



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W

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**U.S. SENATE COMMITTEE ON THE JUDICIARY HEARING ON
"POLICE USE OF FORCE AND COMMUNITY RELATIONS"**

June 16, 2020

My name is Kristen Clarke, and I am the President and Executive Director of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to submit this testimony regarding policing practices and law enforcement accountability. The Lawyers' Committee has been a leader in the battle for equal rights since it was created in 1963 at the request of President Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. Simply put, our mission is to secure equal justice under the rule of law. For more than 50 years, the Lawyers' Committee has worked across the nation to protect and defend the civil rights of African Americans and other people of color in the areas of voting rights, economic justice, education, criminal justice, fair housing. Our Criminal Justice Project works to combat race discrimination and protect equal justice under the law by confronting the ways in which racism infects every stage of our criminal justice system, by challenging laws and policies that criminalize poverty, by promoting access to justice and representation, and by advancing accountability and structural reform of police departments.

The Lawyers' Committee endorses **the Justice in Policing Act of 2020** as an important first step toward reforming how police departments and officers across this country operate. The bill will also make a meaningful contribution to efforts to address the ways in which racism and discrimination affect aspects of policing in our country, causing havoc for African American families and communities of color across the country. Some of the provisions in the bill incorporate legislative proposals that the Lawyers' Committee has endorsed for years. **The End Racial & Religious Profiling Act (Sections 301 and 302 of the Act)** begins the process of creating a comprehensive framework for the identification and elimination of profiling on the basis of actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation, including a provision that enables individuals to sue police departments and officers for engaging in these types of profiling. **The Police Exercising Absolute Care with Everyone Act (Section 364 of the Act)** helps to ensure that policies and rules governing police use of force recognize the dignity of human life. It prescribes sensible limits on the use of deadly force, including so-called "less lethal force," encompassing alternatives such as issuing verbal warnings, engaging in de-escalation techniques, and training officers how to interact with vulnerable people, including people with a disability or who have an impairment. The **PEACE Act** would also make it easier to prosecute federal officers for their unjustified use of force. And at long last, **the Emmett Till Antilynching Act (Sections 401 to 403 of the Act)** makes lynching a federal hate crime in the United States—a prohibition that is hundreds of years overdue. The Act also makes other critical first strides toward police accountability, as discussed in further detail below.

Police accountability is the key to police reform. Without accountability, policing culture will not change. And it must change. For decades, police officers across the country have maintained and reinforced a system that discriminates against African Americans and other people of color, over-criminalizes low-level property and drug crimes, and fails to protect communities of color. Police encounters with African Americans disproportionately result in civil rights violations, and in some tragic circumstances, result in the deaths of Black men and women. As the Committee considers reform legislation, including the Justice in Policing Act, I want to shine a light on the barriers to police accountability that enable and support the type of unconscionable police abuse we have seen in Minneapolis and around the nation. I want to focus the Committee's attention on four key areas: (1) police unions and union contracts; (2) state laws that hinder accountability and block publication of police misconduct; (3) ineffective police

disciplinary structures; and (4) legal doctrines that insulate officers from civil liability. These barriers to accountability result in real-world, catastrophic abuses of power, as they did in Minneapolis, and as they have in so many other violent police responses. Reform across these four areas will stand as a first step in changing the culture and accountability systems in police departments that have historically enabled police brutality, racial profiling, and the erosion of trust with communities of color.

I. THE PROBLEM: POLICE OFFICERS ARE LARGELY UNACCOUNTABLE FOR THEIR MISCONDUCT

Our country has flouted police accountability, prioritizing officers' job security above any other interest. At the state and local level, union contracts block police accountability, state and local laws protect officers from any real consequences, and oversight bodies lack the necessary independence and authority to hold officers accountable. And, judge-made law makes it nearly impossible to vindicate police violations of civil rights in federal courts. Wherever the barriers reside in a particular state or jurisdiction, these features of our system feed a brazen culture of police impunity.

A. POLICE UNIONS AND UNION CONTRACTS LOCK IN BARRIERS TO ACCOUNTABILITY

Police unions, focused primarily on protecting the job security of officers, have crippled the ability of police departments, local governments, and the public to investigate, discipline, and hold accountable officers who engage in misconduct.

Some police union contracts block an investigation before it can even begin. Many contracts disqualify complaints that were filed, or investigations that were initiated "too long" after the alleged misconduct occurred. The Omaha police union's contract, for example, prohibits any disciplinary action (except for criminal activity) unless imposed within 100 days of the incident itself.¹ But "too long" in the eyes of a contract may be nowhere near enough time for a civilian to file a formal complaint, let alone the time needed to investigate a complaint. And if a complaint is disqualified, an investigation process cannot even start.

When an investigation *does* start, these contracts trigger delay mechanisms that give officers information and time to prepare an explanation. These contracts guarantee officers that they will not be questioned about potential misconduct until at least two (and sometimes more) days after the incident.² Unlike civilians accused of crimes, these contracts also often guarantee officers accused of misconduct a summary of the allegations against them (and sometimes disclosure of *all* of the evidence collected) before they put a statement on the record.

¹ Agreement Between the City of Omaha, Nebraska and the Omaha Police Officers Association (in effect through December 26, 2020), Art. 6 Sec. 6, at 12, https://hr.cityofomaha.org/images/stories/public_documents/union_contracts/031517_Police_Labor_Agreement-final.pdf.

² Police Union Contract Project, CAMPAIGN ZERO, <https://www.checkthepolice.org/>.

These delay mechanisms matter. If interviewed immediately, officers cannot sit down with one another and collude to get their stories straight. If interviewed immediately, officers cannot explain away evidence they might not know about, such as video evidence showing their misconduct, or devise some explanation for why their actions were supposedly justified. Together, these delay mechanisms give officers a time and information advantage that corrupts the investigatory process and undermines accountability and oversight processes.³

Even in the rare event that an officer is disciplined or terminated from the force, these contracts often guarantee review by an arbitrator (or another party) who can reverse disciplinary decisions and reinstate a fired employee.⁴ Over half of union contracts studied in one analysis give either officers or the union substantial power in selecting that arbitrator.⁵ Chicago, for example, has a list of acceptable arbitrators embedded in the union contract itself.⁶ It should not be a surprise, then, that about a quarter of officers fired ultimately get that decision overturned and make their way back onto the force.⁷ The number is even higher in some cities, with Philadelphia being forced to rehire over 60 percent of terminated officers.⁸

When terminated officers make their way back to the force, the allegations of misconduct against them may end up getting expunged from their personnel files. Chicago's union contract, for example, provides that even if an officer is found to have engaged in misconduct, but is not disciplined for that misconduct, that finding must be removed from the officer's file within a year.⁹

In the rare case in which an officer is sued civilly for conduct on the job and the civilian is able to break through the shield of qualified immunity—*see* Section I.D. below—that officer is most likely not going to be the one footing the bill. Chicago's union contract, for example, indemnifies officers from most civil judgments against them, which means that the city pays the bill for the rare civil lawsuit that holds an officer liable for misconduct.¹⁰ Research confirms that offending officers almost never have to pay the judgments against them.¹¹ These contract provisions provide financial immunity, providing no incentive to police officers to conform their conduct to the law.

³ *Id.*

⁴ Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 579 (2019).

⁵ *Id.* at 574.

⁶ *Id.* at 575.

⁷ *Id.* at 579.

⁸ *Id.* at 580.

⁹ Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, Eff. July 1, 2012, through June 30, 2017, Art. 8 Sec. 8.4, at 10, https://www.chicago.gov/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement3/FOPCBA2012-2017_2.20.15.pdf. The police union lists this as the “current” contract. *See* Fraternal Order of Police Chicago Lodge 7, Contracts, <http://www.chicagofop.org/contract>.

¹⁰ *Id.* Sec. 22.1 *et seq.*

¹¹ *See, e.g.,* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 3 (2014).

All of these limitations on holding police accountable are commonly found in union contracts. A survey of 81 of the country's 100 largest cities' police union contracts shows serious barriers to accountability across the United States, including many of those described above, ranging from disqualification of certain complaints to restrictions on the interrogation of officers who allegedly engaged in misconduct to erasure of misconduct records.¹² Nearly 90 percent of the contracts analyzed imposed at least one barrier to accountability.¹³ Over 75 percent of the contracts analyzed imposed three or more barriers to accountability.¹⁴

Police unions obstruct accountability in other ways, as well. The Philadelphia police union, for example, sued District Attorney Larry Krasner for collecting and implementing a “do not call” list of officers who have engaged in misconduct, meant to keep dishonest officers from testifying in criminal cases.¹⁵ Police unions across California also sued after the passage of a state law that made some records of misconduct open to public inspection.¹⁶

These protections from consequences from police unions and union contracts have real-world consequences on communities of color. Chillingly, recent research has shown that police unionization is associated with increased violence by the police force, even when controlling for other variables.¹⁷ In particular, police unionization is associated with an increase in civilian deaths, which are disproportionately Black men and women.¹⁸

B. STATE LAWS PUSHED BY POLICE UNIONS FURTHER HINDER POLICE ACCOUNTABILITY AND HIDE POLICE MISCONDUCT RECORDS

Similar barriers to police accountability have been embedded in state statutes. At least 14 states have passed a so-called “Law Enforcement Officers’ Bill of Rights,”¹⁹ a set of laws pushed by police unions and designed to hinder investigations of law enforcement officers who may have engaged in misconduct, including police brutality. As a growing volume of legal scholarship and media analyses has concluded, these laws provide “unreasonably protective

¹² Police Union Contract Project, n.2, *supra*.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Robert Moran, *Court rejects FOP suit against Krasner on police “misconduct” list*, PHILA. INQUIRER (Aug. 23, 2019), <https://www.inquirer.com/news/krasner-fop-lawsuit-police-misconduct-20190824.html>.

¹⁶ *See, e.g.,* Bob Egelko, *Court upholds broad release of police misconduct records in California*, S.F. CHRON. (Apr. 2, 2019), <https://www.sfchronicle.com/bayarea/article/Court-upholds-broad-release-of-police-misconduct-13733312.php>.

¹⁷ Dhammika Dharmapala, Richard H. McAdams, & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, UNIV. OF CHICAGO COASE-SANDOR INST. FOR LAW & ECON., Research Paper No. 831; UNIV. OF CHICAGO PUB. LAW & LEGAL THEORY, Working Paper No. 655 (Aug. 2019), <https://ssrn.com/abstract=3095217> (finding that conferring collective bargaining rights on sheriffs’ deputies was associated with about a 40 percent increase in violent incidents).

¹⁸ Cardiff Garcia & Stacey Vanek Smith, *Police Unions and Civilian Deaths*, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/869176943/police-unions-and-civilian-deaths>.

¹⁹ Eli Hagler, *Blue Shield*, THE MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield#.Etqk3UTYF>.

procedures” that tend to “thwart[] reasonable accountability and oversight.”²⁰ Or, as criminal justice professor Samuel Walker, an expert in police accountability, has put it, these laws are “a scandal.”²¹

Among other restrictions on fair investigations of officer misconduct, these laws prohibit the disciplinary investigation of a complaint of police brutality unless the complaint is first signed and sworn to under penalty of perjury by the victim, the victim’s family, or a witness.²² Mirroring similar provisions in union contracts, these laws intimidate civilians and delay the start of an investigation. Moreover, the signed, sworn-to complaint must be made within a limited period of time. In Maryland, for example, at the time of Freddie Gray’s death at the hands of police in 2015, state law required such a complaint to be filed within 90 days following an incident of police brutality; otherwise, no disciplinary action could be commenced. (Maryland amended the law in 2016 to allow up to a year for a complaint to be filed.)²³

Another legal provision similar to elements in union contracts, state laws typically allow officers to delay their interviews with internal investigators for several days, presumably to obtain legal counsel, affording the officers involved ample time to conform their statements to the existing evidence and agree on a matching version of events.²⁴ In non-criminal, disciplinary hearings, before any internal interview of an officer for misconduct, the law enforcement officer under investigation must be informed in writing of the nature of the investigation.²⁵ These laws also commonly require that an officer may be questioned only for a “reasonable” length of time, at a “reasonable hour,” preferably while the officer is on-duty, and by only one or two investigators, who must themselves be fellow policemen.²⁶

These laws also foreclose any truly independent inquiry of police misconduct by requiring fellow officers to conduct the disciplinary investigation, rather than, for example, a civilian review board.

Police unions claim that these so-called “protections” put officers on equal footing with civilians accused of crimes. But this claim is misleading. When accused of *criminal* conduct, officers have the same rights as any other person in this country. But when subject to an internal investigation for potential employee discipline, police officers are protected in ways that are almost unimaginable in the context of any other profession. These laws neuter the ability of

²⁰ Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 562 (2019). *See also* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005); Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213.

²¹ Hagler, n.19, *supra*.

²² *See, e.g.*, MD. CODE ANN., Public Safety § 3-104 (2016).

²³ *See* Pub. Safety and Policing Workgroup--Recommendations, H.B. 1016, Ch. 519, § 3-104 (Md. 2016).

²⁴ Maryland law originally allowed a ten-day delay. In 2016, it was amended to five days, and the chief may extend that period of time. *See id.* In Louisiana, state law allows officers up to 30 days to secure counsel before investigators can interview them about alleged misconduct. *See* LA. STAT. ANN. § 40:2531(4)(a) (2017); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 562 (2019).

²⁵ Hagler, *Blue Shield*, n.19, *supra*. *See, e.g.*, MD. CODE ANN., Public Safety § 3-104 (2016).

²⁶ *Id.*

police departments, local government, and the public to meaningfully investigate and discipline serious misconduct by their officers.

The disciplinary process is so burdensome that departments often cannot afford to dedicate the time and resources necessary to see it through. Even for serious police misconduct, such as police brutality, often the internal employee disciplinary investigation is the *only* type of investigation that takes place. These obstacles to internal disciplinary actions allow repeat offenders—like the officer who killed George Floyd—to remain on the force, sending the message that officers are indeed above the law, no matter how serious their crimes, and further protecting officers through a police culture of impunity.

In addition to hindering the fair investigation of police misconduct, many state laws prohibit the public disclosure of misconduct complaints. In 23 states and the District of Columbia, a police officer’s disciplinary history is almost wholly unavailable through public records requests.²⁷ In another 15, records are available only in limited ways. In the remaining 12, records are technically deemed “public,” though the official classification is misleading. In those few states that permit public disclosure of police disciplinary records, many still do not disclose complaints that did not result in discipline—complaints that would include 16 of the 17 complaints against the officer who killed George Floyd. And in some states, like Maryland, those records may never be disclosed, as an officer may have such complaints purged after three years.²⁸

The result of these laws, even in the states with the most liberal disclosure policies, an officer can evade public scrutiny (or scrutiny by another police department considering whether to hire that officer) as long as the reviewing body or some appellate body declines to sustain a finding of misconduct.

The **Justice in Policing Act** takes important first steps towards collecting and publicizing officers’ records of misconduct and state certification (or lack thereof), but we can and must do more to stop problem officers from staying on the force or from getting hired by a different police department. **Sections 201 and 202** of the Act, for example, together provide for a national registry that would track misconduct allegations across the country and require states to ensure that its officers meet certification requirements. These are critical steps forward, as they work against the secrecy of misconduct allegations and against the problem of officers moving from one department to another, with no consistent tracking of their misconduct. Section 201 is particularly powerful because it requires tracking of alleged misconduct that did not result in discipline, which addresses some of the problems arising from jurisdictions without an independent review process. The national database proposed, however, breaks down misconduct allegations for one category, use of force. While important, officer use of force is only one category of many types of misconduct. In addition to officers who assault and kill, there are officers who lie, engage in domestic violence at home, manipulate witnesses, and fail to follow

²⁷ WNYC, *Is Police Misconduct a Secret in Your State?*, <https://project.wnyc.org/disciplinary-records/>.

²⁸ See MD. CODE ANN., Public Safety § 3-110 (2010).

up with victims, to name a few examples. To have real impact on officer behavior and the hiring and firing decisions of police departments, all types of misconduct must be tracked and publicized, not just use of force. And of course, that an officer meets state certification requirements may not tell us much at all if those requirements are not independently created and monitored by external people and organizations.

C. COMPLAINT PROCESSES ARE TAINTED AND DO NOT IMPOSE MEANINGFUL DISCIPLINE

Police unions and union-supported laws contribute to another barrier to accountability and, therefore, a culture of impunity: review processes that are either run by police departments themselves, by complaint boards that are staffed with officers, or by boards that have no real authority to impose discipline.

In some jurisdictions, police departments are themselves responsible for resolving complaints of misconduct—without any input from civilians at all.²⁹ Indeed, some state laws explicitly forbid independent inquiry into police misconduct.³⁰

In others, supposedly independent review boards exist outside the formal police department structure.³¹ But these purportedly independent review boards may include officers as panel members. Sometimes, these panel members, while not themselves police employees, are nonetheless selected by the chief of police.

In still others, truly independent civilian review boards weigh in on police misconduct, but they lack teeth.³² In most, the police chief is free to ignore the board's finding of misconduct and to impose no discipline—and this power is regularly exercised. In New York, for example, in 2012, the police department followed the civilian review board's recommendation in less than 10 percent of cases.³³

Regardless of their structure, across the nation's 50 biggest police departments, few complaint boards have any disciplinary authority at all, and instead just make recommendations back to the police departments, which are free to disregard those recommendations. Minnesota's law, for example, provides that "[a] civilian review board, commission, or other oversight body shall not have the authority to make a finding of fact or determination regarding a complaint against an officer or impose discipline on an officer."³⁴

The **Justice in Policing Act** would provide greater clarity on what an independent review board must look like to hold officers accountable, but should go further. The Act takes many of

²⁹ Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1042 (2016)

³⁰ See, e.g., Minn. Stat. Ann. § 626.89, subd. 17.

³¹ Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, n.29, *supra*, at 1053.

³² *Id.*

³³ *Id.* at 1047.

³⁴ MINN. STAT. ANN. § 626.89, subd. 17 (2012).

the first steps required to define what meaningful oversight looks like by a review board, including subpoena power, community diversity, and the power to convene hearings. These features give teeth to review boards, embed these boards in local communities, and work against barriers to police accountability. More is needed. For example, in defining the features of a civilian complaint board, the definition from **Sections 104 and 114** omits the requirements that the board (1) be staffed only by civilians, with no police presence, (2) prohibit the police department or chief from either choosing or recommending board members, or (3) be empowered to impose discipline. While **Section 104** authorizes funding to support independent *criminal* investigations of police misconduct (including civilian complaint boards), it does not address disciplinary investigations crucial to holding officers accountable—including improving policing and removing dangerous officers from a police force. More work remains to be done to improve police departments’ internal disciplinary investigations, and federal reforms can only do so much without meaningful reform of the role of police unions and their influence on barriers to police accountability.

Most jurisdictions provide yet another escape for officers seeking to evade disciplinary action: even if they are initially determined to have committed misconduct, the officers may have those decisions overturned through arbitration, appeals to a different review panel, or other administrative-law mechanisms.³⁵ Some jurisdictions are bound to offer this escape by virtue of union contracts; others offer this avenue through statutory or regulatory law.

The District of Columbia is an example of a jurisdiction with both statutory timeframes on the duration of investigations *and* administrative-law remedies for disciplined officers, which together have put problem officers back on the streets after unconscionable behavior. By statute, the District of Columbia requires that the department initiate disciplinary proceedings within 90 days of learning of the alleged misconduct.³⁶ Because of these protections, after firing approximately 20 officers for serious misconduct—including allegations of domestic violence, extorting a former romantic partner with sexually explicit photographs, and lying about interactions with a sex worker—the District of Columbia was forced to *rehire* those problem officers after they sued in administrative proceedings.³⁷ This reinforces the culture and practice of the department that enabled the misconduct to happen in the first place.

D. OUTSIDE THE DISCIPLINARY PROCESS, THE JUDGE-MADE DOCTRINE OF “QUALIFIED IMMUNITY” PREVENTS POLICE ACCOUNTABILITY THROUGH THE COURTS

While police union contracts and state laws insulate officers from internal employee-discipline accountability measures, still other barriers prevent accountability through the civil

³⁵ See, e.g., D.C. CODE § 1-606.03 (2004) (providing fired officers the right to appeal a decision to the Office of Employee Appeals).

³⁶ D.C. CODE § 5-1031 (2015).

³⁷ Alan Suderman, *Misfired*, WASH. CITY PAPER (Feb. 1, 2013), <https://www.washingtoncitypaper.com/news/article/13043652/misfired-the-dc-government-fired-then-re-hired-then-fired>.

courts, denying justice for the victims of police brutality. When victims of police misconduct seek redress in federal courts, the judge-made doctrine of “qualified immunity” blocks them at almost every turn.

Under federal law, qualified immunity shields police officers from civil liability if their conduct does not violate “clearly established” rights of which a reasonable person would have known.³⁸ The doctrine was created by judges, not Congress, in an attempt to balance “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”³⁹ Over time, however, the Supreme Court has increasingly struck that balance in favor of shielding officers, so much so that now, the doctrine is not just a shield against “harassment, distraction, and liability” for reasonable conduct, but a protection against almost any accountability whatsoever.

A victim of police abuse may succeed in holding an officer accountable in court only if another court has already “clearly established” that the same misconduct in the same context violated an individual’s rights.⁴⁰ In excessive force cases, where the result always “depends very much on the facts of each case,”⁴¹ this requirement for exactness in matching an officer’s misconduct with facts previously considered by a court in a different case will almost always be unattainable. In one recent case, for example, a court held that a police officer had qualified immunity after shooting a 10-year-old boy in the child’s backyard while pursuing an unarmed suspect. The officer was shooting at the nonthreatening family dog and shot the child, who was obeying orders to lie on the ground.⁴² In another case, an officer was granted immunity after releasing a police dog on a man who sat with his hands raised over his head.⁴³ These are but two examples of how, as Justice Sotomayor has recognized, qualified immunity has now been transformed into an “absolute shield” against officer accountability.⁴⁴

The legal support for qualified immunity has never been strong,⁴⁵ and judges and scholars across the ideological spectrum—conservatives and liberals alike—now question the doctrine’s legitimacy.⁴⁶ It is time Congress acted to remove this legally and morally unjustified barrier to police accountability.

³⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁹ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted).

⁴⁰ *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (“Use of excessive force is an area of the law ‘in which the result depends very much on the facts of each case,’ and thus police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.”).

⁴¹ *Id.*

⁴² Robert Barnes, *Supreme Court asked to reconsider immunity available to police accused of brutality*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-asked-to-reconsider-immunity-available-to-police-accused-of-brutality/2020/06/04/99266d2c-a5b0-11ea-b473-04905b1af82b_story.html (collecting qualified immunity cases the Supreme Court currently is considering for argument next term).

⁴³ *Id.*

⁴⁴ *Kisela*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting).

⁴⁵ See William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46 (2018).

⁴⁶ See *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., dissenting) (“Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence.”); Robert Barnes, *Supreme Court asked to reconsider immunity available to police accused*

Section 102 of the Justice in Policing Act does just that, eliminating qualified immunity for some types of law enforcement officers (i.e., state and local law enforcement and correctional officers). Similarly, in the criminal law context, **Section 101** would permit fewer officers to escape accountability by allowing the prosecution not only of officers who act “willfully” to violate an individual’s civil rights, but officers who act recklessly, as well.

II. LACK OF ACCOUNTABILITY MEASURES IN ACTION: THE KILLING OF GEORGE FLOYD AND THE MINNEAPOLIS POLICE DEPARTMENT

Minneapolis provides just the latest example of how these barriers to police accountability predictably lead to unconscionable results. From a union contract that obstructs accountability, to a review board tainted by police membership, to an arbitration process that results in officers who have committed serious misconduct back on the force, Minneapolis is a case study in the absence of any meaningful accountability measures for police.

A. BACKGROUND: GEORGE FLOYD, HIS KILLERS, AND THE POLICE UNION

The union for the Minneapolis police department has circled the wagons around the four officers involved in George Floyd’s death, with the union’s president—a man with allegations of bias and misconduct himself—speaking forcefully against their termination.⁴⁷

Derek Chauvin, one of the officers charged with Floyd’s murder, has a long history of misconduct allegations. Though Chauvin had 17 complaints filed against him in the last 15 years,⁴⁸ the police department issued discipline (a mere letter of reprimand) in just one of them.⁴⁹ The substance of the complaints for which Chauvin was *not* disciplined remains largely shielded from public view.⁵⁰

of brutality, WASH. POST (June 4, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-asked-to-reconsider-immunity-available-to-police-accused-of-brutality/2020/06/04/99266d2c-a5b0-11ea-b473-04905b1af82b_story.html; George F. Will, *This doctrine has nullified accountability for police. The Supreme Court can rethink it.*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html.

⁴⁷ Brandt Williams, *Minneapolis police union head signals fight for fired officers’ jobs*, MINNESOTA PUBLIC RADIO NEWS (June 2, 2020), <https://www.mprnews.org/story/2020/06/02/minneapolis-police-union-head-signals-fight-for-fired-officers-jobs>.

⁴⁸ Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

⁴⁹ MPD [Minneapolis Police Department] Internal Affairs Summary, Derek Chauvin, <http://www.ci.minneapolis.mn.us/www/groups/public/@mpd/documents/webcontent/wcmssp-224705.pdf>.

⁵⁰ Todd Richmond, *Minneapolis cop Derek Chauvin’s work, personal background detailed; had nearly 20 complaints and two letters of reprimand*, THE MERCURY NEWS (May 30, 2020), <https://www.mercurynews.com/2020/05/30/minneapolis-officers-work-personal-background-detailed-2/> (explaining what while some of Chauvin’s prior alleged misconduct got media attention, Minneapolis’ official public records “don’t include any details on the substance of the complaints”).

Bob Kroll, the union president, has a long history of misconduct allegations, with approximately 20 complaints as of 2015, for which he was disciplined in only three.⁵¹ As with Chauvin, the substance of the vast majority of Kroll's complaints remain shielded from public view. Long before George Floyd's death, Kroll also allegedly called the current Attorney General of Minnesota, Keith Ellison, a terrorist and made disparaging comments about a gay government employee.⁵² Kroll also allegedly wore a white-power patch on his uniform, was a member of a motorcycle group associated with white supremacists, and supported three off-duty officers working security when they walked off the job at a WNBA game because players wore Black Lives Matters jerseys when warming up.⁵³ Kroll also sidestepped the Minneapolis Mayor's ban on "warrior"-style police training by contracting for this military-style training for union members for free—reinforcing a militaristic, "us vs. them" culture within the department.⁵⁴

B. HOW MINNEAPOLIS GOT HERE: THE UNION CONTRACT WITH THE CITY, OPEN-RECORDS LAWS, A COMPLAINT REVIEW PROCESS THAT INCLUDES OFFICER-REVIEWERS, AND ARBITRATION THAT REVERSES TERMINATION DECISIONS

One reason why both Chauvin and Kroll faced so many complaints and so little discipline is because of the contract negotiated by the union,⁵⁵ which imposes many of the barriers to accountability that exist in departments across the country. In Minneapolis, only about 1 percent of all complaints even get entered on officers' personnel files because of the protections negotiated by the union.⁵⁶ As is the case with many union contracts, the Minneapolis contract also enables officers to go to arbitration to try to reverse any disciplinary decisions.

Beyond the union contract, statutory barriers exist in Minnesota that keep allegations of misconduct hidden from public view and from other police agencies making hiring decisions. Minnesota's personnel records law requires disclosure of underlying data and documentation

⁵¹ Libor Jany, *Controversy follows Minneapolis police union president*, STAR TRIBUNE (Dec. 11, 2015), <https://www.startribune.com/controversy-follows-minneapolis-police-union-chief/361517061/?refresh=true>.

⁵² Samantha Michaels, *Minneapolis Police Union President Allegedly Wore a "White Power Patch" and Made Racist Remarks*, MOTHER JONES (May 20, 2020), <https://www.motherjones.com/crime-justice/2020/05/minneapolis-police-union-president-kroll-george-floyd-racism/>.

⁵³ Randy Furst, *Minneapolis cops working Lynx game walk out over player comments, warm-up jerseys*, STAR TRIBUNE (July 12, 2016), <https://www.startribune.com/minneapolis-cops-working-lynx-game-walk-out-over-player-comments-warm-up-jerseys/386373171/>.

⁵⁴ Libor Jany, *Minneapolis police union offers free "warrior" training, in defiance of mayor's ban*, STAR TRIBUNE (Apr. 24, 2019), <https://www.startribune.com/minneapolis-police-union-offers-free-warrior-training-in-defiance-of-mayor-s-ban/509025622/>.

⁵⁵ The City of Minneapolis and the Police Officers' Federation of Minneapolis Labor Agreement, January 1, 2017, through December 31, 2019 (still in effect as of June 9, 2020), <http://www.minneapolismn.gov/www/groups/public/@hr/documents/webcontent/wcmssp-200131.pdf>.

⁵⁶ Melissa Segura, *There's One Big Reason Why Police Brutality Is So Common in the US. and That's the Police Unions*, BUZZFEED NEWS (June 2, 2020), <https://www.buzzfeednews.com/article/melissasegura/police-unions-history-minneapolis-reform-george-floyd>.

only for police complaints that were both sustained and resulted in disciplinary action.⁵⁷ For complaints that were either not sustained or that resulted in no discipline, the law requires disclosure only of the “existence” of a complaint (apparently not even requiring disclosure of the *nature* of the complaint, such as police brutality, as long as no discipline was imposed).⁵⁸ With a complaint process that is anything but neutral—and that tilts in favor of not disciplining officers—this provision means that potential misconduct is hidden almost completely from public view. As a result, determining whether an officer has a history of alleged misconduct, or learning the type of misconduct in which the officer allegedly engaged, is not an easy task.

Chauvin’s public disciplinary record is a good example of the barriers created by the union contract and statutory protections: of the 16 complaints listed on the Minneapolis website summarizing Chauvin’s internal-affairs investigations that did not lead to discipline, not a single one lists the nature of the alleged misconduct.⁵⁹ Had Minneapolis newspapers not covered three prior high-profile shootings in which Chauvin was involved,⁶⁰ we would be left with the city’s publicly available summary of his record and the misimpression that Chauvin had never before assaulted or attacked a civilian. And had his full record been available to the public, Chauvin could have been flagged as an officer who needed additional oversight and training—or who perhaps did not belong on the force at all.

Minneapolis city law also injects barriers to accountability into the process of reporting and investigating misconduct. Per city ordinance,⁶¹ no complaint will even be processed more than 270 days after the alleged misconduct, unless extenuating circumstances exist. And despite its classification as a neutral agency, the Office of Police Conduct Review—the governmental body tasked with investigating allegations of misconduct—convenes panels in which two of the four reviewers currently serve on the Minneapolis police force and are selected by the chief of police. The remaining two are civilians. Either a civilian or a police employee is assigned to investigate the complaint. The panels then submit recommendations, not decisions, to the chief, who has ultimate authority on discipline.⁶²

Even the police chief’s disciplinary power is limited by a union-negotiated arbitration clause. Per the union contract, the chief’s determination to impose any discipline may be reversed in arbitration. In one instance, an arbitrator reversed the chief’s decision to fire an officer based in part on the testimony of union president Bob Knoll himself—the same person

⁵⁷ MINN. STAT. ANN. § 13.43, subd. 2(a)-(b) (2015).

⁵⁸ MINN. STAT. ANN. § 13.43, subd. 2(a)(4) (2015).

⁵⁹ MPD [Minneapolis Police Department] Internal Affairs Summary, Derek Chauvin, n.49, *supra*.

⁶⁰ Derek Hawkins, *Officer charged in George Floyd’s death used fatal force before and had history of complaints*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/> (collecting Minneapolis area news stories about Chauvin).

⁶¹ MINNEAPOLIS, MINN., CODE OF ORDINANCES, Police Conduct Oversight, Tit. 9, Ch. 172.10 *et seq.* (2012), https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT9FIPOPR_CH172POCOOV.

⁶² *Id.*

with at least 20 allegations of misconduct on his record and allegations of ties to white supremacy.⁶³

These barriers have had a real impact on efforts to discipline officers in Minneapolis. Since 2012, only a dozen cases initiated by citizens have resulted in any discipline.⁶⁴

Since just 2015, Minneapolis officers have rendered people unconscious with neck restraints nearly 50 times.⁶⁵ The department claims that these types of restraints are neither officially taught nor sanctioned,⁶⁶ which underlines the corrupting power of culture and practice in a police force that lacks any meaningful systems to execute official policy. Because of these barriers to accountability, the culture infecting the Minneapolis police department remains unchanged. Chauvin was permitted to remain on the force, leading to his deadly encounter with George Floyd. Bob Kroll was permitted to remain on the force, to actively fight against efforts to hold his colleagues accountable, and to maintain the culture in the Minneapolis department that led to Floyd's death.

Minneapolis is only now starting to meaningfully grapple with these obstructions to accountability and the department's culture of impunity, with the city council voting over the weekend to dismantle the department as it currently exists.⁶⁷

III. THE BARRIERS TO POLICE ACCOUNTABILITY ARE A THREAT TO OUR DEMOCRACY

This country has reached a critical moment for policing reform. We will never achieve racial equity and equal justice in this country until we break down the barriers to officer accountability. The misconduct and crimes of law enforcement officers—which these pernicious laws and police union contracts make harder to investigate and prosecute—are among those acts most destructive to our society, to the rule of law, and to the sustainability of our democracy. To understand the existential threat posed to the United States by crimes committed by police under color of law, one need look no further than the outpouring of moral outrage among American citizens in recent days. That moral outrage has been expressed by people of all races and ages, demonstrating widespread support for fundamental change. Do not let this moment pass.

⁶³ *17-1 ARB ¶ 6807 Police Officers Federation of Minneapolis and City of Minneapolis*, Lab. Arb. Awards 17-1 ARB P 6807 (C.C.H.), 2016 WL 7840758 (Oct. 6, 2016) (relying in part on testimony from Kroll himself and lack of sustained findings from officer's other complaints of misconduct to reverse chief's termination decision).

⁶⁴ Lazaro Gamio & Richard A. Opper, Jr., *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html?fbclid=IwAR0N4iLXZj1G_IY_sM2fbArwgyzuguRwH3Ep7KTl4Sy7DbiOjNp2qUe4-JM.

⁶⁵ Andrew Blankstein, Andrew W. Lehren, & Emily R. Siegel, *Minneapolis police rendered 44 people unconscious with neck restraints in five years*, NBC NEWS (June 1, 2020), <https://www.nbcnews.com/news/us-news/minneapolis-police-rendered-44-people-unconscious-neck-restraints-five-years-n1220416>.

⁶⁶ *Id.*

⁶⁷ John Eligon & Dionne Searcey, *Minneapolis Will Dismantle Its Police Force, Council Members Pledge*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/minneapolis-police-abolish.html>.

When the American people take to the streets and cry, “No justice, no peace!” they are testifying to a fundamental human truth. It is carved into the stone walls of the building that houses our nation’s Department of Justice that “Justice alone sustains society,” that “Justice is the great interest of mankind” and the “foundation for social security.”⁶⁸ As the Reverend Dr. Martin Luther King, Jr., said: “True peace is not merely the absence of tension: it is the presence of justice.”⁶⁹

When police cannot be held accountable; when they are effectively immunized from the very laws that they are entrusted to enforce; when they beat and kill the people they are supposed to protect, and can do so without accountability, there can be no justice.

⁶⁸ U.S. Dept. of Justice, *The Robert F. Kennedy Building, Celebrating Art and Architecture on the 75th Anniversary* 47, 79, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/30/75RFKBuilding.pdf>.

⁶⁹ Nat’l Park Service, *Martin Luther King, Jr. Memorial, Quotations*, <https://www.nps.gov/mlkm/learn/quotations.htm>.