LIBERTIES UNION S. CAL. (May 29, 2014), <https://www.aclusocal.org/en/news/california-supreme-court-rules-police-transparency> [<https://perma.cc/95L9-E6LP>].

246. Sward, *supra* note 242.

abnormal criminals who must be outed and deterred by a permanent public stain. These arguments have led to a publicness of criminal records that most agree has improperly tipped the balance from privacy to transparency for criminal defendants who have already paid their debt to society through punishment.

B. The Lived Experience of Those with Criminal Convictions

The publication of PDRs and the ensuing debate over transparency and privacy for police do not arise in a vacuum. In fact, there is a long-studied and well-trodden area of scholarship and law addressing a very similar privacy-transparency problem—the publication of criminal records.²⁴⁷ Unlike the police, who are well protected by their unions and legislators, criminal defendants and the formerly incarcerated have long suffered the fate of record publication.²⁴⁸ The statistics and scholarship demonstrating the very real consequences of criminal record publication lend credence to the rhetorical fears of law enforcement advocates and raise concerns that law enforcement either does not realize or is not concerned about—most importantly, the connection between discipline and racial bias. At the same time, law enforcement advocates’ demands for their privacy shines a new and important light on why we must reform our policy on the publication of criminal records, with particular emphasis on concerns related to due process, inaccuracy, racial bias, and reputational stain. While the use of criminal records has been questioned by scholars in numerous contexts,²⁴⁹ this Section focuses on the dissemination of criminal records and their use by the public because that is the direct concern of PDR privacy.

A criminal record, known colloquially as a rap sheet, “is a lifetime record of an individual’s arrests and, ideally, charges, dispositions, and sentences resulting from those arrests.”²⁵⁰ Every state has a criminal

247. See generally, e.g., Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733 (1981) (noting availability of criminal records); JACOBS, *supra* note 199 (same); Jacobs & Crepet, *supra* note 200 (same); Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303 (2016); Logan & Ferguson, *supra* note 200 (same); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321 (2015) (same).

248. JACOBS, *supra* note 199, at 1 (same).

249. See, e.g., Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 563 (2014) (critiquing “impeachment of criminal defendants by means of their prior criminal convictions”).

250. JACOBS, *supra* note 199, at 33.

record repository, and as of 2012, over 100 million people in the United States have a criminal record.²⁵¹ Originally created for use by law enforcement agencies, rap sheets are now made available for a myriad of purposes²⁵² such as housing, welfare, and employment. Moreover, “[c]riminal background checking is a booming business.”²⁵³ There are “hundreds, maybe even thousands” of companies who conduct criminal record searches for a fee.²⁵⁴ These businesses even have their own trade union, the National Association of Professional Background Screeners, which claims to have 700 members.²⁵⁵

Scholars have been arguing for years that mass publication of criminal records brands the those who have contact with the criminal justice system with a lifelong stain. Their arguments have been borne out by studies²⁵⁶ and have led to serious discussion over reforming the current criminal record regime.²⁵⁷ This Section shows the similarities between the fears police claim about publication of their PDRs and the reality of those fears as applied to the formerly incarcerated. While the stain of a criminal record goes far beyond concerns facing police, this Article focuses on issues that are legitimately applicable to both, including problems of inaccuracy, discrimination and arbitrariness, misreading by an institutionally incompetent public, and permanent reputational harm from old or minor charges or convictions. This comparison suggests two things: we should not reflexively dismiss the concerns of rank-and-file police officers, and we should use such concerns to bolster the reform proposals aimed at undoing some of the damage wrought on people with criminal records.

251. *Id.* at 37–38.

252. *Id.* at 46.

253. *Id.* at 70.

254. *Id.* at 71.

255. *Id.*

256. *Id.* at 150.

257. There are numerous proposals for reform. Among the most widely known is “ban the box,” which prevents employers from checking an applicant’s criminal record in the first rounds of interviews. Over 150 cities have adopted this reform. *See generally* BETH AVERY & PHIL HERNANDEZ, NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE HIRING POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS (Sept. 2018), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-September.pdf> [<https://perma.cc/N69J-PVNA>] (documenting state and local initiatives preventing employers from checking candidates criminal records).

There are numerous ways criminal records are used. First, they are used in proceedings for impeachment and sentencing purposes.²⁵⁸ Second, they are used by law enforcement agencies to investigate, surveil, and locate potential wrongdoers.²⁵⁹ Third, they are used by state agencies to deny certain benefits, like food stamps and housing.²⁶⁰ And finally, they are used by the public, who can pay for or simply look up criminal record information, whether for employment purposes, for newspaper articles, or for any other reason. While scholars have critiqued the use of records in each of these settings, the focus here is on this last—most attenuated and least justifiable—use of criminal records.²⁶¹

Criminal record publication reinforces societal stratification along racial lines by denying far more people of color the benefits of a “crime free” life than their white counterparts. This exacerbates an already racially-problematic employment system. Discrimination against those with criminal records is well recorded,²⁶² as is discrimination against people of color who have no criminal record.²⁶³ It follows that if a disproportionate number of people of color have criminal records, their employment chances will be doubly hurt by their race and their records.²⁶⁴

258. See, e.g., Roberts, *supra* note 249.

259. See, e.g., James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 131 (2008) (“[A]ny police officer with access to a laptop computer can use the [FBI’s records database] to find out within minutes whether the person he has just stopped/arrested has a prior criminal record or is wanted anywhere in the United States.”).

260. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826 (2015) (looking at the “role that arrest information plays in immigration enforcement and public housing” and “regulatory decisions: public employment, licensing, foster care, social services, and education”).

261. *Id.* at 816 (“In the criminal justice context, criminal procedure provides important constraints on how [records] ought to be used and processed. But similar constraints do not operate outside of the criminal justice context, leaving the possibility that manifestly unfair, unlawful, or otherwise undesirable [records] may have serious consequences.” (citation omitted)).

262. Lapp, *supra* note 247, at 311 (“Public criminal records also enable discretionary discrimination. Employers, landlords, and colleges conduct background checks and make unfavorable decisions based on criminal records.” (citation omitted)).

263. JACOBS, *supra* note 199, at 280 (describing a field experiment in which a white applicant with no criminal record received more positive interest from employers than an African American applicant with no criminal record).

264. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 973 (2013) (“Regardless of the sentence served, individuals of color, particularly African-American men, have become essentially unemployable, largely because of their criminal records.”).

The problem of discrimination is compounded by the fact that those not familiar with criminal records do not have the institutional competence to accurately or rationally assess charges and convictions.²⁶⁵ In the criminal record context, this plays out most dramatically with employment. Employers, colleges, landlords, volunteer organizations, and licensing agencies routinely run criminal background checks.²⁶⁶ Criminal records, originally intended for use by law enforcement, are now “more often used to provide criminal biographies for non-criminal justice purposes.”²⁶⁷ While, theoretically, law enforcement officers should be able to read and understand a rap sheet, the same cannot be said of non-criminal justice actors, such as employers.²⁶⁸ Even if an employer is not bent on discriminating against anyone with a criminal record, she is likely to overestimate the risk or liability posed by a given charge. Furthermore, because charges and dispositions are often listed more than once on a rap sheet, and because of other problems of “overlap[,]” there is an increased chance that someone without the training to read them will “interpret [a] rap sheet as more serious than it really is.”²⁶⁹ No work has been done to assess the risk posed by a person with a prior conviction for a particular job, and indeed, it is possible, as James B. Jacobs claims, that there is “no science for assessing” such a risk.²⁷⁰

There is, however, vast research to show that recidivism dramatically decreases with age.²⁷¹ Yet, because employers and other non-criminal-justice actors are likely not familiar with the phenomenon of “aging out” of criminality, they may not put infractions committed years before in their rational place. Nor are those unfamiliar with criminal law likely to know how to differentiate between major and minor crimes. For instance, a low-level felony may carry a year in prison, be nonviolent, and have caused no harm to

265. JACOBS, *supra* note 199, at 47 (“While police are accustomed to reading and interpreting rap sheets, the same is not true of many non-law enforcement users.”).

266. Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 249 n.75 (2015); Lapp, *supra* note 247, at 321.

267. JACOBS, *supra* note 199, at 46.

268. *Id.* at 47.

269. *Id.* at 47–48.

270. *Id.* at 264.

271. Lapp, *supra* note 247, at 315 (“It has consistently been found that . . . the prevalence of offending tends to increase in early adolescence, rise to a peak in late adolescence, and diminish in early adulthood. . . . [A] lot of people commit crimes in their teens and early twenties, and most of them stop . . . as they age.” (citation omitted)).

anyone else. Yet, it is hard to imagine many employers distinguishing between an A felony (the most severe) and an E felony (a far less severe conviction). Moreover, to read a criminal record correctly, an employer should concentrate on crimes that might impact a person's ability to work in that particular industry. While it may be relevant to a financial institution, for instance, that a person has financial crimes on her record, it is far less relevant if the person has an arrest or conviction for drug use.²⁷² But it is not apparent that employers weigh such fine gradations when making hiring decisions.²⁷³ Criminal records, no matter their contents or the accuracy of the dispositions contained therein, lead understandably risk-averse employers to refuse to hire millions of individuals.²⁷⁴

Another major issue with public access to criminal records is inaccuracy, particularly in the form the public sees them. This problem can be broken down even further into inaccuracy that violates a defendant's due process rights—that is, arrests and charges that are never erased despite a dismissal or acquittal—convictions that are wrongly attributed, and convictions that have been legally expunged but not erased.²⁷⁵ Each state has its own repository for criminal records, the FBI maintains a national record, and as discussed above, private firms maintain their own data. One clear issue is how to correct thousands of different databases. But inaccuracies are rife even in the databases controlled by the government. For instance, while a rap sheet should contain *all* information after a defendant is arrested and charged, it is often true that dispositions of the case, including

272. *But see* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989) (upholding a lifetime employment ban for anyone convicted of theft crimes).

273. *See* Jones, *supra* note 266, at 249 (suggesting that the notion that employers should have “law-abiding workers” paints a “daunting picture” for anyone with a criminal record who is attempting to gain work).

274. *See id.* (reasoning that because background checks might lead to workplace safety, employers are interested in the backgrounds of job applicants).

275. Inaccuracies in criminal records are multifarious, serious, and wildly prevalent:

One recent study found that fifty percent of FBI rap sheets are incomplete or inaccurate. Some records contain multiple entries for the same arrest or conviction, giving an exaggerated impression of criminality. Others attribute criminal history information to the wrong people. Many do not include updated arrest and court dispositions, and records that were supposed to be sealed or expunged remain fully accessible. Each kind of error produces outcomes at odds with the goals of public criminal records, such as wrongly denied jobs and education, and unwarranted arrests.

Lapp, *supra* note 247, at 307–08 (citations omitted); *see also* Logan & Ferguson, *supra* note 200, at 567 (citing “many instances where record identities of individuals were conflated when court records attributed a case to the wrong person, thereby merging their histories” (citation and quotations omitted)).

acquittals and dismissals, either never get reported or get reported late due to bureaucratic delay.²⁷⁶ Sometimes the same arrest or conviction is entered multiple times on one person's rap sheet. Rap sheets may also contain information attributed to the wrong person.²⁷⁷ Indeed, the National Employment Law Project estimates that as many as 50 percent of criminal records contain errors.²⁷⁸

These errors run counter to the larger goals of public criminal records. As Kevin Lapp notes, "Each kind of error produces outcomes at odds with the goals of public criminal records, such as wrongly denied jobs and education, and unwarranted arrests."²⁷⁹ Even if a person discovers these errors on her criminal record, it takes time, money, and know-how to fix them.²⁸⁰ Often an individual only discovers mistakes on her rap sheet once an employer has already refused to hire her, when the damage has already been done.²⁸¹ In addition, even when a particular conviction or charge is authorized for expungement—that is, erasure from a person's rap sheet—such erasure is not automatic. In fact, it is the person with the criminal record who must initiate the long, frustrating, bureaucratic process of removing a disposition that legally no longer belongs on her record.²⁸²

One obvious response to the problem of inaccuracy is that it is not a reason to make rap sheets less public, but rather inaccuracies should encourage fixing the system that distributes them. Regardless of whether or not such a fix is feasible, even a completely accurate rap sheet reflects only a partial and very problematic story about a person's life, especially once set in the context of our criminal justice system. Criminal records are necessarily underinclusive in that many more people have committed crimes than are accounted for by the criminal justice system.²⁸³ For example, only a small percentage of drug users

276. JACOBS, *supra* note 199, at 38 (noting that prosecutors and judges do not send in information that they have at their disposal, and that even when they do, bureaucratic delays and error lead to permanent inaccuracies).

277. Lapp, *supra* note 247, at 309.

278. JACOBS, *supra* note 199, at 135.

279. Lapp, *supra* note 247, at 309.

280. *Id.* at 314.

281. *Id.*

282. *Id.* (noting that the individual with a criminal record must "initiate the process" to get a disposition expunged and that that process "can be needlessly difficult and costly").

283. *Id.* at 312 ("A major problem with affixing such punitive consequences to criminal records (beyond their inaccuracies) is that criminal records are unavoidably underinclusive as marker[s]. While a record of a conviction typically means the person committed the alleged offense, actual crime far exceeds reported crime, and reported crime far exceeds convictions.")

are arrested. Thus, only those citizens bear the permanent stain of “drug user,” losing housing, employment, and other societal opportunities; many other drug users suffer no such consequences.²⁸⁴ Making matters worse, of course, is the racially discriminatory nature of arrests, incarceration, and criminal records.²⁸⁵

Finally, a criminal record is not just a temporary consequence of a criminal conviction. It is a permanent stain, one which a number of scholars credibly argue leads to “civil death.”²⁸⁶ The reputational consequences of a record dog those with convictions for their entire lives. The wide dissemination of and easy access to these records ensure that most interactions could be tainted, no matter how long it has been since a person served her sentence and no matter what else the person has done. Indeed, criminal records are an example used by privacy scholars to show how problematic the publication of partial information about a person can be.²⁸⁷

Despite recognition from the scholarly community and from advocates for the formerly incarcerated, reform in this area has been glacial. As I have theorized here and elsewhere, this is due in large part to the way in which politicians and voters are able to dismiss and dehumanize the group of people—largely poor, nonwhite, and politically unimportant—who are affected by the forced publication of their worst deeds.

(citation omitted)).

284. *Id.* at 311 (“In one . . . study, a single drug conviction caused employers to significantly reduce their interest in prospective applicants who otherwise looked identical.”).

285. The racial disparities in the criminal justice system have been shown in the drug enforcement context:

The dominating feature of the American criminal justice system is its deep racial disparities. For example, although marijuana is used at similar rates across all age groups in black and white communities, blacks are almost four times more likely to be arrested for marijuana possession than whites across the United States and thus to suffer the many collateral consequences of that arrest.

Roberts, *supra* note 247, at 331 (citation omitted); *see also* Pinard, *supra* note 264, at 972–73 (“Individuals of color constitute the majority of the incarcerated population in the United States.” (citation omitted)).

286. Chin, *supra* note 20, at 1792 (arguing that records, combined with other collateral consequences, cause “the degradation of a convict’s legal status to be a unitary punishment, the new civil death”).

287. *See* Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1157 (2015) (including criminal records on the list of “sensitive information” the article addresses); Solove, *supra* note 81; Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 363 (2008) (“[P]rivacy scholars have bemoaned . . . developments [increasing access to criminal records by private individuals].” (citation omitted)); *supra* Part I.

This is where the police come into play. As the last Section describes, the impacts of criminal records are mirrored by the police's rhetoric about their own privacy.²⁸⁸ The problems with publicly available criminal records are, for the most part, exemplary of the concerns that police have over the publication of their PDRs.²⁸⁹ We cannot at once lament the publicness of criminal records and, at the same time, ignore the possibility that the same problems plague individuals whose PDRs are published. Perhaps more significantly, taking the police at their word provides important credence to the plight of those with criminal records. The next Part discusses how to marshal the police's arguments in favor of the formerly incarcerated.

IV. USING POLICE ARGUMENTS TO PROTECT MORE VULNERABLE CITIZENS

This Part suggests what it might look like if, instead of arguing in favor of publicizing PDRs, advocates and scholars used the arguments made by politically powerful police unions to show policy makers and the public how instructive the arguments are for changing the criminal record regime. It is not feasible that such arguments would change the minds of law enforcement groups, whose *raison d'être* often relies on an us-versus-them mentality. However, by combining the police's self-serving arguments with the data and anecdotal evidence of the formerly incarcerated, a powerful argument can be made, to those willing to listen, that the principle and dynamics are similar for both groups. More broadly, this section develops the theory that the police share certain attributes with criminal offenders, including scapegoating, scrutiny, and the use of the criminal justice system itself to remedy perceived problems.²⁹⁰ Criminal justice reform is better served by listening to the police when they tell us what they feel will protect them from criminal or civil sanction.²⁹¹ Although it is hard to imagine that the police would choose to align their aims with the aims of criminal defendants, we—as scholars, advocates, and policymakers—should be able to hear what the police say about themselves and use it to argue in favor of criminal justice reform, rather

288. *See supra* Part III.A.

289. *See supra* Part III.A.1.

290. *See supra* Part II.C (arguing that scapegoating officers allows police departments to ignore systemic problems).

291. *See* Levine, *How We Prosecute the Police*, *supra* note 22, at 767–75; Levine, *Police Suspects*, *supra* note 22, at 1234–58.

than simply reflexively assuming the police's agenda is always antithetical to the aims of reformers.²⁹²

Issues that the police raise themselves—due process, reputational harm, and institutional competence—infect both forms of record transparency. Imagine if advocates pushing for PDR transparency in states like California and New York, instead of using law-and-order rhetoric to force police transparency, used the very arguments the police make to protect themselves. They could show legislators and the public the hypocrisy at work in a world where the police are protected from the stain of publicizing their infractions but the formerly incarcerated, who have already served a sentence of incarceration or paid a criminal fine, have no choice but to live with such a stain.²⁹³

Such comparisons could support any number of favorable arguments, from keeping minor criminal offenses private, to shielding much more serious offenses after a certain amount of time. On the minor-offense front, the police's argument that small offenses—like lateness, improper attire, or minor insubordination could, out of context, be read to suggest that the officer was not fit to continue on the job—could apply equally to someone with a record of minor criminal offenses. Why should anyone be forced to suffer a permanent taint from small mistakes that so many others have also made with impunity? And even if something like a minor drug offense or trespassing misdemeanor violation is taken to be far worse than minor PDR infractions, a criminal offender is *already punished* far more heavily than what a sanctioned officer faces with any allegation. This difference in the magnitude of punishment is a powerful reason to take criminal record privacy at least as seriously as PDR privacy—even before one considers the uniquely permanent stain of a criminal record.

But the argument that punishment or discipline should not extend beyond a criminal sentence or internal discipline applies with equal force to far more serious crimes or disciplinary infractions. Take a criminal assault or an unauthorized use of force by a police officer. We punish the assaulter, often with a long prison sentence, *and then* we brand her forever as an “assaulter.” If the police do not believe that one improper use of force should forever brand a potentially good officer as a brutal, bad-apple cop, then surely the same consideration must be extended to a civilian who has committed assault. Indeed, it should apply with even more force to private citizens, who are not

292. See Levine, *Police Suspects*, *supra* note 22, at 1205–12.

293. See *supra* Part III.B.

trained in or tasked with upholding the law. And if the police want us to believe that their internal disciplinary process works to punish and deter such behavior without making it public, then surely the same can be said of a sentence of incarceration served by a person convicted of a crime. Moreover, so long as criminal records can be used as evidence in future litigations, any subsequent sanctions will also be harsher than they would otherwise be—regardless of whether those criminal records are publicly visible.

More broadly, issues that the police do not acknowledge, such as racial bias and scapegoating, threaten to diminish the legitimacy of PDRs; more importantly, these issues cloud the systemic responses necessary to reform policing and the criminal justice system.²⁹⁴ Criminal defense advocates should be wary of the way these biases and narratives affect police officers, and the way police organizations scapegoat those who refuse to toe the line. Connecting racism to internal policing issues, and questioning discipline along such lines, has a dual benefit. It will help reform advocates address systemic problems that lead to the misconduct they seek to remedy. It will also continue to highlight the way racism infects all aspects of the criminal justice system.²⁹⁵

Aligning these arguments will not satisfy those on either side who see fundamental differences between the police and the formerly incarcerated, and fundamental differences between agents of the state and private citizens.²⁹⁶ There is a legitimate argument that as agents of the states, police give up a certain right to privacy; that that privacy is outweighed by the public's right to make informed decisions; and that, in a democracy, not only those who are elected but also those who work for elected officials must cede their privacy rights.²⁹⁷ There is also a

294. *See supra* Part II.C.

295. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 693 (1995) (describing the “radical critique” that “criminal law is racist” (citation omitted)).

296. *Cf.* Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 621 (2010) (“Under a strong form of transparency . . . all government information should be available to the public; and in the rare instance when they must be kept from the public, government secrets should not be so deep that their existence is unknown.” (citation omitted)).

297. One argument that public agents' privacy rights are constrained proceeds as follows:

Decent conceptions of democratic rule and individual liberty require, at a minimum, that discretionary judgments and actions be open to the electorate. . . . Even harmful abuses of discretion can be dealt with through legal and political recourse—as long as the behavior is visible to the affected individual and the citizenry. Conversely, veiled discretion cannot be evaluated by the public and is therefore incompatible with the

valid argument that those who violate the criminal law also give up their right to privacy; we can see both of these arguments at work in our system.²⁹⁸ Indeed, it is these beliefs that underpin the many laws already removing privacy both from government employees and from those who are accused or convicted of criminal activity. Public record laws, FOIA requests, and other laws allow for citizens and the media to access the kinds of information about public officials that private citizens would jealously guard.²⁹⁹ Similarly, the Fourth Amendment protections from searches are drastically reduced, not only for those convicted of crime, but also for those who are merely arrested.³⁰⁰

While these laws may make sense up to a point, forcing transparency on police erodes the first principles upon which general privacy laws are based.³⁰¹ Moreover, law enforcement's desire for privacy is one tool that may help an otherwise skeptical legislator or member of the public—who may be far more sympathetic to the police than the formerly incarcerated—understand what risks such transparency entails.³⁰² It is similarly safe to say that attempting to force transparency of PDRs is a step in the wrong direction for those who wish to see our criminal justice system bend toward humanity rather than continue along in its dehumanizing vein.³⁰³ This is a move that is likely to further the racial and other stratifications that exist within police departments themselves rather than addressing the policing problems advocates wish to see fixed.

democratic prerequisite of popular accountability.

Luna, *supra* note 85, at 1108.

298. *Samson v. California*, 547 U.S. 843, 847 (2006) (holding that a parolee's right to privacy is so "diminish[ed] [by virtue of his status] . . . that a suspicionless search by a law enforcement officer [does] not offend the Fourth Amendment" (citation omitted)).

299. *See, e.g., Pozen, supra* note 23, at 16 ("FOIA contains some strikingly bold features. . . . [I]t allows 'any person' to request any federal agency record for any reason, or no reason at all." (citation omitted)).

300. *See, e.g., Maryland v. King*, 569 U.S. 435, 465–66 (2013) (holding that taking a DNA swab from an arrestee does not violate the Fourth Amendment because arrestees have a diminished expectation of privacy); *Florence v. Bd. of Chosen Freeholders of Burlington*, 566 U.S. 318, 322–23 (2012) (holding that a search of an arrestee, including a genital search, is not too intrusive because of the diminished expectation of privacy and because of the need to ensure officer safety); *Samson*, 547 U.S. at 847; *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) ("[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

301. *See supra* Part I.

302. *See supra* Parts III.A.1, III.B.

303. *See Levine, Police Suspects, supra* note 22, at 1234–58 (arguing that special interrogation rights should apply to all, rather than be stripped from police, in order to reform criminal justice system).

This thought experiment does not mean that there is no place for police discipline to be made public. And, as discussed in the final Part, the police have too much protection in certain circumstances.³⁰⁴ But to the extent that the debate over PDR transparency gives us a moment to reflect on the problematic state of criminal records, thinking deeply about transparency more generally may be of great benefit. Overpoliced and overexposed communities may be better served by harnessing law enforcement's concerns about their own privacy than by forcing criminal record transparency onto individual police officers.

V. BALANCING TRANSPARENCY AND PRIVACY FOR POLICE PDRS

This Part briefly explores what a proper balance for police PDRs might look like. While this Article has argued that total transparency for PDRs is not a useful policy, it is also clear that some of the protections police have won through bargaining, statute, and court decisions go too far. Put simply, evidence of police misconduct should be available to prosecutors, defense attorneys, and civil litigants in police brutality cases.³⁰⁵ Furthermore, PDRs should be available to all law enforcement agencies through a federal database. This would address the all too regular practice of officers who are terminated from one police agency gaining employment with another agency that is unaware of the reasons for his or her prior termination.³⁰⁶ Returning, briefly, to the privacy discussion laid out in Part I, this Part suggests that this type of mid-level transparency is akin to “practical obscurity,” a useful concept that already exists in practice and theory.

Whatever harms, systemic or personal, come from outing an individual officer's misconduct records, they are both minimized and outweighed in a courtroom setting.³⁰⁷ They are minimized because lawyers and judges are, or rather should be, competent to assess such records. Lawyers and judges deal constantly with records of

304. This is a point I have made in two past articles regarding the waiting periods police get before they are interrogated during an internal or criminal investigation. *See id.* at 1236; Kate Levine & Stephen Rushin, *Interrogation Parity*, 2018 U. ILL. L. REV. 1685, 1688–91.

305. *See* Conti-Cook, *supra* note 8, at 1082–83 (noting that keeping misconduct secret from criminal defendants is antithetical to the rights of the accused to confront witnesses and to a fair trial); Levine, *We Need to Talk*, *supra* note 26, at 4–6 (observing that the balance of interests favors allowing defendants to see PDRs).

306. *Cf.* Conti-Cook, *supra* note 8, at 1074 (suggesting that the same access should be granted to defendants in criminal cases should be granted to civil litigants).

307. The same argument can be made for criminal records. Because the focus of this Article is PDRs, and for brevity's sake, I focus only on solutions to PDR transparency here.

misconduct; have access to witnesses who can give context to a record of misconduct; and, in our adversarial system, have ways to test out the veracity and legitimacy of individual charges of misconduct. Thus, fear that a PDR could violate an officer's due process, harm her reputation, or be overstated are not as palpable as they would be if PDRs were *publicly* released.

The harms that PDR publication could cause an individual officer are also outweighed by the needs of criminal defendants and civil litigants. This is most clear in a criminal trial, where a defendant must have the tools to defend herself. In many criminal trials, impeaching the credibility of a police officer is the most important tool he or she could have.³⁰⁸ In the thousands of cases where the only witness to a crime is a police officer, her testimony may be the difference between a charge and a dismissal, a conviction and an acquittal. The prosecutor must know whether an officer has a misconduct allegation, both to discharge her *Brady* duty,³⁰⁹ and, more importantly, to exercise her duty to see that justice is done.³¹⁰ In California, police privacy has swung to a ludicrous point where prosecutors do not have access to information about officers who are known to have perjured themselves.³¹¹ While this is extreme, it should simply be the policy that all official misconduct is shared with the prosecutor's office. The prosecutor should then be required to turn over misconduct to a defendant's attorney. It is possible that certain allegations or certain types of allegations could or should be excluded, but that issue is beyond the scope of this Article. It is untenable—particularly in light of the credibility police are given by judges and juries,³¹² combined with

308. Cf. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 102 (2009) (“One of your primary functions as a prosecutor is to make the judge and jury believe the police.”).

309. See Abel, *Brady's Blind Spot*, *supra* note 12, *passim* (arguing that secret PDRs prevent prosecutors from discharging their duty to disclose exculpatory evidence to the defense).

310. *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (“Prosecutors have a special duty to seek justice, not merely to convict.” (quotations omitted)); accord ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3–1.2(b) (4th ed. 2015).

311. See *Ass'n for L.A. Deputy Sheriffs v. Superior Court*, 221 Cal. Rptr. 3d 51, 56–59 (2017) (holding that the Los Angeles Sheriff's Department was not required to turn over its “*Brady* list,” which contained names of officers whose “personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment”).

312. William Bermeister, former head of New York's anti-corruption prosecution unit, noted that police prosecutions have a double credibility problem where “jurors give officers the benefit of a doubt,” while at the same time “if you don't have an ‘innocent’ victim, jurors don't care.” See Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 644 (2003) (quoting Interview with William Burmeister, Chief, N.Y.

reams of evidence that many officers are not truthful³¹³—for defendants to not have the right to confront police with evidence of their past misconduct if it is relevant to the case at hand.

Similarly, civil litigants suing the police for brutality or other infractions should have access to misconduct records.³¹⁴ The balance here might have to be weighed on a more case-by-case basis, as the potential for litigation abuses and mishandling of records is a larger concern.³¹⁵ But given the difficulty inherent in litigating as a civilian against the police,³¹⁶ and the important reforms that can arise from such litigation,³¹⁷ the benefits outweigh the harms, once again. Specifically,

Cty.'s Dist. Attorney's Official-Corruption Unit, in N.Y.C, N.Y. (May 3, 1999)); *see also* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970) (noting that fact finders generally find police testimony credible).

313. Slobogin, *supra* note 176, at 1040 (“[Police] lying intended to convict the guilty – in particular, lying to evade the consequences of the exclusionary rule – is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: ‘testilying.’” (citations omitted)).

314. Conti-Cook, *supra* note 8, at 1074.

315. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 998 (2003) (“In 1990, concerned about civil litigation abuse – particularly during discovery – increasing costs and delay, and overexpansive access to the federal courts, Congress passed the Civil Justice Reform Act (CJRA).” (citations omitted)). *But see* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 4 (2006) (noting that concern over abuse of civil rights litigation is overstated and frustrates the purpose of civil rights statutes: “For many federal judges, however, widespread violations of [the ADA] appear to be of less significance than the motives of the relatively few individuals who are seeking to enforce that law”).

316. *See, e.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1399 (2000) (“Damage suits against police departments and individual officers, however, have proven largely ineffectual in remedying the problem of police brutality and misconduct.” (citation omitted)); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 755 (1993) (“When bringing a suit under section 1983, a victim of excessive force faces the difficult tasks of first, finding an attorney, and then, winning the case. To be successful, the victim and the attorney must overcome financial, procedural, and evidentiary obstacles.”).

317. One author notes that although civil litigation has faced numerous obstacles, it should, in theory, lead to reform:

[C]ivil litigation is a cost-raising regulation tactic. It only works if aggrieved parties regularly litigate and departments feel the financial consequences of this litigation, thus motivating them to change behaviors and policies. At least one study has shown that civil litigation has raised the potential cost of misconduct high enough to force a response by local police agencies.

Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3201–02 (2014) (citation omitted). *See also* Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 34 (2012) (“Federal remedies both increase the expected costs of engaging in misconduct for police officers, and perhaps more importantly,

a major reason the benefits outweigh the harms in civil litigation is that information can be managed. Judges can seal records, impose gag orders, close the courtroom, and make other rulings that protect information against broad dissemination.³¹⁸

Another context in which PDRs should be more transparent is the network of law enforcement agencies. We can see the problem in the employment of Timothy Loehmann, the officer who shot and killed twelve-year-old Tamir Rice. Loehmann was finally terminated, not because he used excessive force on a child, but because it was determined that he had failed to disclose his termination from another police department *in the same state* when he applied for employment with the Cleveland Police Department.³¹⁹ His supervisors in the small police department of Independence, Ohio, had recommended his termination, “citing instances of insubordination, lying and an inability to emotionally function.” Loehmann instead resigned from the Independence Police Department, and he did not disclose these infractions on his application to work in Cleveland. The Cleveland Police Department should have had immediate access to any misconduct committed by that officer, but it did not.³²⁰ As Roger L. Goldman and Steven Puro have noted, unlike most licensed professions, law enforcement is often under local, not state, control.³²¹ This means that an officer with a record of misconduct bad enough to get fired from one department can be rehired by another. Moreover, this encourages officers with problematic records to voluntarily quit local departments, without fear that their records will follow them.

increase the expected costs of permitting misconduct for police departments.”).

318. Cf. *Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) (“The party seeking to seal any part of a judicial record bears the heavy burden of showing [in addition to another element] . . . that disclosure will work a clearly defined and serious injury to the party A party who seeks to seal an *entire* record faces an even heavier burden.” (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994))). A court may decide that a PDR should not be kept secret in an individual case. In such a situation, the judge will have weighed the merits of the loss of privacy against the public’s right to see the record.

319. Jacey Fortin & Jonah Engel Bromwich, *Cleveland Police Officer Who Shot Tamir Rice is Fired*, N.Y. TIMES (May 30, 2017), <https://www.nytimes.com/2017/05/30/us/cleveland-police-tamir-rice.html> [<https://perma.cc/354J-F52H>].

320. *Id.* One news article notes that the Cleveland Police Department should have done a “background check,” which is certainly correct. However, the Cleveland Police Department should also have had the relevant information at its fingertips, in a central database. *Id.*

321. Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 545–46 (2001) (“Although virtually every other profession is regulated by a state board with the power to remove or suspend the licenses or certificates of unfit members of the profession (*e.g.*, attorneys, physicians, teachers), there has been a longstanding tradition of local control of police without state involvement.”).

Other departments, even in the same state, may not know about the officers' records, or may know and hire them anyway because of a dearth of option.

Goldman and Puro suggest that every state have an agency, known as a Peace Officer Standards and Training Commission ("POST"). Only seven states currently have such a commission in place. A POST has the authority to hold hearings and impose sanctions on any officer in the state. A POST can impose "revocation, decertification or cancellation, [of the officer's license]." This ensures "that officers cannot continue to practice their profession in the state It treats the police profession like any other – if minimum standards of performance are not met, the person loses the privilege of continuing in the profession."³²² Beyond the ability to hold officers to a statewide, rather than local, standard, having a central authority would ensure that record keeping is standardized. This would allow for the collection and study of anonymized records, which could provide scholars and policing experts with important data. This data could reveal trends in particular police departments of problematic policing and problematic police discipline—based on race, gender, sexuality, or some other aspect of an officer's biography not related to his or her performance.³²³ Such anonymized information could reap many of the benefits that advocates of PDR transparency hope to achieve, without the concerns this Article has raised regarding the arbitrariness of discipline.

This kind of intermediate step between privacy and transparency may seem difficult to make work in practice. In particular, one may question whether allowing access to PDRs in courtroom and administrative settings may inevitably lead to public knowledge through leaks or media attention. Yet, this kind of privacy-transparency hybrid already exists in Supreme Court decisions and privacy scholarship in the concept of "practical obscurity."³²⁴ This concept applies to information that is technically available to the public but considered "practically obscure" because of the burden associated with discovering it. Courts and commentators have noted that there is

322. *Id.* at 543–44 (citations omitted).

323. *See supra* Part II.C.

324. Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 21 (2013) (discussing information that was technically available to the public, but could only be found by spending a burdensome and unrealistic amount of time and effort in obtaining it). The information was considered practically obscure because of the extremely high cost and low likelihood of the information being compiled by the public. *Id.*

a difference between court records and “a computerized summary located in a single clearinghouse of information.”³²⁵

In other words, the intermediate step of allowing some litigants and police administrative organizations access to PDRs but keeping these records from being seamlessly accessible online strikes an appropriate balance between necessary disclosure and full transparency. This approach also preserves the ability of, and potentially provides a workable roadmap for, criminal justice reform advocates to hold the treatment of police in the criminal justice system up both as a mirror—reflecting the way the system treats ordinary criminal defendants too harshly—and as an aspirational model for how all citizens deserve to be treated.

CONCLUSION

Along with growing awareness of the problematic state of policing in this country, there comes a wellspring of immediate and appealing solutions. These solutions often take the form of foisting the harshest policies used against ordinary citizens—such as criminal punishment and permanent reputational stain—onto individual police officers. The central argument of this Article, and of my work more generally, is that attempting to punish the police the way we do citizens accused of bad or criminal acts is problematic in two important ways. First, it does not solve, and may in fact exacerbate, the systemic and organizational problems that have led to the current state of overpolicing and underaccountability from police departments. Second, such solutions legitimize the policies and punishments that have led to our current state of mass incarceration and a permanent underclass of mostly poor people of color forever tainted by criminal convictions. We will not be able to reform our criminal justice system without reforming our reliance on and accession to police organizations. At the same time, attempting to reform policing by using the same harsh rhetoric and methods used against the millions of citizens who come in contact with our criminal justice system is ineffective and threatens to further entrench harmful criminal justice policy.

325. *Id.*