Balancing Interests in Public Access to Police Disciplinary Records

Ash Gautam[*]

In most states, histories of officer misconduct are shielded from public scrutiny by restrictive open records laws. Advocates for transparency argue that greater public access to such records will lead to better policing by increasing the public's trust in and cooperation with police, making it easier to hold officers accountable, deterring misconduct, and providing scholars and officials the information needed to design more effective policy. Advocates for confidentiality argue that restrictions on public access are needed to protect officer privacy and safety, and that greater transparency may lead to retrenchment instead of better policing. This Note examines the current legislative landscape and the arguments for competing transparency and confidentiality interests. This Note ultimately argues for a limited public access regime that ensures public access to records when doing so would garner substantial transparency benefits, and limits public access in situations where disclosure would implicate confidentiality interests without offering any significant transparency benefits.

* Associate Editor, Volume 100, *Texas Law Review*; J.D. Candidate, Class of 2022, The University of Texas School of Law.

Introduction

On November 22, 2014, a 911 caller in Cleveland, Ohio, reported that a person, who appeared to be a juvenile, was pointing a "probably fake" pistol "at everybody."[1] The dispatcher failed to convey that the weapon was "probably fake," and two Cleveland police officers, Timothy Loehmann and Frank Garmback, showed up to the scene to investigate.[2] Loehmann observed what appeared to be a gun next to a Black boy and ordered the boy to "show his hands."[3] Within two seconds of arriving on the scene, Loehmann shot the boy.[4] By November 23, 2014, the boy, 12-year-old Tamir Elijah Rice, was dead.[5] The murder of 12-year-old Tamir Rice is only one of many instances of fatal police brutality, committed predominantly by White police officers against young Black men and women.[6] Other examples involving Black

1. Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), https://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html [https://perma.cc/X7V6-634L].

2. Eric Levenson & Shachar Peled, *Police Suspend Dispatcher 8 Days in Tamir Rice Shooting*, CNN (Mar. 15, 2017, 12:32 PM), https://www.cnn.com/2017/03/15/us/tamir-rice-police-suspended/index.html [https://perma.cc/RUE9-MW8A].

3. *Video Shows Cleveland Cop Shoot 12-Year-Old Tamir Rice Within Seconds*, NBC NEWS (Nov. 26, 2014, 8:47 PM), https://www.nbcnews.com/news/us-news/video-shows-cleveland-cop-shoot-12-year-old-tamir-rice-n256656 [https://perma.cc/2RT5-J8SN].

4. *Id.*; Laura Westbrook, *Tamir Rice Shot 'Within Two Seconds' of Police Arrival*, BBC NEWS (Nov. 27, 2014), https://www.bbc.com/news/av/world-us-canada-30220700 [https://perma.cc/AC72-EUDW].

5. Richard A. Oppel Jr., *Police Shooting of Tamir Rice Is Ruled a Homicide*, N.Y. TIMES (Dec. 12, 2014), https://www.nytimes.com/2014/12/13/us/police-shooting-of-tamir-rice-is-ruled-a-homicide.html [https://perma.cc/UPG2-MZ8Q]; *Two Years Later, Still No Justice for Slain 12-year-old Tamir Rice*, MEDIUM (Nov. 22, 2016), https://medium.com/@BlackLivesMatterNetwork/two-years-later-still-no-justice-for-slain-12-year-old-tamir-rice-103f0be2658b [https://perma.cc/M4W8-AJ44].

6. *Fatal Force*, WASH. POST (Feb. 23, 2022), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/2BTG-2PAB]; Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns [https://perma.cc/HF28-SJQU].

teenagers include the killing of Laquan McDonald by Chicago police officer Jason Van Dyke[7] and the alleged killing of Anton Black by Greensboro, Maryland police officer Thomas Webster IV.[8]

Beyond representing a tragic trend seen throughout the history of policing in America,[9] these examples have another disturbing commonality. Loehmann, Van Dyke, and Webster all had troubling histories of alleged and proven misconduct that were not revealed or otherwise accessible to the public until well after the deaths of Tamir Rice, Laquan McDonald, and Anton Black, respectively. Loehmann, for instance, was initially a police officer in the small town of Independence, Ohio, where his supervisors had recommended his termination for "insubordination, lying and an inability to emotionally function."[10] He resigned before he was terminated, and confident that his record of misconduct and discipline would remain private, he was able to get a job with the Cleveland police department.[11] Loehmann retained his job with the Cleveland police department for nearly three years after killing Tamir Rice, before ultimately being fired not for his use of force but for failing to disclose the aforementioned disciplinary records before taking employment.[12] Similarly, Webster was only fired from the Greensboro police department when disciplinary records from his previous job as an officer with the Dover, Delaware police department surfaced and revealed that nearly thirty use-of-force complaints had been filed against him.[13] Van Dyke's record of misconduct, which included "eighteen prior civilian complaints for incidents ranging from excessive force to racial slurs," was publicly revealed a year after he killed Laquan McDonald.[14]

Had these records been publicly available and scrutinized before the officers committed these fatal, irreversible acts of misconduct, would their

7. Mitch Smith, *Four Chicago Police Officers Fired for Cover-Up of Laquan McDonald Shooting*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/us/chicago-police-fired-laquan-mcdonald.html [https://perma.cc/4C7Q-GRVT].

8. Michael Kunzelman, *Family of Anton Black, Teen Who Died After Struggle with Police, Wants Federal Investigation*, DEL. ONLINE (Mar. 6, 2019, 2:27 PM), https://www.delawareonline.com/story/news/2019/03/06/family-anton-black-who-died-police-custody-wants-federal-investigation/3081941002/ [https://perma.cc/L49N-4X8J].

9. *See generally* Clarence Taylor, *Introduction: African Americans, Police Brutality, and the U.S. Criminal Justice System*, 98 J. AFR. AM. HIST. 200 (2013) (collecting sources documenting discriminatory trends in U.S. criminal justice systems against Black Americans).

10. Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 903 (2019).

11. *Id.*

12. Bill Hutchinson, *Tamir Rice's Mother Asks Court to Block Cop from Getting His Job Back*, ABC NEWS (May 25, 2021, 2:28 PM), https://abcnews.go.com/US/tamir-rices-mother-asks-court-block-cop-job/story?id=77891621 [https://perma.cc/Z526-PB27].

13. Brandon Holveck, *Former Dover Officer Removed from Greensboro Police Staff After Use of Force Reports Surface*, DEL. ONLINE (Aug. 2, 2019, 7:20 PM), https://www.delawareonline.com/story/news/2019/08/02/former-dover-officer-removed-greensboro-police-staff/1903657001/ [https://perma.cc/2WAC-68VD].

14. Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 838 (2016).

respective departments have adequately punished them to deter use of force, or even fired (or refused to hire) them to ensure they would not be in a position where they could harm civilians? Could public pressure have motivated these departments to hold their officers accountable? While murder is the most serious form of brutality, police brutality takes many forms. Many other officers in these departments might have serious histories of misconduct and escape adequate punishment because those histories have not (yet) culminated in fatal, unjustified use of force. Perhaps a department-wide survey of disciplinary records will reveal trends common to the misconduct histories of these officers. Do instances of misconduct disproportionately affect people of certain racial or religious backgrounds, and do they tend to occur in certain unique contexts, such as domestic violence or immigration law enforcement? If we can identify such trends, we can refocus efforts and design solutions better targeted towards the particular policing needs of our communities and not only root out "bad apples," but help heal the "rotten tree."[15] And by investigating these disciplinary records, we might even find that many departments do take accountability seriously and consistently and adequately punish officers guilty of misconduct, and thereby bolster our faith in the procedural fairness of law enforcement and trust in the police. But despite the many benefits of transparency, in many states, these records are simply not accessible to the public.[16]

Transparency has long been touted as a potent tool in the regulation of public conduct.[17] Many scholars[18] and legislators[19] have likewise prescribed transparency as a key cure needed to police the police. Others argue that the "transparency cure" has been overhyped and that proponents of transparency fail to sufficiently address both police and public interests in confidentiality.[20] This Note looks at transparency and confidentiality interests in the context of police disciplinary records disclosure and agrees with the latter camp that interests in confidentiality should be taken more seriously but argues that the balance of interests in public access to police disciplinary records should

15. *See* Rashawn Ray, *Bad Apples Come from Rotten Trees in Policing*, BROOKINGS (May 30, 2020), https://www.brookings.edu/blog/how-we-rise/2020/05/30/bad-apples-come-from-rotten-trees-in-policing/ [https://perma.cc/AA2M-B39A] (proposing police department misconduct insurance as a means of fixing the "rotten tree" of structural racism in policing).

16. *See infra* subpart I(B).

17. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914).

18. *See generally, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (describing the difficulty of discretionary policing and desire for increased transparency).

19. *See* George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) ("To hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies.").

20. *See generally* Levine, *supra* note 10 (problematizing the "transparency cure" in view of privacy interests).

ultimately favor transparency. Nonetheless, limited public access is preferable to complete public access because a limited public access regime better addresses interests in confidentiality, while still accruing most of the benefits found in a complete public access regime.

Part I first defines police disciplinary records and discusses the sort of content included in, and the variety of sources that inform, these records. It then lays out the current statutory approaches to police disciplinary record disclosure taken by states. States generally can be described as either authorizing essentially no public access, limited public access, or essentially complete public access to police disciplinary records. States that limit public access generally do so in one of two ways: by either expressly qualifying the sorts of records that can be accessed or subjecting public access to a general privacy rights exemption.

Part II makes the case for transparency. First, greater transparency leads to greater public trust in the police, which in turn boosts the legitimacy of police and improves public safety by increasing public compliance and cooperation with law enforcement. Second, transparency would incentivize departments to hold their officers accountable, and holding officers accountable may more frequently reduce misconduct. Firing (and refusing to hire) police officers with histories of severe misconduct ensures that they are not in a position to harm the public. Adequate punishment short of firing could also deter officers from engaging in future misconduct. Creating an atmosphere of accountability within a department might also deter other officers in the department from engaging in misconduct. Third, access to more data would allow advocates, scholars, and legislators to design and administer more effective policy by better targeting troubling trends seen in their communities and police departments.

Part III then reviews the case for confidentiality and argues that a balancing of interests in public access to police disciplinary records should ultimately favor transparency. First, police officers' privacy interests do not justify opacity for records covering on-the-job misconduct, but a limited public access regime should be designed to accommodate legitimate officer privacy interests in minor infractions with little relevance to the public interest. Second, a limited public access regime should be responsive to the potential for abuse of the complaint-making process, distortion of information disclosed in records, and public misunderstanding of information disclosed in records that cause undeserved reputational harms to officers and departments. Third, proponents of transparency must account for potential police retrenchment and design disclosure regimes to limit incentives for unwarranted leniency. Fourth, disclosure of records might make it easier for disaffected parties to identify, locate, and potentially harm, the officers who they believe wronged them. Though there are essentially no data substantiating physical harms to officers from disciplinary record

disclosures, many officers have reported targeted harassment, vandalism, and threats of physical harm, and a limited public access regime should be designed to limit such threats to officer safety.

Part IV argues that limited public access is preferable to essentially complete public access because the former better addresses interests in confidentiality while accruing substantially the same transparency benefits as the latter. Some general measures under both limited public access and essentially complete public access, such as simplifying and clarifying records and redacting identifying information, can help address officer reputation and safety concerns. But limited public access shows a willingness to compromise with police interests that more effectively limits the potential for police retrenchment. Furthermore, the general privacy exemption and express qualifications approaches both have unique benefits that address officer concerns while also permitting public access where the public interest in transparency outweighs interests in confidentiality. Case-by-case adjudication under general privacy exemptions allows courts to examine the relevance of contested information to the public, and more consistently strike a fair balance between officer concerns and the public interest. Police officers might also view accountability measures taken by judges more favorably than those taken by legislators or the public at large, limiting retrenchment. Under the express qualifications approach, qualifying disclosure based on seriousness of conduct—for example, permitting public access for serious conduct such as use of force and prohibiting access for minor infractions such as lateness—ensures public access only where the conduct is relevant to the public interest and poses more than a *de minimis* threat to public safety.

I. Background and Overview

This Part first defines the subject matter of this Note—police disciplinary records—and illustrates the breadth and diversity of information contained within these records. It then examines current statutory approaches states use in regulating public access to police disciplinary records. Though states vary in the exact means they use, three broad approaches can be discerned: (1) essentially no public access authorized, (2) essentially complete public access authorized, and (3) public access authorized subject to significant limitations. Within category (3), this Part discusses two further sub-approaches, one where states denote express statutory qualifications to public access and the other where states limit public access using a general privacy exemption.

A. What Are Police Disciplinary Records?

Statutes in all states regulate public access to state and local government employees' personnel files.[21] In the case of police officers, these files generally include everything about their subject's "employment history, including commendations, promotions, and demotions," and disciplinary records.[22] The contents of police disciplinary records, however, vary significantly across jurisdictions and escape easy generalization.[23] Police disciplinary records may contain many different sorts of reports from many different sources, including complaints by civilians, or other officers and supervisors. Additionally, these records may contain reports of disciplinary investigations and proceedings by departmental supervisors; internal affairs agencies; independent review boards and agencies; local, state, and federal government officials and bodies; etc.[24]

Not all information contained in these reports is of equal or even significant interest to the public. For instance, jurisdictions differ in how they treat allegations contained in these reports and complaints.[25] Thus, depending on the source or the misconduct alleged, some charges might be investigated thoroughly and subject to lengthy officer appeals processes, causing long periods of time where unsubstantiated allegations remain on an officer's disciplinary records before these processes are found to exonerate an innocent officer.[26] Additionally, while some substantiated reports might clearly merit the public's scrutiny, as with an officer's use of force, police disciplinary records also contain reports of many less serious infractions such as "lateness, not wearing the proper uniform, or poor driving on a training day."[27] The reported "punishments, too, range from minor—'last verbal counseling' or a 'memo of correction'—to severe, as with termination."[28] Arguments concerning public access to police disciplinary records should remain cognizant of the broad swath of information included in these records and the numerous social groups and interests impacted by disclosure of these records.

21. Levine, *supra* note 10, at 860.

22. *Id.*

23. *See id.* at 859–60 (acknowledging that some generalizations about police disciplinary records can be made, but that there "is no standard" and they "differ from jurisdiction to jurisdiction").

24. *Id.* at 860.

25. *See id.* at 860–61 (describing a range of different ways that allegations are investigated, appealed, and disciplined, depending on the source of the allegation and jurisdiction).

26. *Id.*

27. *Id.* at 861.

28. *Id.*

B. Current Statutory Approaches to Public Access to Police Disciplinary Records

Statutory regimes fall into three broad categories: (1) records are essentially confidential, (2) records are essentially public, and (3) records are accessible to the public with significant limitations. Limitations on public access in category (3) vary by state, but two general sub-approaches can be discerned. Some states limit public access to records that meet certain expressly defined qualifications. Other states permit public access unless it would constitute an "unwarranted intrusion on privacy."[29]

As of May 2021, police disciplinary records were essentially confidential in eighteen states and the District of Columbia.[30] In some states, "all public employee personnel files are exempt from disclosure."[31] In other states, police disciplinary records are routinely withheld under general privacy exemptions that often use the same unwarranted intrusion on privacy language as privacy exemptions in states with limited public access.[32] The key difference is not in the statutory approach but the administrative and judicial response to otherwise similar statutory commands. At least one state, Delaware, specifically protects police officers' personnel records and internal affairs investigatory files from disclosure in nearly all circumstances.[33] Though these states take superficially different approaches to regulating public access to officials' records, the effect across them is the same: in these states, the public has essentially no access to police disciplinary records.[34]

As of May 2021, police disciplinary records were essentially public in fifteen states.[35] Many of these states make public records generally available by statute and others administratively clarify that police records are

29. *See infra* note 32 and accompanying text.

30. *See* Kallie Cox & William H. Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, AP NEWS (May 12, 2021), https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c [https://perma.cc/4PU3-3YZX] (detailing public record laws in all 50 states and the District of Columbia).

31. Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?* WNYC NEWS (Oct. 15, 2015), https://www.wnyc.org/story/police-misconduct-records/ [https://perma.cc/XLS9-R4A7].

32. *Compare* ALASKA STAT. ANN. § 40.25.120(a)(6)(C) (West 2019) (exempting records that "could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness"), *and* Lewis et al., *supra* note 31 (noting that records are routinely withheld under Alaska's relevant provision), *with* MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2021) (exempting from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy"), *and* Lewis et al., *supra* note 31 (noting that records are sometimes but not routinely withheld under Michigan's relevant provision).

33. DEL. CODE ANN. tit. 11, § 9200(d) (West 2018).

34. *See* Cox & Freivogel, *supra* note 30 (identifying the different ways the eighteen states and District of Columbia keep police disciplinary records confidential).

35. *Id.*

included.[36] Some of these states also include invasion of privacy exemption language, but courts in these states have held these exceptions to be exceedingly narrow and to permit disclosure of essentially all public records.[37] These states do still foreclose public access to records of active investigations,[38] and some bar access to unsubstantiated complaints.[39] But the public essentially enjoys almost complete access to police disciplinary records in these states.

As of May 2021, seventeen states authorized limited public access to police disciplinary records.[40] These states generally take one of two approaches to limiting public access. First, some states set out express qualifications on the sorts of records that can be disclosed. Many of these states limit disclosure to records of officers receiving severe discipline and prohibit public access to records of minor reprimand.[41] For instance, Texas Local Government Code § 143.089 permits public inspection of disciplinary records that resulted in at least a suspension or loss of pay, while records resulting only in written reprimand remain confidential.[42] Other states limit disclosure based on the conduct described in the reports. California, for example, authorizes public access to records relating to incidents where police officers fired a gun at a person, or used force that resulted in serious injury or death.[43]

Second, some states subject public access to general statutory or state-constitutional privacy rights that are subsequently clarified through case law.[44] Intermediate courts in at least three such states, West Virginia,

36. *See, e.g.*, FLA. STAT. ANN. § 119.01(1) (West 2005) ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency."); *see also* Lewis et al., *supra* note 31 (identifying administrative decisions affirming that police records are disclosable).

37. *See, e.g.*, LA. STAT. ANN. § 40:2532 (2021) (prohibiting disclosure of certain information to the news media about a law enforcement officer "with respect to an investigation" of the officer); City of Baton Rouge v. Cap. City Press, L.L.C., 2007-1088, 2007-1089, p. 7 (La. App. 1 Cir. 2/13/09); 7 So. 3d 21, 24–25 (parsing a records request to grant disclosure while only redacting confidential information).

38. *See, e.g.*, GA. CODE ANN. § 50-18-72(a)(8) (West 2021) (exempting investigation materials from disclosure records "until ten days after . . . [an] investigation is otherwise concluded or terminated").

39. Cox & Freivogel, *supra* note 30.

40. *Id.*

41. *Id.*

42. *Id.*; *see also* City of San Antonio v. Tex. Att'y Gen., 851 S.W.2d 946, 948–49 (Tex. App.—Austin 1993, writ denied) (holding § 143.089 requires police departments to maintain files detailing misconduct resulting in discipline, that are subject to disclosure, but also authorizes maintaining internal officer files containing other information, that are not subject to disclosure).

43. CAL. PENAL CODE § 832.7(b)(1)(A)(i)–(ii) (West 2022).

44. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.243(1)(s) (West 2021) (enumerating circumstances when "public interest in disclosure outweighs the public interest in nondisclosure"); *see also infra* note 45.

Louisiana, and South Carolina, have held that on-the-job police misconduct is not covered by any privacy right.[45] In Kentucky, the Attorney General has affirmed that on-the-job misconduct is not protected under the state open records act's general privacy exemption.[46]

II. The Case for Transparency

This Part lays out three reasons to support increased public access to police disciplinary records. First, public access to disciplinary records will enhance public trust in police, which in turn will boost police legitimacy, public compliance with criminal law, and cooperation with police. Second, public access to disciplinary records will ensure greater accountability of officers by removing them from positions where they pose a threat to public safety, creating more credible threats of punishment for misconduct, and deterring other officers from engaging in misconduct. Third, more information in the hands of the public will lead to more effective reform policy and strategy.

A. Public Trust

Both civilian and police proponents of transparency agree that disclosure of police disciplinary records promotes better community relations between the police and the public, and enhances public trust in the police.[47] Greater public trust in police in turn bolsters the legitimacy of criminal "law enforcement and the rule of law more generally."[48] Greater public trust also increases community compliance and cooperation with police, advancing both the police interest in law enforcement and public interest in safety.

Public trust "is widely considered a fundamental ingredient of modern liberal democracy" and a foundational source of government authority and legitimacy.[49] "[T]he primary antecedent of legitimacy is procedural justice,"[50] and "[t]rustworthiness is the primary antecedent of perceived

45. Charleston Gazette v. Smithers, 752 S.E.2d 603, 619 (W. Va. 2013); City of Baton Rouge v. Cap. City Press, L.L.C., 2007-1088, 2007-1089, p. 21 n.19 (La. App. 1 Cir. 10/10/08); 4 So. 3d 807, 821 n.19; Burton v. York Cty. Sheriff's Dep't, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004). An intermediate appellate court in Missouri has also held that on-the-job police misconduct is not protected by any privacy right (however, police records in Missouri are still protected under Missouri's Sunshine Law). Chasnoff v. Mokwa, 466 S.W.3d 571, 573 (Mo. Ct. App. 2015); Lewis et al., *supra* note 31.

46. *In re* Bailey, Ky. Op. Att'y Gen. 03-ORD-213, at 2 (2003).

47. *See infra* notes 56–59 and accompanying text.

48. *See* Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 185–86 (2019) ("Mistrust of the police undermines the legitimacy of both law enforcement and the rule of law more generally.").

49. Luna, *supra* note 18, at 1158–59.

50. *Id.* at 1162 n.217.

procedural fairness."[51] In the absence of information regarding government procedures, the public is likely to presume that the procedures are unfair.[52] Under a transparent regime, where the public has an opportunity to assess the procedural fairness of government procedures, people likely will find that a sizeable number of procedures are fair and thus will have greater trust in the institutions and officials who design and administer these procedures.[53]

Legitimacy is a key interest for any government institution, but it is especially crucial for an institution with high potential social costs, like policing. Police forces are unique among domestic government institutions in their right to use violence, and the consequences of illegitimate government action by police inflict a harm unmatched by most other government institutions. In light of this heightened sensitivity, it is especially striking that a majority of American adults do not trust law enforcement.[54] Mistrust is especially pronounced in certain communities that have historically suffered under unfair policing procedures, with only nineteen percent of Black American adults expressing confidence in the police, and only eleven percent of them expressing confidence in the criminal justice system at large.[55]

A number of scholars,[56] "journalists, activists, lawmakers, and even police chiefs" and other police advocates argue that transparency is an important solution to the police's continuing public trust problem.[57] Members of the public who have been victims or witnesses of police misconduct have also commented on the role of public trust in advocating for greater

51. *Id.* at 1162.

52. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing").

53. *See* Luna, *supra* note 18, at 1162–63 (suggesting that "[i]f an individual believes that government officials are trustworthy . . . the subsequent process is more likely to be viewed as fair," and that "[o]penness is the gateway to trust.").

54. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html [https://perma.cc/9J7Q-6UDF].

55. JEFF JONES & LYDIA SAAD, GALLUP, CONFIDENCE IN INSTITUTIONS 5 (2020), https://news.gallup.com/file/poll/317165/200811Confidence.pdf [https://perma.cc/683E-UBE8].

56. *See, e.g.*, Luna, *supra* note 18, at 1163 (identifying transparency as an important foundation for rebuilding community trust in law enforcement); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 752 (2017) ("[T]ransparency is clearly desirable as the public should be able to monitor how public employees are disciplined, and this is especially important to restoring public trust in police."); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 588 (2019) (calling for reform that "balances officers' need for procedural protections against arbitrary punishment with a community's need for democratic oversight and accountability").

57. Moran, *supra* note 48, at 188.

transparency and disclosure of police records.[58] Police advocates and officers who support greater transparency also single out public trust as a key motivator.[59] In a survey of 344 police administrators, public trust was the most frequently cited benefit of greater transparency; "[s]eventy-eight administrators said public access to misconduct records promoted transparency, sixty-eight said records disclosure increased public trust, and forty-eight saw a benefit in the form of improved police-community relations."[60]

One reason why police proponents of transparency might especially appreciate increased public trust is because official authority that enjoys greater public trust and perceived legitimacy can also count on more public compliance with its legal dictates.[61] Moreover, as with legitimacy, the value of compliance—and the consequences of non-compliance—are more pronounced in the police context. Greater public trust in government institutions also engenders greater public cooperation with them. "[F]ull governmental disclosure can inspire individuals to reciprocate by sharing their otherwise private knowledge,"[62] which is especially helpful in the policing context given the extent to which the police rely on the public to gather tips and evidence. Public compliance thus promotes the police interest in crime detection and law enforcement. Greater public compliance also promotes the public interest because greater public obedience of most laws and more effective prevention and detection of most crimes will increase public safety.

B. Accountability and Deterrence

Proponents of greater transparency argue that accountability, and deterrence produced by the threat of accountability, will reduce misconduct and thus promote the public interest in public safety.[63] One way that accountability may promote public safety is if individual officers guilty of

58. David Greenwald, *Commentary: SB 1286 Would Provide Transparency to Police Complaints*, DAVIS VANGUARD (May 26, 2016), https://www.davisvanguard.org/2016/05/commentary-sb-1286-provide-transparency-police-complaints/ [https://perma.cc/H3ER-6VQ4] (recounting the testimony of a woman in California who witnessed the killing of a young Black man, supporting legislation authorizing greater police disciplinary records disclosure).

59. Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1261 (2021).

60. *Id.*

61. Luna, *supra* note 18, at 1162.

62. *Id.* at 1163.

63. *See, e.g.*, Moran, *supra* note 48, at 189–90 (calling for police misconduct records to be publicly available to encourage accountability for abusive officers and dysfunctional police departments).

egregious misconduct are fired and no longer in a position to seriously harm members of the public.[64]

Proponents of transparency are skeptical that officers deserving of punishment will be punished adequately under a system of police self-regulation.[65] Given the unusually high levels of organizational solidarity seen within police departments and across law enforcement generally,[66] skeptics contend that restrictions on disciplinary record disclosure merely allow internal affairs officials to hide officer misconduct and aid officers in evading adequate punishment.[67] These skeptics note that officers involved in serious incidents of police brutality often had long histories of proven or alleged misconduct that only came to light following public and media uproar.[68] For example, it wasn't until a year after the 2014 killing of Black teenager Laquan McDonald by Chicago police officer Jason Van Dyke that the city of Chicago publicly revealed that Van Dyke had been named in "eighteen prior civilian complaints for incidents ranging from excessive force to racial slurs, and not one of those prior complaints had ever been sustained."[69] Skeptics of police self-regulation argue that transparency could "empower civilians, journalists, and advocacy groups to identify both problematic police officers . . . and patterns of violence in certain police departments."[70] The resultant reputational costs could then incentivize police leadership to reform accountability mechanisms within their departments and motivate internal affairs officials to take stronger actions against officers who deserve greater punishment. In turn, more credible threats of adequate punishment could deter other officers from engaging in misconduct.

However, even the most drastic punishment short of criminal prosecution, firing a police officer, may not be enough to eliminate that officer's potential to harm the public. Given the strong disciplinary appeals protections afforded to police officers and the length of the internal appeals process itself,[71] officers can likely anticipate well ahead of time that they will be terminated for misconduct. They can get ahead of the potential termination

64. Levine, *supra* note 10, at 888.

65. *See generally* Moran, *supra* note 14 (arguing that self-regulation of police departments is an ineffective method of addressing misconduct claims).

66. Levine, *supra* note 10, at 876.

67. *See* Moran, *supra* note 14, at 843–44 ("Saying internal affairs units are the best means of protecting citizens from police misconduct is like saying foxes are the best guards for the henhouse . . . .").

68. *See* Moran, *supra* note 48, at 190 (noting an empirical study that "found a statistically significant correlation between police officers who received numerous complaints, and the likelihood of those same officers being involved in 'serious misconduct as measured by civil rights litigation'").

69. Moran, *supra* note 14, at 837–38.

70. Moran, *supra* note 48, at 190.

71. Rushin, *supra* note 56, at 570–82.

by voluntarily resigning.[72] In states that limit public access to disciplinary records, officers can then seek employment in other departments "without fear that their records will follow them."[73] In Ohio, for example, Cleveland police officer Timothy Loehmann, who shot and killed twelve-year-old Tamir Rice, had previously been employed as an officer by a small town also in Ohio, where his supervisors recommended his termination for "insubordination, lying, and an inability to emotionally function."[74] He instead resigned and got a job at the Cleveland Police Department without ever disclosing these infractions or the Cleveland Police Department having access to them.[75] Greater transparency would allow police departments to scrutinize new hires like Loehmann more carefully and allow advocates and the public to raise their concerns if police departments hire officers who pose a threat to public safety.

C. Effective Policy Making

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[76] Greater transparency means more information in the hands of the public, which can then be used by police departments,[77] citizens, legislators, scholars, and advocates[78] to craft more effective policy that better serves both the public and police interests.[79]

Responding to incidents of police misconduct, police departments and advocates often claim that the incident was the result of an individual "bad" officer who does not reflect the department or the profession more generally.[80] In the absence of department-wide data on the frequency and

72. Levine, *supra* note 10, at 903.

73. *Id.*

74. *Id.*

75. *Id.*

76. 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

77. *See infra* subpart III(B).

78. More information about policing, and particularly about police misconduct, is also valuable to prosecutors. Prosecutors can use that information to prosecute criminal misconduct by police officers and to screen untrustworthy officers who would not make credible witnesses. Moran, *supra* note 48, at 192. Recognizing that such information is especially valuable to prosecutors, defendants in criminal trials, and plaintiffs in civil trials against police, at least one scholar argues for a disclosure regime that limits public access to disciplinary records but allows greater access to parties in litigation and prosecutors both in and outside of the litigation context. Levine, *supra* note 10, at 848–49. Because this Note is limited to arguments concerning everyday public access, I do not discuss the harms and benefits that arise solely in the context of litigation.

79. Moran, *supra* note 48, at 191–92.

80. *See, e.g.*, James Downie, *Time to Toss the 'Bad Apples' Excuse*, WASH. POST (May 31, 2020), https://www.washingtonpost.com/opinions/2020/05/31/time-toss-bad-apples-excuse/ [https://perma.cc/K897-LR75] (quoting national security adviser Robert C. O'Brien, who remarked

nature of officer misconduct, it is difficult for the public to verify such statements. Access to such data might reveal "troubling patterns deserving attention and reform"[81] and make it harder for police leadership to evade deserved public accountability for misconduct by officers under their supervision.

Access to such data might also help reform advocates and scholars to craft, and citizens to vote for, more effective policy. Policing needs and patterns of misconduct vary by community, and policing, unlike other licensed professions, is regulated largely at the local level.[82] Reform advocates reliant on national databases might miss reform opportunities and needs local to their communities. For example, because most policing occurs in high-population cities and suburbs, national-level data probably will not reflect policing concerns unique to rural communities. In another example, where local police functions coincide with federal authority (e.g., immigration and national security), national-level data on policing might focus entirely on misconduct by federal officials instead of local police. Thus, reform advocates in rural communities, border towns, and other communities poorly reflected in national policing data may benefit from public access to data that helps them craft more localized policies and reform strategies.

III. The Case for Confidentiality

This Part considers four arguments for confidentiality: (1) harms to police officers' informational privacy interests; (2) undeserved harms to officers' reputations; (3) police retrenchment; and (4) officer safety concerns. Though these concerns are legitimate and should be taken seriously by supporters of public access, they do not justify total opacity and can be accommodated by limited public access regimes that also benefit the public through greater transparency.

A. Privacy

Legislators,[83] law enforcement unions,[84] and scholars[85] who criticize public access to police disciplinary records most often center their arguments

after the killing of George Floyd at the hands of police officer Derek Chauvin, "We have got great law enforcement officers . . . But we got a few bad apples that have given—given law enforcement a bad name").

81. Moran, *supra* note 48, at 189.

82. Levine, *supra* note 10, at 903.

83. *See id.* at 870 (describing the privacy right enshrined in the Law Enforcement Officers Bill of Rights, a set of laws passed in sixteen states).

84. Moran & Hodge, *supra* note 59, at 1248; Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 133–34 (2017).

85. Moran & Hodge, *supra* note 59, at 1251.

on the informational privacy[86] rights and interests of police officers. Though the Supreme Court has not spoken on informational privacy rights in the context of police disciplinary records,[87] the Court's jurisprudence suggests strict limits on informational privacy rights for police officers, at least with respect to information recorded on the job and relating to their duties as public officials.[88] Recognizing this, some police officers even agree that informational privacy rights in on-the-job misconduct do not outweigh interests in disclosure,[89] but police disciplinary records often include information unrelated to on-the-job misconduct that might embarrass officers while serving no public interest. These legitimate police privacy concerns should be taken seriously, but they can be addressed without completely barring public access.[90] In light of the Court's balancing approach to informational privacy questions, any balance between limited police interest in informational privacy and significant public interest in public access should fall towards the public's side.

One reason—reflected in informational privacy jurisprudence—why the balance of interests should favor the public is that police officers are "public officials," who have historically enjoyed limited expectations of privacy.[91] From the very beginning, privacy theorists have believed that "actions associated with the discharge[] of a public duty were not private."[92] In *Nixon v. Administrator of General Services*,[93] the Court concluded that people who enter public life "voluntarily surrender[] the privacy secured by law for those who elect not to place themselves in the public spotlight."[94] Though taking public employment carries a lower expectation of public scrutiny than seeking elected office, a public employee's expectations of privacy are still lower than that of an ordinary citizen.[95] That is especially the case for public employees like police officers, who occupy a highly visible role in their communities and whose actions have enormous social consequences.[96] Thus, though the Court has not said whether police officers are public officials, "at

86. "[T]hat is, privacy in recorded information about oneself." Moran, *supra* note 48, at 156.

87. Several lower federal and state courts, however, have considered the issue and have concluded "that the records were not private." *Id.* at 178–80.

88. *See id.* at 168–71 (surveying informational privacy jurisprudence).

89. *See* Moran & Hodge, *supra* note 59, at 1269–73 (summarizing police administrators' reasons for releasing misconduct-related records).

90. *See infra* subpart IV(A).

91. Moran, *supra* note 48, at 181.

92. *Id.*

93. 433 U.S. 425 (1977).

94. *Id.* at 455.

95. Moran, *supra* note 48, at 181.

96. Proponents of complete disclosure might also argue that police officers have lower expectations of privacy than most other public employees, which makes it especially striking that, due largely to powerful police unions, police officers enjoy greater privacy and procedural protections than most other public employees. Fisk & Richardson, *supra* note 56, at 718.

least two state supreme courts, Hawaii and Washington, have utilized this public/private actor distinction in the context of police misconduct records" to find no expectation of privacy in information about officers' on-the-job misconduct.[97]

However, in *Nixon*, the Court indicated that even public officials "are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."[98] Even if police officers are public officials, police disciplinary records might include information about matters of personal life deserving of stronger privacy protections. Police officers worry that disclosure of such information represents an unwarranted intrusion into their informational privacy rights. For example, police disciplinary records may include details on officers' drug use and treatment, areas in which the Court has recognized the informational privacy interests of even public officials.[99] Officers also worry about the potential for abuse of the complaint-making process, because vengeful parties with intimate knowledge of officers' lives may file complaints including details about an officer's personal life that would become publicly accessible in states where all records are essentially public.[100] However, even in such cases, the Supreme Court often finds that other interests outweigh the public official's privacy interests,[101] suggesting that these worries alone do not justify total opacity. Nonetheless, these privacy interests merit concern, and a limited public access regime can accommodate these officer privacy interests by preventing the disclosure of highly personal information that is unlikely to serve civilian purposes.[102]

B. Reputation

One of the most frequent types of harm that officers worry about resulting from greater public access to police disciplinary records is unfair damage to officer reputation.[103] In some cases, police disciplinary records

97. Moran, *supra* note 48, at 182.

98. 433 U.S. at 457. Lower courts have also limited informational privacy rights to highly personal information, generally defined "as including details about medical, sexual, or financial history and activities." Moran, *supra* note 48, at 177.

99. *See* Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (recognizing the various interests, including privacy interests, that individuals have regarding disclosure of medical information); Nat'l Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 138 (2011) (assuming the existence of constitutional privacy rights as mentioned by the Court in *Whalen*).

100. *See, e.g.*, Moran & Hodge, *supra* note 59, at 1268 (noting the use of unsubstantiated misconduct records by an officer's ex-spouse in divorce proceedings).

101. *See, e.g.*, *Nelson*, 562 U.S. at 138 (holding that in employment background investigations of drug use and treatment, government interest overrides the privacy interest of federal contract employees).

102. *See infra* subpart IV(A).

103. *See* Moran & Hodge, *supra* note 59, at 1238 (noting police union claims that public record access would harm officers' reputations).

merely note the infraction alleged or sustained without the factual context that prompted the discipline or investigation, leaving the public to make uninformed judgments and potentially assume the worst about the officers.[104] Police disciplinary records may also contain technical terminology or presume knowledge about internal disciplinary procedures that most members of the public will not be familiar with, and officers worry that the public will misunderstand misconduct reports and will not fairly judge an officer's actions.[105] For an extreme example, some records might not clearly delineate whether a complaint against an officer was substantiated or unsubstantiated, potentially leaving readers to assume that a reported case of misconduct was substantiated when it was not. Also, personnel files and police disciplinary records vary significantly in both content and style across departments.[106] The public might fail to keep track of all these differences and read records from one department assuming, or at least implicitly influenced by, very different contexts used in files and records in other departments.

Officers especially worry that social and mainstream media will unfairly "pre-judge" officers accused of misconduct and distort records to fit their judgments, continue using records that were unfounded or "not sustained," or otherwise try and exploit the potential for the public to misunderstand police disciplinary records.[107] Officers also worry about distortion by lawyers, civilians, and other police personnel. Lawyers routinely use disciplinary records to attack officers' credibility, in both court and the media, but officers argue that some infractions disclosed in records and used by lawyers, such as "miss[ing] traffic court or [being] late twice in ninety days" do not reflect on their credibility.[108] Other members of the public may

104. Levine, *supra* note 10, at 866. In Chicago, two Black police officers were disciplined for kneeling in support of Colin Kaepernick and nationwide protests of police treatment of minorities, while uniformed. Katherine Rosenberg-Douglas & John Byrne, *Emanuel Declines to Criticize Police Officers Facing Reprimand for Kneeling*, CHI. TRIB. (Sept. 27, 2017, 6:25 AM), https://www.chicagotribune.com/news/breaking/ct-officers-reprimanded-instagram-taking-the-knee-20170925-story.html [https://perma.cc/R58C-4MLB]. Levine describes how a member of the public looking at one of these officers' disciplinary records would only see vague reports of infractions such as "[f]ailure to be courteous to the public" without any of the context mentioned above. Levine, *supra* note 10, at 865–66.

105. Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 183 (2019); Moran & Hodge, *supra* note 59, at 1259.

106. Levine, *supra* note 10, at 861.

107. Moran & Hodge, *supra* note 59, at 1259. "Most law enforcement agencies label a complaint as 'not sustained' when the agency has determined that the allegations 'cannot be proven true or untrue by a preponderance of the evidence.'" *Id.* at 1259 n.140 (citing U.S. DEP'T. OF JUST. OFF. OF CMTY. ORIENTED POLICING SERVS., STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE § 4.1 (2009), https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf [https://perma.cc/EVL3-WEXM]).

108. Moran & Hodge, *supra* note 59, at 1260.

also use the complaint-making process to advance their personal interests at an officer's expense by either disclosing irrelevant but embarrassing information or filing false complaints.[109] Some officers worry that corrupt police administrators and other officers will abuse the complaint-making process to discriminate against them on the basis of race or sex,[110] or simply out of favoritism, or to get ahead in the police hierarchy at their expense.[111] Other civilians, like officers' ex-spouses[112] or neighbors,[113] could also abuse the complaint-making process for their own benefit in various court proceedings or simply for the joy of embarrassing someone they dislike.[114]

These concerns should be taken seriously by transparency advocates because unjustified reputational damage to officers means an unwarranted erosion in public trust in the police, with all the attendant legitimacy and compliance harms previously discussed.[115] Anxieties regarding abuse of the complaint-making system also unnecessarily distract officers, hinder their job performance,[116] and might deter capable recruits from becoming police officers, thus further restraining the police's ability to preserve public safety. However, these concerns do not justify barring all public access to police disciplinary records. A limited public access regime can ensure confidentiality for information that does more harm than good,[117] and greater transparency may even alleviate some of these concerns. For example, if police officers are aware of the disciplinary measures taken against other officers, they may be able to detect favoritism and corruption that was previously hidden behind confidentiality.[118]

109. *See id.* at 1283–84 (discussing the harm caused by false and unfounded allegations).

110. *See* Levine, *supra* note 10, at 878–79 (describing "biases that pervade the policing profession").

111. *See* Conti-Cook, *supra* note 105, at 183–84 (noting the "corruption, favoritism, and overly broad discretion creating unfairness in the police disciplinary system").

112. Moran & Hodge, *supra* note 59, at 1268.

113. Conti-Cook, *supra* note 105, at 188 n.180.

114. *See* Moran & Hodge, *supra* note 59, at 1268, 1277 (discussing officers' feelings of embarrassment at "having their dirty laundry aired").

115. *See supra* subpart II(A).

116. Moran & Hodge, *supra* note 59, at 1260.

117. *See infra* subpart IV(A).

118. This may be especially useful in large, bureaucratic police departments, where workplace gossip is no match for robust record disclosure.

C. Retrenchment

Law enforcement organizations[119] and scholars[120] have argued that disclosure of police disciplinary records will have a "chilling effect on the complaint-making process and impede police departments from enforcing appropriate standards of police conduct."[121] High levels of organizational solidarity often result in police officers closing ranks behind compatriots who have been accused of misconduct,[122] and knowledge that any disciplinary action taken against an officer will be public (and, therefore, will impose on that officer and on the department a higher reputational cost) might incentivize police leadership to be even more lenient. This is exacerbated by the "us versus them" mentality that many police officers are taught to adopt.[123] Officers, thus, might be more likely to punish misconduct adequately when that punishment is viewed as police holding their own accountable instead of police being subjected to attack by outsiders who do not understand the necessities of policing.[124]

Police retrenchment could lead to more officers not being held accountable for their misconduct, leaving those officers emboldened to engage in further misconduct to the detriment of the public interest.[125] However, there are no data to suggest that an increase in public access to police disciplinary records causes any such retrenchment.[126] And, given the moral reasons that often motivate accountability and punishment, one might be skeptical whether departments that routinely hold officers accountable for misconduct will stop doing so just because the public might access information about the punishment. The benefits of public trust under a

119. *See, e.g.*, City of San Jose v. Superior Ct., 850 P.2d 621, 627 (Cal. 1993) (rejecting assertion by various law enforcement organizations that disclosure of police disciplinary records would have a chilling effect).

120. *See, e.g.*, Levine, *supra* note 10, at 848 (examining the state of disclosure laws and arguing that "forced transparency may lead to further retrenchment on the part of police departments . . . further shrouding disciplinary processes").

121. Bies, *supra* note 84, at 115 (footnotes omitted).

122. *See* Levine, *supra* note 10, at 877 ("Police are already famous for circling the wagons . . . .").

123. *Id.* at 877–78.

124. *Cf.* 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, 524 (2008) ("Police reform efforts are doomed to fail without significant cooperation of the police officers themselves, thus providing further justification for ensuring the participation of rank-and-file officers in police reform efforts.").

125. *See supra* subpart II(B).

126. California and New York, two states that once were the most restrictive with respect to public access to police disciplinary records, recently enacted reforms that significantly increased public access to disciplinary records. Act of Sept. 30, 2021, Cal. Legis. Serv. ch. 402 (West); Act of June 12, 2020, N.Y. Sess. Laws ch. 96 (McKinney). While it may yet be too early to make any inferences from the data, a future study on changes in police behavior in response to these reforms may prove instructive on this point.

transparent regime[127] might also motivate them to punish at an optimal level and assure the public of their commitment to procedural fairness. As for departments that routinely fail to hold officers accountable under confidential regimes, there can be no retrenchment, or only very little retrenchment, due to increases in transparency and public access. Nonetheless, a number of departments might fall on a spectrum between these two extremes and respond with varying levels of retrenchment to varying increases in transparency. The possibility of police retrenchment should be taken seriously, and limited public access can better address these retrenchment concerns than a regime that authorizes essentially complete public access.

D. Safety

Proponents of confidentiality have also emphasized that public access to police disciplinary records creates risks for officers that threaten their physical safety.[128] Police disciplinary records often contain officers' names and other identifying information, and officers worry that civilians might use this information to locate and physically retaliate against them.[129] Officers also worry that civilians and reform advocates may target them for harassment.[130]

Though there is an "almost total absence of data supporting claims of physical harm to officers,"[131] many officers have reported credible threats and accounts of harassment that merit careful consideration by advocates of greater transparency. Officers have reported credible threats of murder from prison gang members and unknown civilians.[132] One officer reported community members threatening the officer's children at their school.[133] In another instance, "people showed up at [a fired officer's] residence."[134] Nonthreatening verbal harassment can also pose a serious risk to officer health. For example, one officer reported that department members had to regularly check on a colleague for "suicide prevention" after that colleague had been the target of public ostracization on social media.[135]

127. *See supra* subpart II(A).

128. Moran & Hodge, *supra* note 59, at 1238.

129. *See id.* at 1281 (describing fear of physical danger invoked by opponents of public access to argue that even officer names should not be disclosed).

130. *See id.* at 1260–61 (reporting alleged threats suffered by police officers after their misconduct records were released).

131. *Id.* at 1281. "Out of 344 respondents across twelve states representing widely varied department sizes and regions of the country, only one identified any physical harm to an officer in their department. This administrator described the harm as '[p]hysical and verbal harassment' with no additional information provided." *Id.* (footnotes omitted).

132. *Id.* at 1260–61.

133. *Id.* at 1261.

134. *Id.*

135. *Id.*

However, while such threats pose a serious risk to officers, they do not justify total opacity. Because a limited public access regime can limit the release of identifying information, a limited public access regime can effectively balance threats to officer safety with the many benefits of public access to police disciplinary records.

IV. Limited Public Access Is Preferable to Essentially Complete Public Access

This Part argues that a limited public access regime is preferable to one with essentially complete public access because limited public access better addresses interests in confidentiality while still accruing substantially the same benefits of increased transparency as essentially complete public access.

A. *Limited Public Access Better Addresses Interests in Confidentiality*

First, this Part outlines general measures to address officer reputation, safety, and retrenchment concerns. Simplifying access to and language used in records will alleviate officer reputational concerns; redacting identifying information will limit threats to officer safety; and settling for limited public access instead of essentially complete public access may limit police retrenchment. Second, this Part argues that the general privacy exemption approach to limited public access can further address officer privacy, reputation, and retrenchment concerns. Courts will likely bar disclosure of information that clearly serves no public interest, and by examining the relevance of off-the-job conduct to alleged misconduct and threats to public safety on a case-by-case basis, courts can more consistently reach a fair balance between a particular officer's privacy and reputation concerns, and the public interest in disclosure. Accountability at the hands of the judiciary instead of the legislative branch might also strike officers as more legitimate and limit police retrenchment. Third, this Part argues that an express qualifications approach based on conduct instead of severity of discipline can further address police privacy and reputational concerns by authorizing public access only if the conduct objectively implicates the public interest in a significant way.

1. General Measures to Address Reputation, Safety, and Retrenchment Concerns.—Certain measures to address interests in confidentiality and certain benefits of limited public access are applicable to both the general privacy exemption and express qualifications approaches. As an initial matter, under both limited public access approaches and even essentially complete public access regimes, simplifying the language used in disclosed records and including detailed, instructive legends may help prevent public misunderstanding and limit the unfair reputational harms that officers worry

about.[136] Simplifying and clarifying these records would also address another major reputational concern of officers, the prospect for media distortion,[137] by making these records more accessible to the public and thus making them less reliant on the media to interpret arcane, technical documents. Simplifying the process of obtaining disciplinary records and making them more easily and quickly accessible, for instance, by using an automatic online form instead of requiring requests to be mailed or e-mailed,[138]might also induce more members of the public to seek out these records themselves rather than rely on the media as an intermediary for disclosure.

Both limited public access and essentially complete access regimes could also further protect officer safety by redacting identifying information, such as officer names, when disclosure of identifying information is unlikely to serve any legitimate public interest. For example, disclosure of identifying information would be warranted when a member of the public requests records relating to a particular officer who engaged in misconduct that recently harmed them. However, when a media organization or advocacy group requests records to investigate general trends in the department, identifying information should not (at least initially) be disclosed. Names and publicly identifiable information, such as badge numbers, should be replaced with uniquely generated codes so people scrutinizing general data can still identify problematic officers who are not being held sufficiently accountable and petition the departments to release identifying information and hold them properly accountable. Though individuals who receive identifying information could turn around and give that information to the media (or the media could recruit such individuals to seek out information in the first place), adding an extra layer of costs for the media at least reduces the threat to officers by some degree. States could also include in limited public access regimes measures to prohibit sharing of information released on such contingent bases.

Pursuing limited public access might stoke less police retrenchment than pursuing essentially complete public access. The anchoring effect, a well-known cognitive bias in negotiation, [139] might provide a means to limit police retrenchment from increases in public access to police disciplinary records. The anchoring effect in the context of negotiation describes the power that

136. *See supra* subpart III(B).

137. *See supra* note 107 and accompanying text.

138. *See, e.g.*, *How to Request Public Information*, TEX. ATT'Y GEN., https://www.texasattorneygeneral.gov/open-government/members-public/how-request-public-information [https://perma.cc/8A88-373L] (explaining how to submit a public information request via U.S. mail, electronic mail, hand delivery, or "any other method approved by the governmental body").

139. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974) (describing how the anchoring effect may skew final values).

first offers hold in defining the limits of negotiation.[140] People are more likely to accept an offer if it is closer to the first offer made in a negotiation.[141] By starting legislative reform negotiations with the public goal of achieving essentially complete public access (while privately intending to achieve only limited public access), and accepting limited public access as a compromise with police advocates and unions, reform advocates might be able to better convince police of the fairness of reform and limit police retrenchment to some degree.

2. General Privacy Exemptions Can Address Privacy, Reputation, and Retrenchment Concerns.—Whether the general privacy exemption adequately addresses interests in confidentiality will depend on the judges and courts called on to interpret the statutory exemption on a case-by-case basis. There are reasons to believe that most courts will interpret the commonly used unwarranted intrusion on privacy language to limit public access in a way that discloses publicly useful information while protecting less useful information that, if released, would intrude on officers' privacy rights, or unfairly harm their reputations. The Supreme Court has indicated that public officials "are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity,"[142] and following such language, lower courts will probably bar disclosure in most cases that clearly implicate officer concerns (such as potential abuse of the complaint-making process to enter irrelevant, embarrassing intimate information about officers' lives into their personnel files and disciplinary records).[143]

However, it is harder to forecast with certainty how courts will respond to information that falls within a gray area between on-the-job misconduct and information that is irrelevant to the public interest. Take for example, as previously discussed, drug use and treatment by officers.[144] The Supreme Court has commented that public officials have strong privacy interests in information relating to drug use and treatment but has nonetheless found the public and governmental interests to outweigh privacy interests in at least one instance and authorized disclosure of such information (via a form

140. *The Anchoring Effect and How It Can Impact Your Negotiation*, PROGRAM ON NEGOT., HARVARD L. SCH. (Nov. 26, 2019), https://www.pon.harvard.edu/daily/negotiation-skills-daily/the-drawbacks-of-goals/ [https://perma.cc/6Y92-TTR7].

141. *See id.* ("Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor.").

142. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 457 (1977).

143. *See supra* subpart III(B).

144. *See supra* note 99 and accompanying text.

questionnaire) to a public employer.[145] However, the general privacy exemption approach's reliance on case-by-case adjudication can ensure more consistently fair outcomes when it comes to the disclosure of such gray-area information by, for example, permitting disclosure in cases where the facts show that drug use played a role in documented misconduct and barring disclosure where it did not (i.e., permitting disclosure where it is found to actually, and not merely hypothetically, advance the public interest).

The judicial role in administering the general privacy exemption approach might also lead to less police retrenchment. Many police officers are taught to adopt an "us versus them" mentality, and police retrenchment in response to reform seeking greater accountability might be due to perceiving reform as an attack by outsiders who do not understand the necessities of policing. Under the general privacy exemption approach, police officers might view accountability measures undertaken by judges as more legitimate than those taken by advocates or legislators because, though judges rarely have policing experience, they are part of the same law enforcement culture as police and have, broadly speaking, the same mission—to enforce the law. Under the general privacy exemption, officers might also view accountability resulting from detached, legalistic judicial scrutiny as more legitimate than legislative reform efforts provoked by public and media campaigns. Depending on the extent of their geographical jurisdiction, judges in smaller or less populous jurisdictions might also have personal relationships with police that further legitimize accountability against any one officer in the eyes of other officers in the department. However, these personal relationships and cultural affiliations might also bias judges in favor of police and make them less likely to authorize record disclosure even where it is warranted.

3. Express Qualifications Can Address Privacy and Reputation Concerns.—The express qualifications approach can also address privacy and reputation concerns, but its capacity to best balance interests in both confidentiality and transparency will vary with the precise qualifications and the basis of qualification (i.e., whether public access is qualified based on conduct described in a report versus the severity of punishment faced by the officer) that a state electing the express qualifications approach chooses to adopt. Some states, like Texas, permit public access to records only if the officer received some minimum—often severe—level of punishment.[146] Other states, like California, limit public access to police disciplinary records

145. *See* Nat'l Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 138 (2011) (holding the government's interests as employer outweighed any assumed privacy interest regarding drug use and treatment).

146. *See supra* note 42 and accompanying text.

based on the conduct that they describe[147] (e.g., in California, public access is mandated if an "officer fired a gun at a person . . . or used force that resulted in serious injury or death"[148]). Though both the Texas and California approaches address officer concerns, the latter approach more efficiently balances interests in confidentiality and transparency.

Under the Texas approach, police disciplinary records are publicly accessible when the public interest in access is high (as evidenced by the severity of punishment, signifying the seriousness of misconduct and its threat to the public). On the other hand, minor infractions like lateness, which might cause privacy and reputational harms despite being of limited interest to the public, will not be disclosed if they are punished only by written reprimand. At first glance, this approach seems to appropriately balance officer and public concerns, but by basing the qualification on severity of punishment, it allows departments to shield wrongdoers from public scrutiny by being lenient, thereby decreasing public trust and reducing accountability.[149] The California approach can similarly balance interests by expressly limiting public access to records where conduct implicates the public interest (as with use of force) and expressly barring disclosure where officer privacy and reputational concerns outweigh the public interest (as with lateness). But by limiting departmental discretion, it ensures the benefits of transparency will not be lost to departments unwilling to hold officers properly accountable.

B. Limited Public Access Accrues Substantial Transparency Benefits

Though accommodating interests in confidentiality in a limited public access regime limits disclosure of some information that would be divulged under an essentially complete public access regime, a limited public access regime designed, as previously described, to protect only information with little relevance to the public interest will still accrue transparency benefits to substantially the same extent as an essentially complete public access regime.

Proponents of essentially complete public access might argue that any decrease in the amount of information disclosed will cause a decrease in public trust in the police. However, by using fair procedures to govern limits on public access to information, a limited public access regime can minimize erosion of public trust in police.[150] The primary benefit of greater public trust is greater legitimacy, and "the primary antecedent of legitimacy is procedural

147. *See supra* note 43 and accompanying text.

148. *Access to CA Police Records*, ACLU OF S. CAL., https://www.aclusocal.org/en/know-your-rights/access-ca-police-records [https://perma.cc/TD9C-3C9S].

149. *See supra* subparts II(A)–(B).

150. *See supra* notes 49–53 and accompanying text.

justice."[151] Under a general privacy exemption approach, promulgation of case law will allow the public to scrutinize procedures to ensure their fairness, and the public will likely find procedures to be fair when only information irrelevant to the public interest is deemed protected. Similarly, under an express qualifications approach, the public availability of these qualifications and the opportunity for the public to participate in their development through the legislative process will bolster the public's trust in the fairness of these procedures. However, if the qualifications are based on severity of discipline and the disciplinary process itself is not public or subject to impartial scrutiny, then the public might assume that the procedures are biased in favor of police,[152] eroding their trust in the police. Thus, an express qualifications approach based on officer conduct would better build public trust while addressing officer concerns.

Additionally, because only minor infractions that do not pose a threat to public safety and officer conduct with no relevance to the public interest will be protected, limited public access regimes can ensure accountability that serves the public interest and disclosure of data that will help advocates and legislators refine reform efforts regarding serious infractions and trends in policing that most worry the public. Under both a general privacy exemption approach and an express qualifications approach (at least one based on conduct), states can ensure public access to records regarding serious issues like use of force and documented racism by officers against members of the public. Limited public access would still allow the public to scrutinize whether departments hold officers accountable and campaign for accountability if they do not; allow other departments to scrutinize records of potential new hires to ensure only qualified persons get hired; and allow advocates, scholars, and legislators to study threats to the public interest from policing in their communities and at a national level. The only information protected under these regimes—minor infractions like lateness and some embarrassing personal details[153]—poses at most a *de minimis* threat to public safety. A pattern of minor infractions might indicate a disregard for public resources or the public interest, but these limited threats to the public interest can be remedied internally through less intrusive means and bear little relevance to issues on the public's reform agenda.

151. *See supra* note 50.

152. *See supra* note 53.

153. *Cf.* Moran & Hodge, *supra* note 59, at 1260, 1283 (describing reports of lateness in misconduct records and treatment of "highly personal and intimate information such as medical, mental health, sexual, [and] financial history").

Conclusion

Recent instances of police brutality have inspired many to call for greater transparency in policing generally, and greater public access to police disciplinary records in particular. These calls are justified by the many benefits of transparency, including greater public trust in police, greater accountability and deterrence against officer wrongdoing, and the potential for more policing data to inform and refine reform efforts. However, greater public access to police disciplinary records also raises concerns about officer privacy rights, undeserved reputational harms, physical safety, and the potential for police retrenchment. By addressing officer concerns without surrendering substantial transparency benefits, limited public access regimes best balance these competing interests in transparency and confidentiality.