

NOTE

LET THE SUNSHINE IN: ILLUMINATING THE POWERFUL ROLE POLICE UNIONS PLAY IN SHIELDING OFFICER MISCONDUCT

Katherine J. Bies*

INTRODUCTION	110
I. ARGUMENTS FOR AND AGAINST POLICE OFFICER MISCONDUCT	
CONFIDENTIALITY LAWS	113
A. Overview of Confidentiality Legislation	114
B. The Argument for Confidentiality	115
C. Countervailing Public Interest: Transparency and Accountability	117
1. Accountable and Transparent Decision-making	118
2. Trust and Community Relations	119
II. THE DEVELOPMENT OF POLICE UNIONS IN THE 1960S AND 70S.....	120
A. The Call for Police Reform Triggered the Growth of Unions	121
B. Police Union Backlash	123
1. Police Resistance to Civilian Review Boards.....	124
2. Police Union Support of the Police Officer Bill of Rights	125
III. POLICE UNIONS AND THE DEVELOPMENT OF POLICE OFFICER PRIVACY RIGHTS	126
A. California Case Study	126
1. Development of <i>Pitchess</i> Laws	126
2. Legislative History of the <i>Pitchess</i> Law	129
B. New York Case Study.....	131
1. Development of Section 50-a	131
2. Legislative History of Section 50-a	133

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C. Recent Efforts of California Police Unions to Limit the Public Disclosure of Disciplinary Records	135
1. <i>Copley Press</i> Decision	135
2. SB 1019	136
3. SB 1286	137
IV. THE ABILITY OF POLICE UNIONS TO DISTORT DEMOCRATIC PROCESSES AND OUTCOMES	139
A. Distorting the Democratic Process.....	139
1. Playing the Public Safety Card	140
2. Aligning Police Officers' Privacy Interests with the Public Interest...	141
3. Political Machinery.....	142
B. Undermining Democratic Values	143
V. RECOMMENDATIONS FOR REFORM.....	144
A. Ballot Initiatives	144
B. Post-Conviction Litigation.....	145
C. Participatory Democracy and Political Collective Bargaining	146
CONCLUSION.....	149

“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

– U.S. Supreme Court Justice Louis Brandeis (1856-1941)

INTRODUCTION

In recent years, videos capturing the fatal shootings of unarmed men of color by police officers have swept media outlets and public discourse. Facilitated by cellphone video and social media and spurred by a new generation of Black Lives Matter activists, public awareness of excessive force incidents has gained new momentum and shined a light on broader concerns about racial disparities within our criminal justice system. In 2010, almost ten out of every 1,000 American police officers were accused of some type of police misconduct.¹ In 2015, one thousand people were killed in officer-involved shootings.² Although African-American men only make up six percent of the population, they made up forty percent of those killed.³

1. Reuben Fischer-Baum, *Allegations Of Police Misconduct Rarely Result In Charges*, FIVETHIRTYEIGHT (Nov. 25, 2014, 9:45 AM), <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>.

2. Kimberly Kindy, Marc Fisher & Julie Tate, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/>.

3. *Id.*

A new wave of protests surged as grand juries refused to indict the officers charged in Michael Brown's death in Ferguson⁴ and Eric Garner's death in New York City,⁵ and a judge acquitted a police officer charged in Freddie Gray's death in Baltimore.⁶ These three high-profile cases highlight the obstacles a victim of alleged officer misconduct may face when seeking a legal remedy. For a criminal case against a police officer to result in conviction, a prosecutor, grand jury, and finally a judge or jury must all see past an officer's badge and hold accountable an individual sworn to protect. Not surprisingly, less than forty percent of these misconduct accusations result in conviction.⁷

In light of the low conviction rate of police officers accused of excessive force, community activists, scholars, and government officials have proposed alternative reforms. For instance, "sunshine legislation" makes officer disciplinary records public once a police officer is found guilty of misconduct such as excessive force. Like reforms to increase the use of officer body cameras,⁸ some legislators hope that sunshine laws will bolster public trust in officers by piercing the secrecy that often shrouds officer misconduct.⁹ However, in many states, officer disciplinary records remain confidential.

In California, sunshine laws recently gained momentum due in part to public concern over the fact that California police officers killed 211 people last year.¹⁰ But the most recent sunshine bill—facing substantial opposition

4. Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>.

5. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

6. Scott Calvert, *Baltimore Police Officer Acquitted in Trial Over Freddie Gray Arrest*, WALL ST. J. (May 23, 2016, 2:41 PM EST), <http://www.wsj.com/articles/verdict-expected-for-a-2nd-baltimore-policeman-in-freddie-gray-death-1464005409>.

7. *Id.*

8. Body cameras are often viewed as an essential reform. For example, in June of 2016, the Chicago Independent Review Panel announced that it is releasing body camera footage en masse. Richard A. Oppel Jr. & Richard Perez-Pena, *Chicago Releases Videos of Police Shootings*, N.Y. TIMES (June 3, 2016), http://www.nytimes.com/2016/06/04/us/chicago-police-misconduct.html?_r=0. Chicago Mayor Rahm Emanuel stated that the release of the raw footage was "a major step forward to promote transparency, and it makes us one of the leading cities in America to guarantee timely public access to this breadth of information involving sensitive police incidents." *Id.* However, the local police union, the Fraternal Order of Police, criticized this release as "irresponsible." *Id.*

9. Sen. Mark Leno, *Police Transparency & Accountability (SB 1286)*, ACLU OF NORTHERN CAL., <https://www.aclunc.org/our-work/legislation/police-transparency-accountability-sb-1286> (last visited Jan. 11, 2017).

10. *Police Transparency Bill Gathers Steam After California Officers Kill An Estimated 211 People Last Year*, CBS S.F. BAY AREA (May 6, 2016, 12:12 PM PST), <http://sanfrancisco.cbslocal.com/2016/05/06/police-transparency-bill-gathers-steam-after-california-officers-kill-an-estimated-211-people-last-year/>.

from law enforcement organizations—died in the Appropriations Committee in May 2016.¹¹

It is not unusual for police unions to oppose reforms, like sunshine legislation, which increase transparency and accountability in both the processes and outcomes of misconduct investigations. This Note will bring to light that during the rise of police unions to political power in the 1970s, police unions lobbied for legislation that shrouded personnel files in secrecy and blocked public access to employee records of excessive force or other officer misconduct. Today, these officer misconduct confidentiality statutes continue to prohibit public disclosure of disciplinary records related to police shootings and other instances of excessive force. Moreover, as the failure of recent sunshine legislation demonstrates, police unions continue to challenge and deter today's progressive reform efforts that would replace secrecy with accountability and transparency.

This Note also argues that police unions are unparalleled in their ability to successfully advocate for policy proposals that conflict with traditional democratic values of accountability and transparency. As this Note illustrates, police unions often strategically frame any opposition to their agenda of secrecy as endangering public safety and harming the public interest. However, police unions often conflate “the public interest” with the private interests of police officers. Police unions—like all unions—first and foremost advocate for the rank-and-file's interests as employees, sometimes at the expense of democratic values. Additionally, police unions have established highly developed political machinery that exerts significant political and financial pressure on all three branches of government. This Note draws on two case studies that illuminate the unique ability of police unions to persuade and control public officials. Further, this Note argues that the power of police unions over policymakers in the criminal justice context distorts the political process and generates political outcomes that undermine the democratic values of transparency and accountability.

These criticisms do not call for the elimination of police unions. Rather, this Note targets a gap in the literature in order to provide some guidance for scholars, activists, and police officers in pursuit of future criminal justice reform. Although police unions have a unique ability to influence policy, the effect of police unions' political agendas on the criminal justice system is under-researched.¹² Indeed, the impact of police union activism in the 1970s on modern day criminal justice reform efforts has not yet been studied. Moreover, police secrecy in discipline and misconduct investigations is an area that both

11. Liam Dillon, *California Police Misconduct Records Will Remain Secret After Bill Dies in Committee*, L.A. TIMES (May 31, 2016, 2:48 PM PST), <http://www.latimes.com/politics/la-pol-sac-essential-politics-california-police-misconduct-r-1464384312-htmstory.html>.

12. Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of Policing*, in POLICE REFORM FROM THE BOTTOM UP 88, 90 (Monique Marks & David A. Sklansky eds., 2012).

researchers and reformers have neglected.¹³ Thus, in determining what role rank-and-file officers should play in future reform efforts, scholars and activists must first acknowledge this tendency of police unions to distort democratic processes and undermine democratic values.

This Note proceeds in five parts. Part I outlines the arguments offered in support of and against officer misconduct confidentiality laws. Part II summarizes the reactionary rise of police unions in the 1970s and the subsequent police officer backlash to reform initiatives of the civil rights era. Part III extends this narrative and analyzes the role police unions played in the 1970s and today in advocating for officer misconduct confidentiality laws in California and New York. Part IV, relying on the case studies in Part III, offers a criticism of the democracy-distorting effect of police unions on the political process and outcomes. With these findings in mind, Part V provides recommendations about how to successfully advocate for the public disclosure of disciplinary files and other progressive criminal justice reforms that may be unpopular with police unions.

I. ARGUMENTS FOR AND AGAINST POLICE OFFICER MISCONDUCT CONFIDENTIALITY LAWS

The public interest in the disclosure of officer disciplinary records is in tension with a countervailing interest in protecting police officer confidentiality. Some states have weighed these interests in favor of transparency and accountability and others have emphasized the importance of police officer privacy rights.¹⁴ In this Part, I provide an overview of confidentiality legislation. Then I discuss the arguments in support of this

13. *Id.* at 99; DAVID A. SKLANSKY, *DEMOCRACY AND THE POLICE* 102 (2008); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability: An Analysis of Statutory Law Enforcement Officers' Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 243 (2005).

14. States must also weigh privacy rights with the federal constitutional requirement under *Brady v. Maryland* to disclose to defendants any favorable, material evidence known to the prosecution team, including impeachment evidence to a witness's credibility. But in many jurisdictions, "a thicket of state laws, local policies, and bare-knuckle political pressure prevents access to the material in these personnel files." Jonathan Abel, *Prosecutors' Duty to Disclose Impeachment Evidence in Police Personnel Files: The Other Side of Police Misconduct*, WASH. POST: VOLOKH CONSPIRACY (July 11, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/11/prosecutors-duty-to-disclose-impachment-evidence-in-police-personnel-files-the-other-side-of-police-misconduct/?utm_term=.960ed3588854. See also Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 747 (2015) ("Wide variations in *Brady's* application to these files stem from a multiplicity of state laws and local policies protecting personnel files, as well as from differences in the institutional dynamics between and within prosecutors' offices and police departments."). Thus, in the name of protecting police privacy, these officer personnel files remain confidential—despite the federal constitutional requirement to disclose.

legislation and how these arguments are in tension with democratic values of accountability and transparency.

A. *Overview of Confidentiality Legislation*

Police officer misconduct records are completely confidential in twenty-three states.¹⁵ California and New York are two states that have protected the confidentiality of officer disciplinary records with legislation. For example, California Penal Code Section 832.7, protects all law enforcement personnel records:

Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.¹⁶

Personnel records are only accessible by filing a motion in a civil or criminal proceeding known as a *Pitchess* motion (after *Pitchess v. Superior Court*). The New York Civil Rights Law § 50-a similarly makes law enforcement records confidential:

All personnel records . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer or peace officer within the department of corrections and community supervision or probation department except as may be mandated by lawful court order.¹⁷

Just as in California, these records are also discoverable by making a motion to the court.

In contrast, police disciplinary records are public in only twelve states.¹⁸ Many of these states still make records of unsubstantiated complaints or active investigations confidential.¹⁹ Florida Statute § 119.01 provides that “all state, county, and municipal records are open for personal inspection and copying by

15. New York, California, and Delaware specifically make law enforcement officer records confidential. A police officer’s disciplinary history is mostly unavailable through public records requests in Alaska, Colorado, DC, Idaho, Iowa, Kansas, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wyoming. Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), <http://www.wnyc.org/story/police-misconduct-records/>. In some cases, all public employee personnel files are exempt from disclosure. *Id.* In others, police departments withhold records under a general privacy exemption. *Id.*

16. CAL. PENAL CODE § 832.7 (West 2016).

17. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016).

18. Alabama, Arizona, Connecticut, Georgia, Florida, Ohio, Maine, Minnesota, North Dakota, Utah, and Washington. Lewis et al., *supra* note 15.

19. *Id.*

any person.”²⁰ The statute does create a confidentiality exception for records pertaining to an active investigation.²¹ Minnesota Statute § 13.34 makes public “the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action.”²²

Fifteen states also make records available under limited circumstances.²³ In some states, only records of severe discipline, like a suspension or termination, are public. For example, Hawaii Statute § 92F-14 allows the disclosure of information related to the “employment misconduct that results in an employee’s suspension or discharge.”²⁴ In other states, whether or not personnel files can be disclosed varies based on evolving court precedent. Under South Carolina code § 30-4-40, public disclosure of officer disciplinary records is allowed unless it “would constitute unreasonable invasion of personal privacy.”²⁵

B. *The Argument for Confidentiality*

Courts, police unions, and other law enforcement groups offer several reasons why the confidentiality of police disciplinary records benefit the public interest.

First, they posit that the disclosure of these records would have a chilling effect on the complaint making process²⁶ and impede police departments from enforcing appropriate standards of police conduct.²⁷ For instance, one court emphasized that “the knowledge that some of the confidential information recorded might be later exposed to outside parties would have a certain and chilling effect upon the internal [police officer] use of such record making.”²⁸ This might exacerbate the “thin blue line” or the unwritten rule that exists among police officers not to report on a colleague’s errors, misconducts, or

20. FLA. STAT. ANN. § 119.01 (West 2016).

21. *Id.* § 112.533 (“A complaint filed against a law enforcement officer or correctional officer with a law enforcement agency or correctional agency and all information obtained pursuant to the investigation by the agency of the complaint is confidential and exempt from the provisions of s. 119.07(1) until the investigation ceases to be active . . .”).

22. MINN. STAT. ANN. § 13.43 (West 2016).

23. Arkansas, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Vermont, and West Virginia. Lewis et al., *supra* note 15.

24. HAW. REV. STAT. ANN. § 92F-14 (West 2016).

25. S.C. CODE ANN. § 30-4-40 (West 2016).

26. *See, e.g.*, City of Los Angeles v. Superior Court, 109 Cal. Rptr. 365, 369 (Ct. App. 1973).

27. City of San Jose v. Superior Court, 850 P.2d 621, 627 (Cal. 1993).

28. City of Los Angeles v. Superior Court, 109 Cal. Rptr. 365, 369 (Ct. App. 1973).

crimes, including police brutality.²⁹ Additionally, the Ventura County District Attorney, in opposition to recent sunshine legislation in California, argued that public disclosure would discourage the public from coming forward with complaints because confidential proceedings also protect the complaining parties.³⁰ The prospect of having to testify against police officers at a public meeting is likely to discourage some citizens from complaining at all.³¹

Police unions have also emphasized that the disclosure of disciplinary records could create public safety risks. Unlike most professions, police officers are involved in physical altercations and “daily confrontations with criminals.”³² Not only may criminal defendants take advantage of access to personnel files to “escape liability for themselves or to seek financial gain,”³³ but access to these files could lead to increased risks to officer personal safety, which in turn may jeopardize public safety.³⁴

Moreover, opening officers to public scrutiny may “diminish public confidence” in officers who return to work after an incident.³⁵ One police union argued in opposition to a 2008 sunshine bill that the disclosure of personnel files would “subject officers to increased risk of retribution on the streets, lost credibility, diminished effectiveness on the beat, diminished credibility on the witness stand, increased civil liability, and general embarrassment.”³⁶ As one court concluded, maintaining confidential disciplinary records encourages citizens and officers “to cooperate fully without fear of reprisal or disclosure in internal investigations into misconduct.”³⁷

Using these rationales, police unions aggressively defend against the public release of officer disciplinary records to advance the public interest.³⁸ Although many of the aforementioned arguments are framed in terms of benefiting the public interest, police unions—like all unions—are also advocating for their members’ best interests as employees. Like all employees, police officers have an interest in “job security, fair pay, safe working conditions, and fair and appropriate treatment by their employers.”³⁹ And police unions are “the

29. Benjamin J. Branson, “*Good Cop, Bad Cop?*” *Anyone’s Guess: A Review of the Pitchess Motion for Criminal Discovery in the State of California*, 31 WHITTIER L. REV. 279, 301 (2009).

30. S. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 1286 (LENO), 2015-2016 Sess., at A (Cal. 2016) [hereinafter S.B. 1286 BILL ANALYSIS].

31. *Id.*

32. *Id.*

33. *Id.*

34. ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 1019 (ROMERO), 2007-2008 Sess., at U (Cal. 2008) [hereinafter ASSEMB. COMM. S.B. 1019 BILL ANALYSIS].

35. *Id.*

36. S. COMM. PUB. SAFETY, BILL ANALYSIS, S.B. 1019 (ROMERO), 2007-2008 Sess., at R-S (Cal. 2008) [hereinafter S. COMM. S.B. 1019 BILL ANALYSIS].

37. *People v. Gissendanner*, 399 N.E.2d 924, 927 (N.Y. 1979).

38. Walker, *supra* note 12, at 98-99.

39. Keenan & Walker, *supra* note 13, at 198.

principal advocates for the interests of police officers.”⁴⁰ For example, one California-based police union states that its mission is to “represent and protect the rights and benefits of peace officers.”⁴¹

Not surprisingly, the rank-and-file have strong personal interests in protecting their personnel files from public view. The disclosure of police personnel files may jeopardize an officer’s livelihood. Officers whose credibility is called into question by police misconduct may not be able to testify in future cases because they can be impeached by a defense attorney who has access to the disciplinary records. These officers, sometimes called Brady cops, “cannot make arrests, investigate cases, or conduct any other police work that might lead to the witness stand.”⁴² Thus, for officers, the disclosure of police personnel files is a matter of due process.⁴³

To address these concerns, police unions have also argued that the public disclosure of disciplinary records constitutes an unwarranted invasion of police officer privacy rights.⁴⁴ But police officer privacy rights were not always protected by state courts. For example, the state freedom of information acts in both New York and California were originally interpreted by the respective state courts to allow the disclosure of officer misconduct files without any mention of a countervailing privacy right.⁴⁵ Yet, by the late 1970s, courts began to reference a definitive privacy right. For example, in *People v. Gissendanner*, the court balanced the “constitutionally based rights of an accused to confront and cross-examine adverse witnesses” with “the *interest of the State and its agents* in maintaining confidential data relating to performance and discipline of police.”⁴⁶ The New York Court of Appeals placed this newly identified police officer privacy right on the same footing as the Sixth Amendment confrontation right.

C. *Countervailing Public Interest: Transparency and Accountability*

In contrast, courts, activists, and scholars have offered two main arguments for why the public benefits from access to officer disciplinary files. First, the public has an interest in accountable and transparent decision-making by government officials. Second, providing public access to personnel files not only promotes public confidence in the ability of the police “to police

40. *Id.*

41. *Mission Statement*, POLICE OFFICERS RES. ASS’N OF CAL., <http://porac.org/about/mission-statement/> (last visited Oct. 5, 2016).

42. Abel, *Brady’s Blind Spot*, *supra* note 14, at 745.

43. *Id.*

44. *See, e.g., id.* at 926-27.

45. *See Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974) (en banc); *People v. Sumpter*, 347 N.Y.S.2d 670, 678 (Sup. Ct. 1973).

46. *People v. Gissendanner*, 399 N.E.2d 924, 927 (N.Y. 1979).

themselves” but also builds greater trust and mutual respect between the officers and the community they have sworn to serve.⁴⁷

1. *Accountable and Transparent Decision-making*

Disciplinary records are of public importance because police officers are public officials. The public has an interest in accessing and assessing the “thoroughness, impartiality, and correctness of the police departments’ investigations and conclusions and the propriety of any disciplinary actions taken in response.”⁴⁸ It is a matter of public concern whether or not these officials are fit for duty. Several courts, echoing this reasoning, have held that public officials have no right to privacy with regard to their official duties.⁴⁹

Transparency and accountability in police departments foster democratic decision-making. An informed citizenry is the fundamental basis of a representative government. The Founders emphasized the importance of transparency in a democracy. James Madison stated:

Nothing could be more irrational than to give the people power, and to withhold from them information without which power may be abused A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy, or, perhaps both.⁵⁰

In our political system, government legitimacy is derived, in part, from the disclosure of government information through media, public hearings, and public meetings.⁵¹ Transparency assists citizens in making informed decisions.

Accountable and transparent decision-making is imperative because police officers play a unique role in society: the state-sanctioned ability to use force against other citizens.⁵² Both police departments and individual officers should be held publicly accountable for the manner in which they perform their official duties, including: fighting crime, maintaining order, and serving the

47. Walker, *supra* note 12, at 99.

48. Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, COMM. LAW, Fall 2004, at 34, 37.

49. See, e.g., *Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) (“A public official has no right to privacy as to the manner in which he conducts his office.”) (quoting *Rawlins v. Hutchinson News Publ’g Co.*, 543 P.2d 988, 993 (Kan. 1975)); *Rutland Herald v. City of Rutland*, 48 A.3d 568, 572 (Vt. 2012) (“[N]o legitimate reasonable expectation of privacy in records that concerned how they discharged their official duties.”); *Cowles Publ’g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (“[D]isclosure of the officers’ names would not invade the officers’ right to privacy because such disclosure would not be offensive to a reasonable person, and because matters of police misconduct are of legitimate concern to the public.”).

50. Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957).

51. SKLANSKY, *supra* note 13, at 91.

52. Keenan & Walker, *supra* note 13, at 192.

community.⁵³ Greater transparency also allows the public to determine whether police departments and individuals are treating people with respect and fairness.⁵⁴

Some may argue that police departments and officers are already accountable to mayors, city councils, attorneys general, and legislatures who exercise control and oversight through the political process.⁵⁵ Courts also hold police officers accountable by upholding constitutional rights. However, as mentioned above, officer misconduct is rarely settled through the courts because grand juries seldom indict officers or because indicted officers are later acquitted.⁵⁶ And, as discussed below, police unions have a unique lobbying power over the legislative branch.⁵⁷ Thus, as this Note illustrates, public accountability provides additional and essential oversight.

In fact, court opinions have highlighted the importance of public review.⁵⁸ As one federal judge stated, “[t]he public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.”⁵⁹ Similarly, in *Demers v. City of Minneapolis*, the court allowed access to disciplinary records because “[t]here is a compelling need for public accountability, particularly with law enforcement agencies.”⁶⁰ The court stated that “if complainants’ names are kept private, then ‘there is virtually no way in which citizens, scholars, and the news media can examine whether law enforcement agencies are adequately policing themselves.’”⁶¹ In that case, a Minneapolis police chief denied a social science graduate student access to complaint forms that were neither current nor pending. As these opinions demonstrate, public access to disciplinary records is an essential democratic mechanism to hold police officers and other public officials accountable.

2. *Trust and Community Relations*

Disclosure of disciplinary records is not only important for public decision-making but also for community relations with police officers. Transparency

53. SAMUEL WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 8 (2d ed. 2014).

54. Keenan & Walker, *supra* note 13, at 190-91.

55. WALKER & ARCHBOLD, *supra* note 53, at 8-9.

56. *See* discussion *supra* Part I.

57. *See* discussion *infra* Part V.A.

58. For example, the Superior Court of Vermont found that the public had an interest “in determining if the police department followed its own internal affairs investigation procedure, and if the police department properly decided whether to conduct criminal investigations of its own employees.” *Rutland Herald*, 48 A.3d at 572.

59. *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995).

60. *Demers v. City of Minneapolis*, 468 N.W.2d 71, 72 (Minn. 1991).

61. *Id.* at 74.

fosters trust and legitimacy in the government⁶² and encourages compliance with authorities.⁶³ In the 2013 case *Worcester Telegram & Gazette Corp v. Chief of Police of Worcester*, the Massachusetts Court of Appeals highlighted the role public access to disciplinary records plays in fostering trust and police officer legitimacy. The court stated that “[a] citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.”⁶⁴

Studies show the general public lacks confidence in police, and public confidence in police in minority communities is disproportionately low. In the United States, recent polling demonstrates that public confidence in police is at its lowest since 1993—the year that LAPD officers stood trial for assaulting Rodney King.⁶⁵ As discussed above, minorities are more likely to experience arrests and stops as well as excessive force at the hands of police officers. Research consistently shows that people of color are more likely than white individuals to view law enforcement with suspicion and distrust.⁶⁶

Contrary to the arguments made by those in support of confidentiality laws, police officers may actually be less effective in their communities when shrouded in secrecy by confidentiality laws. Research shows that when the police are perceived as untrustworthy or illegitimate, both police officers and prosecutors will be less effective at serving their community.⁶⁷ Thus, increasing transparency by publicly disclosing misconduct records should increase community faith and make police officers more effective in protecting their community.

II. THE DEVELOPMENT OF POLICE UNIONS IN THE 1960S AND 70S

During the civil rights era, activists, courts, and scholars encouraged greater accountability and transparency in police departments. However, these reforms quickly led to powerful backlash from the rank-and-file and police unions that rejected these reforms and instituted their own political agenda. This Part will briefly summarize previous scholarship, which has focused on

62. WALKER & ARCHBOLD, *supra* note 53, at 9; Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1161 (2000).

63. Tom R. Tyler, *Public Mistrust of the Law*, 66 U. CIN. L. REV. 847, 867-72 (1998).

64. *Worcester Telegram & Gazette Corp v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

65. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.

66. Office of Justice Programs, *Race Trust and Police Legitimacy*, NAT'L INST. OF JUST., <http://www.nij.gov/topics/law-enforcement/legitimacy/pages/welcome.aspx> (last visited Oct. 28, 2016).

67. KATHERINE J. BIES ET AL., *STUCK IN THE '70S: THE DEMOGRAPHICS OF CALIFORNIA PROSECUTORS: A REPORT OF THE STANFORD CRIMINAL JUSTICE CENTER* 15-16 (July 2015).

the police union's resistance to civilian review boards and support of the Police Officer Bill of Rights.

A. *The Call for Police Reform Triggered the Growth of Unions*

The Civil Rights Movement and its criticisms of police conduct strengthened modern police unions in the late 60s and early 70s. During the Civil Rights Movement, police were a symbol of an unjust society.⁶⁸ Student protests of Vietnam escalated into increasing conflict with the police.⁶⁹ The Black Panther movement practiced militant self-defense against abusive police practices.⁷⁰

Courts also called for police reform. Supreme Court decisions brought police discretionary power and practices into the public view. In 1961, the Supreme Court in *Mapp v. Ohio* held that all evidence obtained by unconstitutional searches and seizures is inadmissible.⁷¹ The Court emphasized that “we can no longer permit [constitutional rights] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.”⁷²

Additionally, the Court cracked down on police officer interrogation practices. In 1964, the Court affirmed that statements elicited during police interrogations after a suspect has requested and been denied an opportunity to consult with a lawyer are not admissible during a criminal trial.⁷³ In 1966, the Court recognized that officers must warn a defendant of his privilege against self-incrimination if conducting a custodial interrogation.⁷⁴ The Court referenced police manuals that outlined the tactics police officers use to induce a confession including persuading, tricking, or cajoling a defendant “out of exercising his constitutional rights.”⁷⁵

Community activists also called for reform within police departments as a solution to community unrest. Protests in response to officer misconduct and excessive force had become widespread. On July 16, 1964, a white officer shot and killed an African-American teenager in New York City, which inspired demonstrations and protests in Harlem.⁷⁶ By 1966, forty-three cities had been the site of protests—most motivated by other instances of alleged excessive force by police officers.⁷⁷ Many cities sought stronger community control over

68. SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 224-27 (1980).

69. SKLANSKY, *supra* note 13, at 76.

70. *Id.*

71. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

72. *Id.* at 660.

73. *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

74. *Miranda v. Arizona*, 384 U.S. 436, 498-99 (1966).

75. *Id.* at 455.

76. WALKER, *supra* note 68, at 223-24.

77. *Id.* at 222-23.

police departments such as putting the police under control of city commissioners or civilian review boards.⁷⁸

Another strategy to implement reform was through “participatory democracy,” which engaged rank-and-file officers in grassroots reform efforts within police departments.⁷⁹ In 1960, philosopher Arnold Kaufman invented the term “participatory democracy” to describe the importance of widespread political involvement.⁸⁰ In the 1960s, activists, embracing this theory of democracy, encouraged grassroots reform and emphasized collaborative decision-making as a method for inspiring widespread reform.⁸¹ For instance, Oakland police officers, in consultation with criminologist Hans Toch, successfully developed a Peer Review Panel that allowed rank-and-file officers to set their own reform agenda to address issues of officer misconduct and excessive force.⁸²

Many scholars specifically emphasized the importance of participatory democracy in police departments. First, many scholars concluded that involving rank-and-file officers in police departmental decision-making would engrain democratic values such as accountability and transparency in rank-and-file officers.⁸³ Second, scholars believed top-down reform was less effective and less expert than reform movements involving the participation of rank-and-file officers because top-down reform forfeits “the vast amount of knowledge, insight, experience, and just plain street savvy that officers acquire.”⁸⁴

But, by the end of the 1970s, the academic pressure for participatory democracy in police departments had vanished.⁸⁵ Rank-and-file officer involvement, via police unions, had taken discouraging forms that prevented rather than encouraged reform.⁸⁶ Academics concluded that white, male, and

78. *Id.*

79. Hans Toch a criminologist who studied rank-and-file officers was impressed by their ability to serve as “agents of change.” SKLANSKY, *supra* note 13, at 163.

80. *Id.* at 61.

81. *Id.* at 7.

82. *Id.* at 163; HANS TOCH, J. DOUGLAS GRANT & RAYMOND T. GALVIN, *AGENTS OF CHANGE: A STUDY IN POLICE REFORM* (1975). Criminologist William Muir similarly encouraged police departments to embrace a workplace culture that invited “participation, discussion, argument, and questioning” by rank-and-file officers. SKLANSKY, *supra* note 13, at 169; WILLIAM KER MUIR, JR., *POLICE: STREETCORNER POLITICIANS* (1977).

83. SKLANSKY, *supra* note 13, at 169-70; WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY*, at xvii (1970); GEORGE E. BERKELEY, *THE DEMOCRATIC POLICEMAN* 29, 35 (1969); John E. Angell, *Toward an Alternative Classic Police Organization Arrangements: A Democratic Model*, 9 *CRIMINOLOGY* 185, 187, 192-95 (1971).

84. SKLANSKY, *supra* note 13, at 164; Hans Toch, *Police Officers as Change Agents in Police Reform*, in *POLICE REFORM FROM THE BOTTOM UP* 34 (Monique Marks & David A. Sklansky eds., 2012).

85. SKLANSKY, *supra* note 13, at 171.

86. *Id.*

reactionary police forces were organizing in ways that threatened rather than instilled democratic values.⁸⁷

B. *Police Union Backlash*

In the 1970s, police unions developed as well-organized interest groups with significant financial resources and political clout.⁸⁸ Police unions endorsed favorable political candidates and lobbied local and state governments for favorable legislation.⁸⁹ Scholars noted that legislators welcomed police unions and their efforts as a source of “campaign funds, support, and good times.”⁹⁰ As police unions matured, so did their political strategies. In 1979, the president of the San Francisco Police Officers Association emphasized that his union’s efforts were becoming more sophisticated by “hiring professional firms to do political polling and installing a computer system to track bills in the legislature.”⁹¹ In addition to hiring professional lobbyists, police unions began setting up political action committees to facilitate donations to favorable candidate and legislative campaigns.⁹²

Through these efforts, rank-and-file officers gained a major voice in state and local government.⁹³ Police unions used similar tactics to civil rights groups: asserting rights in the face of perceived discriminatory treatment, organizing private interest groups, picketing, lobbying, and litigating.⁹⁴ Strikes by police officers became increasingly popular. Police officers also developed alternatives to strikes like “blue flu” epidemics, work slowdowns, and writing enormous numbers of tickets.⁹⁵ Police unions used these strategies to push back on the police reform movement.

Police unions were known for reactionary politics and for using racism and fear tactics as political strategies.⁹⁶ Scholars concluded that these reactionary tendencies developed out of a burgeoning police subculture. In the 1960s and 70s, police sociologists described a “Policeman as Other” subculture and an “us vs. them” mentality that developed in response to what officers felt was growing criticism and calls for reform from all sides.⁹⁷ As developing police

87. *Id.* at 170, 173.

88. Walker, *supra* note 12, at 99.

89. *Id.* For example, in the 1970s, the Patrolmen’s Benevolent Association in New York City began to aggressively lobby state legislators. Anthony V. Bouza, *Police Unions: Paper Tigers or Roaring Lions?*, in POLICE LEADERSHIP IN AMERICA 241, 250 (William A. Geller ed., 1985).

90. *Id.* at 250-51.

91. Paul Grabowicz, *Police Groups are Wielding More and More Political Clout*, WASH. POST, Oct. 28, 1979, at A11.

92. *Id.*

93. *Id.* at 241. See Walker, *supra* note 68, at 241-42.

94. Walker, *supra* note 12, at 98.

95. WALKER, *supra* note 68, at 241.

96. SKLANSKY, *supra* note 13, at 76.

97. *Id.* at 40, 167. See discussion *infra* Part III.A.

unions grew more isolated, they emphasized solidarity, and tolerated secrecy, officer misconduct,⁹⁸ and even hostility to the public.⁹⁹ In addition to advocating for better working conditions and compensation, police unions also developed a political agenda that was counter to democratic values of accountability and transparency. Two policy positions in particular demonstrate this anti-democratic agenda: 1) the opposition to civilian review boards and 2) the support for a Police Officer Bill of Rights in state legislatures.

1. *Police Resistance to Civilian Review Boards*

Police unions resisted the development of civilian review boards by challenging their legitimacy in court and seeking legislative repeal. They argued citizen oversight violated provisions of local city charters—either disciplinary provisions of collective bargaining contracts or local versions of the recently codified Police Officer Bill of Rights.¹⁰⁰ Additionally, unions advised officers not to cooperate with investigations by these boards.¹⁰¹

One well-known example of police union resistance to civilian review boards is the effort of the Patrolmen's Benevolent Association (PBA) in New York City. In 1966, the NYC mayor wanted to create a civilian review board to address police brutality issues.¹⁰² The PBA picketed, secured signatures protesting the passage of the law, persuaded legislators to introduce a bill in the state legislature blocking the review board, moved to place the issue on the ballot by referendum, and launched a "Fear City" media campaign to win the 1966 referendum outlawing the board.¹⁰³ Similarly, in California, efforts by the Peace Officer's Research Association of California (PORAC) blocked civilian review initiatives.¹⁰⁴

Efforts to derail civilian review boards were only temporarily successful. For instance, after more than two decades, civilian oversight of the police was restored to New York City.¹⁰⁵ Today, over 200 civilian oversight entities exist around the country.¹⁰⁶

98. Referred to by many scholars as the code of silence where officers refuse to testify against other officers accused of misconduct. Walker, *supra* note 12, at 96-97.

99. *Id.* at 96.

100. *Id.* at 95.

101. *Id.* at 96.

102. Bouza, *supra* note 89, at 253.

103. *Id.* at 253-54.

104. Financed by union dues, the PORAC similarly funded political campaigns such as the 1970s fights against the community control of police initiative in Berkeley. Gerda Ray, *Police Militancy*, 7 CRIME & SOC. JUST. 40, 45 (1977).

105. Martin Kaste, *Police are Learning to Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015, 10:18 AM EST), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers>.

106. *Id.*

2. *Police Union Support of the Police Officer Bill of Rights*

In the 1970s, police unions also lobbied to support the development of the Police Officer Bill of Rights (POBR). Fourteen states have passed POBRs.¹⁰⁷ The first states were Florida and Maryland in 1974,¹⁰⁸ followed by California and Rhode Island in 1976, Virginia in 1978, and Wisconsin in 1979.¹⁰⁹

The POBR developed in reaction to the demands of civil rights activists for greater police accountability, including the advent of civilian review boards, because some provisions of POBRs seek to preempt civilian review.¹¹⁰ POBRs also arose in response to perceived overzealous investigations by police chiefs of police officer misconduct.¹¹¹ Police unions argue that POBRs are important because, without them, a lack of due process rights decreases police officer morale, impairs effective policing, disincentivizes recruitment, destabilizes employee and employer relationships, and lessens uniformity.¹¹²

After analyzing the effect of POBRs, Keenan and Walker found that, while many provisions are simply consistent with due process, some include potential impediments to police accountability, such as: “formal waiting periods that delay investigations; . . . prohibitions on the use of non-sworn investigators in misconduct investigations; . . . pre-disciplinary hearings that include rank-and-file officers on the hearing board; and . . . statutes of limitations on the retention and use of data on officer misconduct.”¹¹³

The recent investigation of the police officers charged in the killing of Freddie Gray in Baltimore highlights the ability of POBRs to impede accountability and transparency. Indeed, Baltimore mayor noted the significant role that the POBR played in the delay of the investigation into Freddie Gray’s death.¹¹⁴ Maryland’s POBR prevents the internal investigation of officers for 10 days following the incident, during which time they are presumed to be searching for a lawyer.¹¹⁵ POBR critics refer to this as a period of delay for officers to coordinate their stories.¹¹⁶ Walker, whose research focuses on law enforcement accountability, argues that this “special layer of due process . . . impedes accountability, and truly is a key element of our lack of responsiveness to [excessive force] cases.”¹¹⁷

107. Walker, *supra* note 12, at 95.

108. Keenan & Walker, *supra* note 13, at 197.

109. *Id.*

110. *Id.* at 194-96.

111. *Id.* at 199-200.

112. *Id.* at 199.

113. *Id.* at 241.

114. Eli Hager, *Take a Look at the Law Enforcement Officers’ Bill of Rights*, HUFFINGTON POST (Apr. 27, 2015, 12:34 PM EST), http://www.huffingtonpost.com/2015/04/27/law-enforcement-bill-of-rights_n_7153106.html.

115. *Id.*

116. *Id.*

117. *Id.*

Although police union efforts to prevent the formation of citizen review boards were unsuccessful, POBRs have served as much more effective obstacles to police accountability.¹¹⁸ Moreover, POBRs are not likely to disappear anytime soon. As many as eleven additional states are currently considering passing POBRs and other communities have essentially written these rights into their contracts with police unions.¹¹⁹ National POBR legislation is also pending in Congress.¹²⁰

III. POLICE UNIONS AND THE DEVELOPMENT OF POLICE OFFICER PRIVACY RIGHTS

Previous scholarship on the reactionary rise of police unions has been silent about the role that police unions also played in advocating for statutes that protect disciplinary records from public disclosure. Like the POBRs, this legislation continues to shape the criminal justice system today. This Part demonstrates how the police union lobby in California and New York has advocated successfully for police officer disciplinary record protections both in the 1970s and in recent years.

A. *California Case Study*

1. *Development of Pitchess Laws*

California's police personnel file confidentiality statutes developed as backlash to a pattern of state legislation and judicial rulings allowing access to police disciplinary files. In 1968, the state legislature passed the California Public Records Act (CPRA), the state analog of the federal Freedom of Information Act (FOIA). The CPRA's purpose emphasized that the ability to access information about state officials was a "fundamental and necessary right of every person in [California]."¹²¹

In 1974, the California Supreme Court, in *Pitchess v. Superior Court*, recognized a criminal defendant's right to discover the contents of police officers' personnel files.¹²² In *Pitchess*, the defendant, charged with battery of a police officer, requested the discovery of evidence substantiating the officer's prior use of excessive force in order to argue a self-defense claim.¹²³ The court

118. Ovetta Wiggins & Josh Hicks, *Proposed Police Reform in Maryland Draws Strong Praise, Sharp Criticism*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-consider-sweeping-changes-to-policing-policies/2016/02/22/1162160e-d9a2-11e5-925f-1d10062cc82d_story.html.

119. Hager, *supra* note 114.

120. *Id.*

121. CAL. GOV'T CODE § 6250 (West 2016).

122. *Pitchess v. Superior Court*, 11 Cal. 3d 531, 536 (1974) (en banc).

123. *Id.* at 534.

reasoned that the accused is “entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.”¹²⁴

In response to this decision favoring the discovery of officer disciplinary records, the Los Angeles City Attorneys’ office filed an internal report to the LAPD in 1975, which indicated a desire to “prevent or circumvent” defense attorneys from gaining access to police records following the *Pitchess* decision.¹²⁵ Following this report, city attorney and Los Angeles Police Department (LAPD) staff secretly agreed to shred records of citizen complaints against police officers.¹²⁶ In May of 1976, four tons of police misconduct files were shredded by the LAPD.¹²⁷ In response to the file-shredding scandal, judges dismissed more than 100 cases where defendants charged with assaulting officers or resisting arrest were unable to discover citizen complaints.¹²⁸ In another example of immediate judicial responses to the scandal, an appellate court reversed resisting arrest and battery convictions in a 1976 case because officer misconduct files had been shredded.¹²⁹

Lower courts quickly expanded the California Supreme Court decision to permit the discovery of misconduct other than an officer’s prior use of excessive force. In November of 1977, a judge ordered discovery of prior citizen complaints against arresting officers in a narcotics case called *People v. Navarro*.¹³⁰ The defendant argued that the arrest had been made without probable cause and sought discovery of supporting evidence such as prior complaints against the officers for “false arrest, illegal search and seizure, improper tactics, false imprisonment and dishonesty.”¹³¹ The order was affirmed on appeal. Police and prosecutors feared that this rule would impose an “intolerable burden” by extending discovery to any case, not just a case where alleged officer misconduct was being used as an affirmative self-defense like in *Pitchess*.¹³² The Los Angeles City Attorney’s Criminal Branch Chief warned that the decision could lead to the “proliferation of discovery abuse” such as using the obtained information to “manipulate dismissals.”¹³³ Further, he emphasized “the profound burden on the Police Department to respond to ‘boiler plate’ discovery motions.”¹³⁴

124. *Id.* at 535.

125. Gene Blake, *DA to Reopen Police File-Shredding Case: New Evidence Found Involving City Attorney Office*, L.A. TIMES, Mar. 4, 1978, at B1.

126. *Id.*

127. *Id.*

128. *Id.* at B10.

129. Gene Blake, *Suspect’s Access to Police Files Supported by Court: Suspect’s Access to Police File Backed*, L.A. TIMES, June 21, 1978, at OC 5.

130. *Id.* at OC 1.

131. *Id.* at OC 5.

132. *Id.* at OC 1.

133. *Id.*

134. *Id.*

In 1978, SB 1436—the “*Pitchess* Law”—was passed to limit the discovery of officer misconduct files.¹³⁵ The legislation was drafted by the California Attorney General and supported by Senator Dennis Carpenter of Orange County, a former agent for the Federal Bureau of Investigation.¹³⁶ The *Pitchess* Law made police officer personnel information confidential, including information relating to third-party complaints and resulting investigation reports.¹³⁷ As codified in Section 832.7 of the California Penal Code, the Law establishes the confidentiality of police personnel records, provides limited exceptions to confidentiality, including an exception for investigations conducted by a district attorney.¹³⁸

The *Pitchess* Law also established a formal procedure for discovering police officer personnel records via a “*Pitchess* motion.” Officer disciplinary records can no longer be requested through the CPRA or through other criminal discovery motions like *Brady* or *Giglio* motions. Instead, a *Pitchess* motion requires a showing of good cause “setting forth the materiality” of the information sought to “the subject matter involved in the pending litigation”¹³⁹ The *Pitchess* motion must be served on the law-enforcement agency sixteen court days before the motion hearing date.¹⁴⁰ The agency must also notify the targeted police officer and provide an opportunity to seek a protective order.¹⁴¹ If good cause is shown, the judge conducts an *in camera* review outside the presence of the litigating parties or the accused in a criminal case.¹⁴² However, the attorney for the law-enforcement agency normally assists the judge in the collection and production of the disciplinary files.¹⁴³ The judge then determines what files, if any, will be disclosed to the moving party.

The *Pitchess* Law provide strong protection for police personnel files. First, this Law shifts the burden to criminal defendants to show good cause sufficient to trigger *in camera* judicial review of the disciplinary files. Law enforcement officers and agencies are not required to assert any additional

135. See 1978 Cal. Stat. 2081 (enacting SB 1436, codified as amended at CAL. EVID. CODE §§ 1043-47, and CAL. PENAL CODE §§ 832.5, 823.7, 832.8).

136. Miguel A. Neri, *Pitchess v. Brady: The Need for Legislative Reform of California’s Confidentiality Protection for Peace-Officer Personnel Information*, 43 MCGEORGE L. REV. 301, 306 (2012).

137. See CAL. PENAL CODE § 823.7 (making personnel information confidential); § 832.8(e) (including complaints and investigation reports in the definition of personnel information).

138. *Id.* § 823.7(a).

139. CAL. EVID. CODE § 1043(b)(3) (West 2016).

140. *Id.* § 1043(a).

141. *Id.* See also *id.* § 1045(d) (giving officer standing to seek protective order).

142. *City of Santa Cruz v. Mun. Court* (Kennedy), 776 P.2d 222, 226-27 (Cal. 1989) (“Once good cause for discovery has been established, section 1045 provides that the court shall then examine the information ‘in chambers’ . . . out of the presence of all persons except the person authorized to claim the privilege and such other persons as he or she is willing to have present . . .”).

143. Neri, *supra* note 136, at 308 n.57.

privilege to prevent disclosure. Thus, the *Pitchess* Law encourages officers to “advocate for maximum confidentiality in every case without penalty.”¹⁴⁴ Further, state courts opinions have only strengthened *Pitchess* protections, including extending the *Pitchess* Law to apply to state prosecutors who are also requesting these files about their own law enforcement witnesses.¹⁴⁵

2. *Legislative History of the Pitchess Law*

The legislative history shows that the California statutory limitations on discovery of police personnel files were enacted in direct response to perceived problems flowing from the *Pitchess* decision for police unions.¹⁴⁶ The stated purpose of the legislation was to make police officer personnel records confidential. According to the Statement of Purpose in the Enrolled Bill Memorandum, “[e]xisting law does not contain provisions characterizing peace officer personnel records as privileged” and “[t]his bill would enact such provisions, delineating the circumstances under which such privilege can be asserted”¹⁴⁷ Similarly, the Officer of Employee Relations report to the Governor emphasized, “the bill provides that information in these personnel records is confidential.”¹⁴⁸

Another stated purpose of the bill was to limit the ability of judges to disclose personnel files in discovery. The California Highway Patrol Department wrote in support of the bill that “without this legislation, disclosure of peace officer personnel records will remain at the mercy of the courts and each individual judges’ interpretation.”¹⁴⁹ Further, the department argued:

Peace officers should be afforded the same rights to privacy as are private citizens. The recent proliferation of overzealous [criminal defense] attorneys attempting to dig into officers’ personnel records on the chance of finding some incident that can turn the heads of jury members, has established the need for this legislation.¹⁵⁰

Letters attached to the Enrolled Bill Report of SB 1436 also reflected police union support. The Attorney General wrote a letter stating that SB 1436 was drafted “in order to assist law enforcement officers throughout the State of California. It has the unanimous support of every major law enforcement

144. *Id.* at 309.

145. *Id.* at 304. *See, e.g.*, *Alford v. Super. Ct.*, 63 P.3d 228, 236 (Cal. 2003) (noting that, absent a *Pitchess* law exception, “peace officer personnel records retain their confidentiality vis-à-vis the prosecution”).

146. Neri, *supra* note 136, at 306-07.

147. Enrolled Bill Memorandum: Bill No. SB 1436 from the Legislative Secretary to Governor Hon. Edmund G. Brown, Jr. (Sept. 12, 1978) (on file with author).

148. Enrolled Bill Report from Rebecca K. Taylor, Dir., Office of Emp. Relations, to Office of Governor Hon. Edmund G. Brown, Jr. (Sept. 7, 1978) (on file with author).

149. Enrolled Bill Report from the Dep’t of Cal. Highway Patrol, to Governor Hon. Edmund G. Brown, Jr. (Sept. 6, 1978) (on file with author).

150. *Id.*

association in California, and represents a substantial step forward in protecting the rights of law enforcement officers in this state.”¹⁵¹

Many police unions wrote letters that also referenced frustrations with the California Supreme Court’s decision in *Pitchess*. One police chief wrote that:

The enactment of SB 1436 will solve many of the problems arising out of the California Supreme Court decision in *Pitchess v. Superior Court*, by prohibiting discovery of unfounded, anonymous, or outdated citizen complaints against peace officers. Such complaints could hardly be considered relevant to an issue at trial, yet the courts have been allowing discovery of such records. Even more distressing, the courts have been routinely dismissing cases involving offenses against a peace officer if the records sought are no longer in existence.¹⁵²

Furthermore, the police chief stated that SB 1436 would “prevent criminal defendants from conducting a fishing expedition in their attempt to ‘beat a rap.’”¹⁵³ It is ironic that the police chief would complain about the presumption against the missing records, given that in the most prominent cases preceding the legislation, dismissals were due to Los Angeles officials’ intentional destruction of records to avoid mandated disclosure.

Similarly, the Peace Officers Research Association of California sent a letter of support stating that “[t]his bill would bring about some form of rationality to the current problems caused by the ‘*Pitchess*’ decision, in which defendants in criminal cases embark on fishing expeditions into peace officers’ personnel files.”¹⁵⁴ The PORAC letter attached a letter from a police officer’s attorney, which criticized the appellate court’s decision in the *People v. Navarro* case, discussed above. The PORAC attorney warned that the decision “left the door open to discovery . . . where the defendant raises any claim of excessive force, be it an affirmative defense to the charge or not.”¹⁵⁵ The Enrolled Bill Report also included mailgrams of support sent directly to the governor by several police unions.¹⁵⁶

151. Letter from Evelle Younger, California Att’y Gen., to Governor Hon. Edmund Brown, Jr. (1978) (on file with author).

152. Letter from Chief of Police D.L. Collinske, Willits Police Dep’t, to Governor Hon. Edmund Brown, Jr. (July 24, 1978) (on file with author).

153. *Id.*

154. Letter from Jack R. Pearson, State President, Peace Officers Research Ass’n of Cal., to Governor Hon. Edmund Brown, Jr. (Sept. 6, 1978) (on file with author).

155. *See supra* Part IV.A.1; Letter from Linda B. Greenberg, Att’y, Dryden, Harrington & Swartz, to the Peace Officers Research Ass’n of Cal. (Aug. 31, 1978) (on file with author).

156. Mailgram from John L. Benbow, President, Sacramento Cty. Deputy Sheriffs Ass’n, to Governor Hon. Edmund Brown, Jr. (Sept. 6, 1978) (on file with author); Mailgram from Norman L. King, President, San Bernardino Cty. Sheriff Emps. Benefits Ass’n, to Governor Hon. Edmund G. Brown, Jr. (Sept. 5, 1978) (on file with author).

Both houses passed SB 1436 unanimously on the last day of the 1978 legislative session.¹⁵⁷ Although analysts supporting the bill stated, “we are unaware of arguments against the bill,”¹⁵⁸ at that time, the ACLU, the California Attorneys for Criminal Justice, and the State Public Defender all opposed the bill.¹⁵⁹

Newspapers articles from 1978 support the claim that police unions played a powerful role in the bill’s passage. Newspapers reported that the *Pitchess* Law was “an attempt by the law enforcement establishment to block openings to police files created by the *Pitchess* Decision.”¹⁶⁰ Articles also referred to the LAPD file-shredding scandal as an important motivation because the statute explicitly allowed records to be destroyed after five years.¹⁶¹

B. *New York Case Study*

1. *Development of Section 50-a*

The rise of confidentiality statutes in New York is remarkably similar to their rise in California. New York also passed a state analog to FOIA called the Freedom of Information Law (FOIL) in 1973. That same year, a judge’s decision in *Sumpter*, the first New York case to allow the discovery of officer personnel files, sparked a flurry of judicial opinions on the issue. One judge reflected on the “number of recent New York cases, all at nisi prius level, [that] have dealt with the question of whether production of police department personnel records may be compelled by subpoena or a motion for discovery.”¹⁶²

The court in *Sumpter* held that a police department was required to turn over disciplinary files in a narcotics case.¹⁶³ The defendant had served a subpoena on the NYPD requiring the production of “personal records” of two officers.¹⁶⁴ The court reasoned that the prosecution’s evidence would largely consist of these two officers’ testimony and thus, the prosecutor must make available to the court “any information in its possession or in the Police Department’s possession which might go to the issue of the defendant’s guilt, including evidence affecting the credibility of such officer.”¹⁶⁵

157. Doug Shuit, *City Attorney’s Ruling on Police Files Upsets Bradley*, L.A. TIMES, Mar. 1, 1979, at A1.

158. Enrolled Bill Report from Cal. Highway Patrol, to Governor Hon. Edmund G. Brown, Jr., *supra* note 149.

159. Enrolled Bill Memorandum: Bill No. SB 1436 from the Legislative Sec’y to Governor Hon. Edmund G. Brown, Jr., *supra* note 147.

160. Shuit, *supra* note 157, at A4.

161. *Id.*

162. *People v. Torres*, 352 N.Y.S.2d 101, 106 (Crim. Ct. 1973).

163. *People v. Sumpter*, 347 N.Y.S.2d 670, 678 (Sup. Ct. 1973).

164. *Id.* at 673.

165. *Id.* at 678.

The *Sumpter* case spurred some related decisions¹⁶⁶ but also a lot of backlash. One judge, referencing *Sumpter* and the justice who authored the decision by name, stated that the decision had “spawned a number of similar applications . . . [but] [i]n every case the courts have refused to follow Justice Fein’s decision.”¹⁶⁷ Not surprisingly, that judge similarly disagreed with the *Sumpter* holding and refused to grant the defendant’s discovery motion.¹⁶⁸

The court in *People v. Coleman* also distinguished *Sumpter*. The court held that because the case was not a narcotics case, it would not “permit a defendant an unlimited inquiry into the personnel files of prospective witnesses by means of a subpoena duces tecum.”¹⁶⁹ Further, the court cautioned that:

Police Officers are likely to suffer many complaints about their professional conduct since those whom they arrest or reprimand are not often pleased and seldom, if ever, can be fair critics. A cross-examination which recites a litany of complaints from such sources could easily mislead rather than enlighten.¹⁷⁰

The judge-made discovery procedure devised in *Sumpter* did not last long. In 1976, the New York legislature passed New York Civil Rights Law Section 50-a, which made all “personnel files . . . confidential and not subject to inspection or review without the express written consent of such police officer, firefighter, firefighter/paramedic, correction officer or peace officer . . . except as may be mandated by lawful court order.”¹⁷¹ Section 50-a put several procedures in place before disclosure could be mandated.¹⁷² Before issuing a court order, a judge must conduct an *in camera* review.¹⁷³ The party seeking the disclosure of personnel records has the burden of showing that the information sought is relevant and material.¹⁷⁴ This requires demonstrating, in good faith, that some “factual predicate” which would make it reasonably likely that intrusion into the requested records would provide some relevant or exculpatory material and “that the quest for its contents is not merely a desperate grasping at a straw.”¹⁷⁵ Once the moving party meets her burden, the judge will then conduct an *in camera* review of the sealed records to determine

166. Under FOIL, the New York Supreme Court, Broome County, granted the discovery of a police officer’s written reprimands. *Farrell v. Vill. Bd. of Trustees, of Vill. of Johnson City*, 372 N.Y.S.2d 905, 909 (Sup. Ct. 1975). The defendant had filed a complaint to the Chief of Police about the alleged wrongdoing of several on-duty police officers. *Id.* at 906. The defendant then requested a copy of the Police Chief’s disciplinary report, but was denied access by the City Attorney. *Id.* at 907. The court emphasized that this disclosure would not harm “the public interest.” *Id.* at 909.

167. *Torres*, 352 N.Y.S.2d at 106.

168. *Id.* at 109.

169. *People v. Coleman*, 349 N.Y.S.2d 298, 304 (Co. Ct. 1973).

170. *Id.* at 305.

171. N.Y. CIV. RIGHTS LAW § 50-a(1) (1976) (current version at N.Y. CIV. RIGHTS LAW § 50-a(1) (2016)).

172. *Id.* §§ 50-a(2)-(3).

173. *Id.*

174. *Taran v. State*, 528 N.Y.S.2d 131, 134 (App. Div. 1988).

175. *People v. Gissendanner*, 399 N.E.2d 924, 924 (N.Y. 1979).

“whether the records are relevant and material.”¹⁷⁶ The judge then makes that portion of the record available to the mover.

The process put in place by Civil Rights Law § 50-a is very similar to California’s *Pitchess* procedure. Both procedures provide strong protection of police personnel files by shifting the burden to criminal defendants, plaintiffs in a constitutional tort case, journalists seeking access for a story, or other moving parties to trigger *in camera* review.

2. Legislative History of Section 50-a

The legislative history also supports a claim that the police union lobby supported the bill to reinforce police officer privacy protections that had been eroded by recent court decisions.

The stated purpose of the bill was to protect the privacy rights of police officers. The Senate Assembly Journal stated the purpose of the act was to amend the civil rights law “in relation to the confidentiality of certain personnel records relating to performance of police officers.”¹⁷⁷ A summary of the Assembly version, A-9640-A, stated that the rationale was “to restrict the availability of personnel records of police officers.”¹⁷⁸ Additionally, the Journal highlights that “the personnel records of any employee in any business are confidential to his employer” and that discovery requests harass police officers because their personnel files are “scrutinized, reviewed, and commented upon, sometimes publicly.”¹⁷⁹

Several legislative committees provided their own evaluations of the bill and recommended approval. In a memorandum from the Division of Criminal Justice Services, Roger Hayes criticized the discovery procedures put in place by *Sumpter* as being implemented in “pro forma fashion.”¹⁸⁰ In another attack on judicial decision-making in this context, he added, “if all judges carefully considered defense counsels’ requests before issuing subpoenas for these records, this legislation would not be necessary. But it is asserted, far too many judges routinely and without due consideration issue the subpoenas.”¹⁸¹

The police union lobby also strongly supported the bill. The president of the PBA wrote a letter directly to the governor that was included in the New York State archives. He criticized the *Sumpter* discovery procedure because:

Police officers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack officers’ credi-

176. N.Y. CIV. RIGHTS LAW § 50-a(3).

177. 1976 N.Y. Laws ch. 413.

178. A. 9640-A, 181st Sess., at 1 (N.Y. 1976).

179. *Id.*

180. Memorandum from Roger Hayes, General Counsel, N.Y. Division of Criminal Justice Servs., to Judah Gribetz, Counsel to the Governor (June 16, 1976) (on file with author).

181. *Id.*

bility, a tactic that has lead [sic] to abuse in some cases to the disclosure of unverified and unsubstantiated information that the records contain.¹⁸²

He urged that passing this legislation could stop these abuses.

Similarly, the Superintendent of the New York State Police offered his full support “that the personnel records of police officers should be restricted for use only by the employing police agency in order to protect the integrity of such police officers in carrying out his law enforcement obligations.”¹⁸³ Like others in favor of the bill, he criticized courts for not requiring appropriate protections.

The legislative history also offers several arguments made against the bill. The state’s Budget Division recommended disapproval and laid out several objections. First, the bill imposed unnecessary extra procedures because courts already weighed the disclosure of the personnel files against the public interest.¹⁸⁴ Second, the bill would create a “separate judicial process” that would not apply to any other citizen.¹⁸⁵ And similarly, the confidentiality protection would not apply to other civil servants.¹⁸⁶

The Special Deputy Attorney General also discussed the harmful impact the law would have on police accountability, calling the bill “a significant step in the opposite direction [towards secrecy].”¹⁸⁷ Additionally, he also emphasized that allowing the public disclosure of personnel files would not deter police officers and would in fact benefit the workforce:

All the participants in the criminal justice system should constantly be reminded that their employment in this system is a privilege and that the greatest part of this privilege is being charged with the public trust of maintaining the public’s right to justice. Therefore, the public and the members of the criminal justice system should both be aware that personnel records, which are the history, and are frequently the basis for promotional decisions and the expansion of responsibilities, are open to public scrutiny.¹⁸⁸

Lastly, the New York Civil Liberties Union criticized the bill as a “wholly unjustified attempt to protect those policemen at the expense both of the

182. Letter from John Maye, President, Patrolmen’s Benevolent Ass’n, to Governor Hon. Hugh L. Carey (June 18, 1976) (on file with author).

183. Letter from William G. Connelie, Superintendent, N.Y. State Police, to Governor Hon. Hugh L. Carey (June 8, 1976) (on file with author).

184. Budget Report on Bills from Vincent E. LaFleche, Assistant Chief Budget Exam’r, to Governor Hon. Hugh L. Carey (June 8, 1976) (on file with author).

185. *Id.*

186. *Id.*

187. Letter from Joseph P. Hoey, Special Deputy Att’y Gen., Dep’t of Law, to Judah Gribetz, Counsel to the Governor (June 22, 1976) (on file with author).

188. *Id.*

persons against who they are testifying and of the truth.”¹⁸⁹ Despite these expressed concerns, the bill had 48 votes for and 4 votes against.¹⁹⁰

C. Recent Efforts of California Police Unions to Limit the Public Disclosure of Disciplinary Records

1. *Copley Press Decision*

In 2006, the California Supreme Court’s decision in *Copley Press* extended *Pitchess* Laws to prevent the disclosure of records of administrative appeals of sustained misconduct charges to agencies, such as civil service commissions, outside a police officer’s employing agency.¹⁹¹ In *Copley Press*, the San Diego Union-Tribune requested access to documents created by the San Diego Civil Service Commission related to a police officer’s appeal from a department’s termination notice.¹⁹² The Commission denied the request. Copley Press, the newspaper publisher, filed a petition in Superior Court against the Commission seeking declaratory and injunctive relief to access the records.¹⁹³ The trial court denied access.

After reviewing the statutory and legislative history, the California Supreme Court determined that the Legislature did not intend that “one officer’s privacy rights would be less protected” because disciplinary appeals are heard in that jurisdiction by an outside agency like the Civil Service Commission rather than the employing police department.¹⁹⁴ Accordingly, the Court held that the Commissions’ records related to disciplinary action are protected under the *Pitchess* Law.¹⁹⁵ The *Copley Press* decision effectively foreclosed the public disclosure of any records related to excessive force and dishonesty, officer-involved shootings, and other patterns of misconduct.¹⁹⁶

Police unions were heavily involved in the litigation of this case. The trial court allowed two local unions, the San Diego Police Officers Association and the San Diego County Sheriffs Association, to intervene.¹⁹⁷ Additionally, the PORAC Legal Defense Fund wrote an *amicus brief* to the California Supreme Court in the case supporting the decision of the trial court and the two police

189. Memorandum from NYCLU to N.Y. State Senate (May 24, 1976) (on file with author).

190. S. 7635-B, 181st Sess. (N.Y. 1976).

191. *Id.*; *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1284-86 (2006).

192. *Copley Press*, 39 Cal. 4th at 1279.

193. *Id.*

194. *Id.* at 1295.

195. *Id.* at 1286.

196. *Frequently Asked Questions about Copley Press and SB 1019*, ACLU OF NORTHERN CAL. (June 15, 2007), <https://www.aclunc.org/blog/frequently-asked-questions-about-copley-press-and-sb-1019>.

197. *Copley Press*, 39 Cal. 4th at 1279.

union parties in interest.¹⁹⁸ The brief highlights the public safety argument that the public disclosure of these disciplinary files could lead to “increased officer-directed violence.”¹⁹⁹ Further the brief provides specific examples of where citizens sought “vigilante retribution” against police officers post-disclosure.²⁰⁰

2. SB 1019

In 2007, activists rallied to abrogate the *Copley Press* decision with SB 1019—sunshine legislation that would allow local governments to publicly disclose police disciplinary records. The bill would have allowed local governments to “operate public hearings, release information regarding citizen complaints, disciplinary actions, and other personnel decisions” and to limit confidentiality exceptions so that they would not apply to investigations and proceedings concerning the conduct of peace officers conducted by civilian review boards, personnel boards, police commissions, or civil service commissions.²⁰¹

In 2007 and 2008, Sunshine Bill SB 1019 died in committee. Police unions both local and statewide mainly headed up the Opposition to SB 1019.²⁰² Several police lobbies wrote letters of opposition.²⁰³ The Riverside Sheriffs

198. Brief for Peace Officers Ass’n of Cal. Legal Def. Fund as Amici Curiae Supporting Respondents at 1, *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1284-86 (2006), 2005 WL 1304034.

199. *Id.* at 30.

200. *Id.* at 29-30.

201. See ASSEMB. COMM. S.B. 1019 BILL ANALYSIS, *supra* note 34, at A.

202. See *id.* at X-Y. Anaheim Police Officers Political Action Committee; Association for Los Angeles Deputy Sheriffs; Association of Orange County Deputy Sheriffs; California Association of Highway Patrolmen; California Coalition of Law Enforcement Associations; California Correctional Peace Officers Association; California District Attorneys Association; California Fraternal Order of Police; California Narcotics Officers’ Association; California Peace Officers’ Association; California Police Chiefs Association; California School Employees Association; California State Employees Association; California State Firefighters’ Association; California State Sheriffs’ Association; California Statewide Law Enforcement Association; Coalition of County Unions; Glendale City Employees Association; Labor Coalition; Long Beach Police Officers Association; Los Angeles County Federation of Labor; Los Angeles County; Professional Peace Officers Association; Los Angeles Police Protective League; Los Angeles Probation Officers’ Union; Orange County Chiefs’ & Sheriff’s Association; Orange County Employees Association; Organization of SMUD Employees; Peace Officers Research Association; Professional Peace Officers Association; Riverside Sheriffs’ Association; Sacramento County Deputy Sheriffs Association; San Bernardino County Safety Employees’ Benefit Association; San Bernardino Public Employees Association; San Diego County Court Employees Association; San Francisco Police Officers Association; San Luis Obispo County Employees Association; Santa Ana Police Officers Association; Santa Rosa City Employees Association; Southern California Alliance of Law Enforcement; Ventura County Deputy Sheriffs’ Association.

203. Although many police officers opposed the bill, San Francisco Sheriff Michael Hennessey and Chief Ronald Davis of the East Palo Alto Police Department both wrote letters in support. See *id.* at S.

Association argued that the bill would “subject officers to increased risk of retribution on the streets, lost credibility, diminished effectiveness on the beat, diminished credibility on the witness stand, increased civil liability, and general embarrassment.”²⁰⁴ Several other unions like the California Correctional Peace Officers Association and the California Statewide Law Enforcement Association (CSLEA) expressed concerns that the bill would jeopardize the safety of police officers.²⁰⁵

The California Association of Highway Patrolmen and the Peace Officers Research Association of California wrote jointly that:

SB 1019 erodes what has taken decades to build, which is confidentiality of peace officer records. The *Copley* decision firmly upheld the provisions of Penal Code Section 832.7 to confirm that disciplinary hearings shall be closed to the public. It does no good to open up a peace officer to this public scrutiny or debasement, especially when the peace officer will return to work. This only serves to diminish public confidence in that peace officer’s ability to work in their community.²⁰⁶

In 2007, the bill passed the Senate but eventually stalled in an Assembly committee. The police unions’ strong opposition won out over arguments that SB 1019 would encourage accountability and transparency and would begin to repair broken relationships between police officers and communities. The *LA Times* reported that members of the Assembly’s public safety committee refused to discuss or vote on the sunshine bill after influential police unions spoke out against the bill.²⁰⁷ The unions also threatened to oppose “relaxing the state’s term limits law if lawmakers approved the police sunshine bill.”²⁰⁸

3. SB 1286

Recent sunshine legislation also died in committee in May 2016. The ACLU of California and the California Newspaper Publishers Association sponsored the bill, and many social justice organizations, including Black Lives Matter, supported it.²⁰⁹ SB 1286 would have provided greater public access to peace officer and custodial officer personnel records and other records maintained by state or local agencies and related to complaints against these officers.²¹⁰ The bill also explicitly provided that disciplinary records relating to the use of deadly force, excessive use of force, sexual assault, unjustified stops and arrests, racial profiling, discriminatory treatment, or other civil rights

204. S. COMM. S.B. 1019 BILL ANALYSIS, *supra* note 36, at R-S.

205. ASSEMB. COMM. S.B. 1019 BILL ANALYSIS, *supra* note 34, at U.

206. *Id.* at U-V.

207. Editorial, *Police Unions Get Their Way: Assembly Public Safety Committee Kills Police Sunshine Bill*, FRESNO BEE, July 6, 2007, at B8.

208. *Id.*

209. S.B. 1286 BILL ANALYSIS, *supra* note 30, at A.

210. S. COMM. ON APPROPRIATIONS, BILL ANALYSIS, S.B. 1286 (LENO), 2015-2016 Sess., at 4 (Cal. May 9, 2016).

violations would be available for public inspection pursuant to the California Public Records Act.²¹¹ Additionally, SB 1286 would have expanded confidentiality exceptions to allow the public disclosure of records created by the following agencies, thus abrogating *Copley Press*: civilian review agencies, inspectors general, personnel boards police commissions, civil services commissions, city councils, etc.²¹²

In support of the bill, the ACLU of California highlighted recent current events that demonstrate the tendency of police secrecy to erode public trust:

Californians do not know why officers were allowed to shoot Fridoon Nehad in San Diego, Charlie “Africa” Keunang on Skid Row in Los Angeles, or Mario Woods in San Francisco. We do not understand why officers were permitted to beat Marlene Pinnock, or threaten people over social media. SB 1286 would break this wall of silence, and allow the tax-paying public to get meaningful answers.²¹³

Just as they opposed the 2007 and 2008 sunshine bill, the police union lobby opposed SB 1286.²¹⁴ District attorneys were also in opposition. The Ventura County District Attorney had particularly harsh criticisms: “SB 1286 would give peace officers lesser privacy rights in investigation files than those afforded murderers, pedophiles, and other criminals.”²¹⁵ The District Attorney also argued that the bill would reduce privacy protections for police officers below that of other professions like teachers and fire fighters and would actually discourage people from making complaints.²¹⁶

In May 2016, the *LA Times* reported that the bill was held indefinitely in the Senate Appropriations Committee after substantial opposition from law

211. *Id.* at 4.

212. *Id.* at 5-6.

213. S.B. 1286 BILL ANALYSIS, *supra* note 30, at V-W.

214. *Id.* at B-C. Association for Los Angeles Deputy Sheriffs; Association of Orange County Deputy Sheriffs; California College and University Police Chiefs Association; California Correctional Peace Officers Association; California District Attorneys Association; California Peace Officers Association; California Correctional Supervisors’ Organization; California Narcotic Officers Association; California Police Chiefs Association; California School Employees Association; California State Sheriffs’ Association; California Statewide Law Enforcement Association. *See also* S. COMM. ON APPROPRIATIONS, BILL ANALYSIS, S.B. 1286 (LENO), 2015-2016 Sess., at 2. Fontana Police Officers Association; Fraternal Order of Police; Labor Coalition; Long Beach Peace Officers Association; Los Angeles County Federation of Labor, AFL-CIO; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Office of the District Attorney, County of Ventura; Office of the San Diego County District Attorney; Orange County Employees Association; Peace Officers Research Association of California; California Association of Highway Patrolmen; Riverside Sheriffs Association; San Diego Police Officers Association; Sacramento County Deputy Sheriffs Association; Southern California Alliance of Law Enforcement.

215. *Id.* at 15.

216. *Id.* at 15-16.

enforcement groups.²¹⁷ State Senator John Moorlach, the Republican co-author on the bill, stated in an update to his constituents that “[t]he big take away . . . is, once again, the power of public safety employee unions.”²¹⁸

IV. THE ABILITY OF POLICE UNIONS TO DISTORT DEMOCRATIC PROCESSES AND OUTCOMES

As these case studies demonstrate, police unions have achieved considerable political success. These case studies also illuminate the unique ability of police unions to persuade and control public officials. A 1979 *Washington Post* article criticized the growing political clout of police unions.²¹⁹ In this article, James Chanin, the former Chairperson of the Berkeley Police Review Commission, argued that police unions derive their power from “the public’s fear of crime and the fears of politicians that they will appear ‘soft on crime.’”²²⁰ He added that “[t]he military’s power over Congress is nothing compared to the power of the police over city government.”²²¹ This disproportionate political power of police unions over the political process in the criminal justice context has generated political outcomes that undermine the democratic values of transparency and accountability.

A. *Distorting the Democratic Process*

Some scholars have criticized public employee collective bargaining as distorting democratic processes.²²² The argument proceeds as follows: collective bargaining may distort the “democratic processes because it gives one interest group, public employees and their unions, an avenue of access that is unavailable to other interest groups and may, as a practical matter, preempt the voices of competing interest groups.”²²³ Scholars emphasize that collective bargaining distorts the democratic process by guaranteeing union representatives unparalleled face-to-face access with policymakers in which a “responsible public official must bargain in good faith until either an agreement

217. Liam Dillon, *California Police Misconduct Records Will Remain Secret After Bill Dies in Committee*, L.A. TIMES (May 31, 2016, 2:48 PM PST), <http://www.latimes.com/politics/la-pol-sac-essential-politics-california-police-misconduct-r-1464384312-htlstory.html>.

218. Matt Coker, *State Sen. John Moorlach Laments Union Power in Killing of Police Misconduct Bill*, OC WEEKLY (June 3, 2016, 7:06 AM), <http://www.ocweekly.com/news/state-sen-john-moorlach-laments-union-power-in-killing-of-police-misconduct-bill-7234582>.

219. *Id.*

220. *Id.*

221. *Id.*

222. See, e.g., Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy: A Perspective from the United States*, 34 COMP. LAB. L. & POL’Y J. 277, 278 (2013).

223. *Id.* at 279.

or impasse is reached.”²²⁴ Some scholars have argued that unions should have to “compete against all other interest groups in the broader political process in attempting to persuade public decision makers to resolve workplace issues in workers’ favor” in order to guard against potential political capture.²²⁵

This Note does not address whether scholars have properly criticized collective bargaining and political capture. Instead this Note applies the democracy-distorting criticism to the lobbying activities of police unions and the political capture of policymakers in the criminal justice context. Just as public employee unions distort democratic processes with unparalleled access to public officials in collective bargaining, police unions distort democratic processes by wielding a disproportionate amount of political power over policymakers relative to organizations that oppose the police union agenda.

These two case studies shed light on the unique ability of police unions to persuade and control public officials when lobbying. First, police unions play the public safety card by framing any opposition to their political agenda as endangering public safety. Second, police unions create false parallels between police officers’ privacy interests and the public interest. Third, police unions operate political machinery that exerts significant political and financial pressure on all three branches of government. By using these strategies, police unions have developed substantial political clout.

1. *Playing the Public Safety Card*

Police unions gain a distinct advantage over policymakers by playing the public safety card. As these case studies illuminate, police unions often argue that public disclosure of personnel files via sunshine laws will harm police officer safety. For instance, in support of the original *Pitchess* Law, the California Attorney General warned that “[p]eace officers will become targets for criminals and any recourse by the officer will be removed from the courts to the streets.”²²⁶ Similarly in New York, the Senate Assembly Journal discussed concerns about the harassment of police officers. These arguments have been reprised in recent years by PORAC in its *Copley Press* amicus motion and in opposition to sunshine legislation in 2007 and 2008.

224. *Id.* (quoting Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1164 (1974)).

225. *Id.* Additionally, further criticisms have alleged that, even in the broader political process, collective bargaining inappropriately advantages public employees unions. This argument criticizes states laws mandating “fair share” fees from nonunion workers as an “inappropriate advantage.” *Id.* The Supreme Court upheld fair share fees in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and the Court’s recent decision in *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016), left this precedent intact.

226. Brief for Peace Officers Ass’n of Cal. Legal Def. Fund as Amici Curiae Supporting Respondents at 31, *Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272, 1284-86 (2006), 2005 WL 1304034 (quoting Mar. 8, 1978 Letter from Cal. Dep’t of Justice).

Because the police are protectors of public safety, a threat to the safety of officers consequently threatens public safety. Police officers may be less effective at fighting crime or may simply leave their posts under these increased safety risks. Moreover, setting aside whether these safety risks are plausible, policymakers and the public will often defer to a police officer's assessment of public safety risks because the police play such an integral role in ensuring our safety.

By simply framing any opposition to their political agenda as endangering safety, police unions force policymakers to choose between supporting the union's political agenda and endangering public safety. For instance, in the case of sunshine legislation, by voting for sunshine legislation, legislators are encouraging public accountability and transparency in police departments. But this vote also appears "anti-police" and "soft on crime." From the policymaker's perspective, sacrificing police safety in return for these more abstract benefits is likely to be a political risk. To many voters, the threat of physical violence to police officers is a more tangible threat than the gradual reduction of accountability and transparency. Policymakers, concerned about reelection or ratings, are often more willing to side with the police unions and their moral authority on public safety.

2. *Aligning Police Officers' Privacy Interests with the Public Interest*

Police unions attempt to align police officers' privacy interests with the public interest in two ways. First, police unions strategically frame the disclosure of personnel files as a disclosure to criminal defendants, as opposed to a disclosure to the general public. As the case studies illustrate, the police unions focused their criticism of sunshine legislation not on the disclosure of their misconduct to the public but to criminal defense attorneys attempting to exonerate their client on technicalities. In this way, the unions reframed the argument in terms of crime committers violating the privacy rights of crime fighters.

This rhetorical strategy allows police unions to change the terms of the debate from one of secrecy and transparency, to one of "bad" criminals seeking to escape culpability by shifting blame to "good" police officers. The former raises public concern about the self-interested motivation of the police union—something police unions wish to avoid. The latter frames the debate around the fairness concerns and public safety risks caused by sunshine laws.

Second, police unions attempt to analogize police officer privacy rights with other privacy rights. For instance, the Ventura County District Attorney dramatically compares the police officer privacy rights under sunshine legislation as less than the privacy rights of "murderers, pedophiles, and other criminals."²²⁷ A policymaker would not want to sign off on legislation that diminishes the privacy rights of "good" guys (police officers) down to the same

227. S.B. 1286 BILL ANALYSIS, *supra* note 30, at 15.

level of “bad” guys (criminal defendants). This rhetoric diverts attention from concerns about secrecy in police departments to fairness concerns.

Police unions also draw false parallels between the privacy rights of police officers and private citizens. For example, in support of the original *Pitchess* Law, the California Highway Patrol argued that police officers should be afforded the same rights to privacy as private citizens. This rhetorical strategy intentionally implicates fairness concerns. But, as discussed above, there is a logical explanation for the difference the privacy rights of public officials and private citizens. It is a matter of public concern whether police officers, as public officials, are fit for duty, particularly when police officers have the unique state-sanctioned ability to use force on other citizens.²²⁸

Both of these comparisons seek to align the privacy interests of police officers more closely with the public interest. This strategy is successful because it obscures any self-interest underlying the police union’s agenda in establishing a police officer privacy right. It also forces policymakers to choose between supporting the union’s agenda, which is counter to democratic values, and “harming” the public interest by treating officers unfairly. Policymakers may feel it is more expedient to side with the police unions and their appeals to the public interest.

3. *Political Machinery*

Police unions also have highly developed political machinery that exerts significant political force on all three branches of government. As illustrated by the two case studies, police unions have fiercely contested efforts to loosen police record confidentiality. Police unions, large and small, send out letters in support of their position en masse to state legislators and governors. Further as the *Copley Press* case demonstrates, the activism of police unions is not limited to the legislative and executive branches. Police unions are actively involved in disciplinary records litigation in courts as high as the California Supreme Court.

This machinery wields even greater power because police unions exert financial pressures on legislators. Police unions invest heavily in legislative election campaigns. In 2015, the Peace Officers Research Association of California (PORAC) was the fifth highest individual donor with \$26,500.²²⁹ Over the past nineteen years, the PORAC has donated over \$10,839,359 to political campaigns.²³⁰ Interestingly enough, the PORAC has spent almost two times as much on Democratic campaigns as on Republican campaigns.²³¹ The

228. Keenan & Walker, *supra* note 13, at 192.

229. *California Election Overview*, FOLLOW THE MONEY (June 26, 2016), <http://www.followthemoney.org/election-overview?s=CA&y=2015>.

230. *Peace Officers Research Association of California*, FOLLOW THE MONEY (June 26, 2016), <http://www.followthemoney.org/entity-details?eid=4238&default=contributor>.

231. *Id.*

exertion of financial, as well as political pressures, ensures that “there are only votes to be gained by deferring to the police and only votes to be lost by suggesting that police could be more accountable.”²³²

B. *Undermining Democratic Values*

Police unions have brought about anti-democratic outcomes by implementing the above strategies to impede reform efforts for greater transparency and accountability in police departments. While activists and scholars dominated the criminal justice arena with more progressive reforms in the civil rights era, since the 1970s, the political agenda of rank-and-file officers has preempted the interests of other groups. Legislators’ embrace of the police union agenda is due in part to the effectiveness of police unions at playing the “law and order card.”²³³ Because candidates are incentivized to appear conservative on criminal justice issues, criminal justice policy has shifted to the right since the 1970s.²³⁴

Moreover, both the financial support and political pressure of police unions create very real incentives for even left-leaning politicians to ignore efforts to increase transparency and accountability in police departments. In a recent interview, Jim Chanin, former Chairperson of the Berkeley Police Review Commission and current civil rights attorney, emphasized the “incredible power that police unions have on the Democratic Party” and that “most Liberal democrats do their bidding.”²³⁵ Thus, not only have police unions distorted democratic processes, but their political agenda—rarely opposed by right or left—has also undermined democratic values.

Although police unions may frame their policy agenda as benefiting the public interest, the mission of police unions is not to further democratic values but instead, to advocate for the interests of their members. At times, the interest of the rank-and-file in retaining employment and the public interest in transparency and accountability do not align. The inherent conflict of interest between police unions and the general public is problematic when there is no consistent vetting by policymakers of the public safety and public interest arguments made by police unions. Even assuming police unions genuinely believe that their policy proposals benefit the public safety, police unions do not communicate that their agenda also supports the private interests of rank-and-file officers discussed above,²³⁶ or that their agenda may be at times counter to the public interest. These cases studies reveal that there is no

232. Radley Balko, *The Increasing Isolation of America’s Police*, WASH. POST (May 11, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/05/11/the-increasing-isolation-of-americas-police/>.

233. Walker, *supra* note 12, at 99-100.

234. *Id.* at 100.

235. Telephone Interview with Jim Chanin, Civil Rights Att’y and Former Chairperson of the Berkeley Police Review Comm’n (June 23, 2016).

236. *See* discussion *supra* Part II.B.

comparable oppositional force to counter the police union lobby. In order to offset police union pressure on state officials, it will take continued, active, and organized resistance to encourage greater accountability and transparency in police departments.

V. RECOMMENDATIONS FOR REFORM

Although the culture within police departments is changing, it is clear from recent opposition to sunshine legislation that police unions are still using the same tactics and arguments to prevent reform as they did in the 1970s. Moreover, public officials remain highly incentivized to do the bidding of police unions because the political spending of public employee unions has only been encouraged by recent Supreme Court decisions in *Citizens United*²³⁷ and *Fredrichs*.²³⁸ How then do we encourage progressive reform, specifically in the context of officer misconduct and secrecy?

A. *Ballot Initiatives*

In the legislative branch, criminal justice reform may be best advanced through direct democracy, and specifically ballot initiatives, as opposed to traditional legislation. Though it will certainly be difficult to turn out the public in force to overcome the police union agenda, it is perhaps more likely that they will be able to resist the police unions' political pressure than state legislators. While the public may similarly be persuaded by public safety arguments, the public, unlike state officials, at least do not have a tradition of being financially beholden to police unions. Thus, the public may still have more of an incentive to oppose police unions if persuaded that a reform would benefit transparency and accountability.

Another difficulty with obtaining public support is that when crime levels rise, voters typically vote passionately to fight crime. The inverse, however, is not usually true. When crime levels have declined, voters have not voted for criminal justice reform. However, tides are changing, as evidenced by the recent passage of California's Proposition 36 in 2012 and 47 in 2014, both of which reflect efforts to reduce mass incarceration.²³⁹ This may illustrate a trend

237. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that the government may not limit the spending of corporations or unions in elections to support or denounce individual candidates).

238. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083, 1083 (2016) (affirming the lower court ruling that public-sector unions can collect fees from workers who chose not to join and did not want to pay for the unions' collective bargaining activities). See *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS CWX, 2013 WL 9825479, at *3 (C.D. Cal. Dec. 5, 2013), *aff'd*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

239. Jessica Eaglin, *California Quietly Continues to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUST. (Feb. 17, 2015), <https://www.brennancenter.org/blog/california-quietly-continues-reduce-mass-incarceration>.

that criminal justice reform is best achieved through ballot initiatives as opposed to state legislation. But in order for sunshine legislation to succeed in a public referendum, more people than just those who have experienced police brutality and misconduct firsthand—overwhelmingly minority populations—would need to vote in support. As one editorial recently stated: “To put it more bluntly: For police reform to happen, [w]hite people have to start caring.”²⁴⁰

B. *Post-Conviction Litigation*

Progressive reform could also be achieved by challenging misconduct confidentiality laws through impact litigation. The courts would provide a more successful avenue for reforms lacking in majority support.²⁴¹ Several scholars have recommended challenging confidentiality laws under *Brady*.²⁴² *Brady* requires the prosecution to turn over to the defense any exculpatory or impeachment material including material about key witnesses in the case, like the arresting officers.²⁴³

A recent news story exemplifies the kind of case that could lead to a legal challenge under *Brady*. In early June 2016, a California city identified three cases where instances of officer misconduct were not disclosed to the court during the *Pitchess in camera* review.²⁴⁴ Although defense attorneys claimed that the police department intentionally withheld police officer personnel files from judges in violation of *Brady*,²⁴⁵ they also could have made a facial challenge to the unconstitutionality of the *Pitchess* Law. The *Pitchess* Law prevents the ability of criminal defendants to access exculpatory material required by *Brady*. But even if this argument was successful, it would only invalidate *Pitchess* Law as to criminal defendants—not to civil plaintiffs such as citizens bringing excessive force claims or newspapers seeking access for a story.

Alternatively, attorneys could challenge individual convictions through habeas corpus proceedings if police misconduct later comes to light. These challenges occur years after a conviction. Men and women have been sent to

240. Radley Balko, *The Increasing Isolation of America's Police*, WASH. POST (May 11, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/05/11/the-increasing-isolation-of-americas-police/>.

241. John Ely's political process theory asserted that courts can legitimately reject the decisions of a majority when the democratic process that produced the decision was unfair to a disadvantaged social group. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1363-64 (2011).

242. For more detailed information about how *Brady* applies in this context see, Neri, *supra* note 136, at 310; Abel, *Brady's Blind Spot*, *supra* note 14, at 795.

243. *Brady v. Maryland*, 373 U.S. 83 (1963).

244. Matthias Gafni, *Pittsburg: Cops Hid Police Misconduct Records in Three Cases, Public Defender Says*, E. BAY TIMES (June 28, 2016, 8:04 PM PST), http://www.eastbaytimes.com/breaking-news/ci_30068698/pittsburg-cops-hid-police-misconduct-records-three-cases.

245. *Id.*

prison and even death row because critical impeachment evidence was hidden from them at trial.²⁴⁶ Indeed, one study found official misconduct to be a factor in 51% of exonerations.²⁴⁷ But because these litigious strategies would only be successful on a case-by-case and post hoc basis, a preventative policy reform would provide a more effective long-term outcome.

C. Participatory Democracy and Political Collective Bargaining

Ironically enough, participatory democracy may be both the cause and the solution to the inability to pass progressive criminal justice reform. Although participatory democracy was rejected after police unions blocked more progressive reforms in the 1970s, Professor David Sklansky has recently encouraged reassessing the value of the participation of the rank-and-file in reform efforts.²⁴⁸

Professor Sklansky's various models of participatory democracy provide helpful insight.²⁴⁹ One model implements management-controlled initiatives, which are top-down reform proposals that encourage police department management to work routinely and collaboratively with line-level employees to implement these reforms.²⁵⁰ By bringing together both high-level management and rank-and-file officers, this model encourages reform efforts that seek to improve practices through collective learning and line-level expertise.²⁵¹ It also provides some control over the policy decisions of rank-and-file officers. Traditionally, police chiefs and other high-level officers are more likely than police unions to respond to public concerns about officer misconduct.²⁵² Thus, in the context of officer disciplinary record reforms, top-down proposals may better promote democratic values of transparency and accountability than grassroots proposals.

A second model encourages the development of identity-based organizations external to police forces that members of police unions can also join.²⁵³ For example, Officers for Justice is a San Francisco law enforcement organization that promotes diversity in police departments.²⁵⁴ Identity-based

246. Abel, *Prosecutors' Duty*, *supra* note 14.

247. There were 1000 cases of misconduct in 1963 exonerations as of January 11, 2017. *Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS (Jan. 11, 2017), <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

248. SKLANSKY, *supra* note 13, at 173-74.

249. *Id.* at 181.

250. *Id.*

251. *Id.* at 183-85.

252. 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, 523 (2008).

253. SKLANSKY, *supra* note 13, at 181.

254. For more information about Officers for Justice, visit <http://officersforjustice.org/about-us.html>.

organizations limit insularity by creating connections to outside groups.²⁵⁵ These outside groups may be more likely than police unions to appreciate the benefits of reform efforts that encourage transparency and accountability.

A recent collaborative effort in San Francisco demonstrates these models of participatory democracy at work. In May, the police union voted unanimously to support a set of rules for using and implementing body cameras among its officers.²⁵⁶ Body camera policies were initiated by acting S.F. Police Chief Toney Chaplin in response to public pressure.²⁵⁷ Chaplin's predecessor was the subject of repeated calls for resignation after multiple officer-involved shootings and release of racist text messages exchanged by S.F. police officers.²⁵⁸

These policies were developed by a working group that included the union, the public defender's office, the San Francisco Bar Association, and other police force alliances such as the Officers for Justice. Although these groups often diverged on when officers should be allowed to view footage, eventually these groups agreed on a compromise. The San Francisco Police Officers Association agreed to a policy that requires officers to provide an initial statement of an incident involving in-custody deaths and officer-involved shootings before viewing the footage.

Initially, union officials had fought to allow officers to view the videos before issuing any statement. The union president stated that the ACLU, the Office of Citizen Complaints, the public defender's office, and the San Francisco Bar Association all wanted a "state-of mind statement" prior to viewing the video.²⁵⁹ However, discussions between the police union, police department management, and other groups eventually encouraged the police union to agree to body camera proposals.²⁶⁰

In future efforts to make police disciplinary records public, activist organizations could similarly encourage police department management to brainstorm disciplinary record disclosure policies and include police unions in this conversation. But as the body camera anecdote illustrates, even getting police unions to the bargaining table to discuss potential reform will take public pressure and progressive leadership. Although the San Francisco police union was willing to make compromises to allow body cameras, police unions may be even less likely to make compromises regarding disciplinary files.

255. SKLANSKY, *supra* note 13, at 182.

256. Vivian Ho, *SF Cops Could Have Body Cameras By August After Union Vote*, S.F. GATE (May 31, 2016, 8:52 PM), <http://www.sfgate.com/crime/article/San-Francisco-cops-could-have-body-cameras-by-7955560.php>.

257. *New Acting SFPD Chief Says Reforms Are Top Priorities*, CBS S.F. BAY AREA (May 20, 2016, 5:51 PM PST), <http://sanfrancisco.cbslocal.com/2016/05/20/new-acting-sfpd-chief-says-reforms-are-top-priorities/>.

258. *Id.*

259. Ho, *supra* note 256.

260. *Id.*

Despite these reservations, this anecdote demonstrates an additional avenue to promote progressive criminal justice reform: political collective bargaining. Here, police management entered into negotiations about implementing top-down reforms with police unions and other organizations bent on progressive reform. Rather than forcing rank-and-file officers to enact change through court orders, reforms implemented via participatory democracy may meet less resistance by directly negotiating progressive reforms with the police union itself and harnessing rank-and-file officers as agents of reform.²⁶¹ This anecdote also demonstrates the synthesis of management-controlled initiatives with the development of identity-based organizations. The combination of these participatory democracy models allows rank-and-file officers to voice their private interests, but also collaborate with other organizations and individuals that might be more aligned with the public interest. However, unions may not always see eye-to-eye with identity-based organizations like Officers for Justice.²⁶²

Most importantly, this story illustrates that progressive management and leadership is essential in order for reforms initiated by police departments to be successful. As Sklansky writes, “good supervision can do much of what the criminal procedure revolution tried, with only limited success, to accomplish with rules: make the day-to-day work of policing less arbitrary, more accountable, and more enlightened.”²⁶³ Similarly, one criminologist believed that the “key ingredient” in the Oakland Peer Review Panel—a project designed to address issues of excessive force in the 1970s—was an “enlightened Chief of Police.”²⁶⁴

Currently, some leaders are signing onto progressive reforms. Although many police officers opposed the sunshine bill, San Francisco Sheriff Michael Hennessey and Chief Ronald Davis of the East Palo Alto Police Department both wrote letters in support.²⁶⁵ These two police departments, with the support of their progressive management, could pioneer negotiations with police unions to disclose disciplinary records. If successful, these departments could become examples of and advocates for broader reform.²⁶⁶

261. Rank-and-file officers have consistently been viewed as “agents of change” because police decision-making can be improved by relying on their “street knowledge.” Hans Toch, *Police Officers as Change Agents in Police Reform*, in *POLICE REFORM FROM THE BOTTOM UP* 34 (Monique Marks & David A. Sklansky eds., 2012).

262. Sergeant Yulanda Williams, president of Officers for Justice, has been under fire from the SFPOA after she testified about racism in the SF police department in front of an investigative panel after racist and homophobic text messages were disclosed. Vivian Ho, *Amid Push for S.F. Police Reform, Union Escalates Counterattack*, S.F. CHRON. (Mar. 24, 2016), <http://www.sfchronicle.com/crime/article/Amid-push-for-S-F-police-reform-union-escalates-7004239.php>.

263. SKLANSKY, *supra* note 13, at 186.

264. Toch, *supra* note 261, at 37.

265. ASSEMB. COMM. S.B. 1019 BILL ANALYSIS, *supra* note 34, at U.

266. Additionally, William Muir has suggested that the lever of change is not the Police Chief or the rank-and-file officer, but the patrol sergeant. Muir, *supra* note 82, at 170. As a

CONCLUSION

Since their rise in the 1970s, police unions have proven to be tough opponents of progressive reform in both the state legislatures and courts. This Note demonstrates that the role of unions in encouraging secrecy in police misconduct investigations is not a story of the past. Police unions continue to challenge and deter progressive reform efforts that would foster accountability and transparency.

Recent efforts to increase access to police officer personnel files and instances of officer misconduct have failed, largely due to the political clout of police unions. The New York and California case studies illuminate the powerful influence of the police unions' political agenda over state and local legislators. In efforts to keep officer personnel files confidential, police unions have framed their proposals as benefiting public safety and the public interest. Without consistent opposition to counter this narrative, police unions have been very successful in pressuring policymakers to sign off on their agenda.

The political power of police unions is clear. The pathway to successfully implementing progressive criminal justice reform is not. This Note explores the rhetorical strategy and political machinery used by police unions to successfully implement their agenda. This Note also analyzes why police unions continually oppose efforts to foster accountability and transparency in the processes and outcomes of misconduct investigations. But in order for sunshine legislation to be successful in the future, scholars and activists must organize and brainstorm concrete solutions to rebalance the distribution of political power in the fight over criminal justice reform.

supervisor of rank-and-file officers, the sergeant “can make the time to teach his squad about the origins, singularity, and importance of our country’s socially democratic ideas.” *Id.*