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A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public

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A NEW BALANCE: WEIGHING HARMS OF HIDING POLICE MISCONDUCT INFORMATION FROM THE PUBLIC

Cynthia H. Conti-Cook[†]

ABSTRACT

Three New York City events in the past two years have demonstrated how hiding information related to police misconduct harms its residents. In April 2016, the New York Police Department (“NYPD”) eliminated public access to misconduct information by taking down a clipboard in the Deputy Commissioner of Public Information’s office that posted disciplinary summaries and removing decades worth of archives of those same summaries from City Hall. In September 2017, an Administrative Law Judge employed by the NYPD closed from the public a courtroom where a former officer was about to be impeached with his prior disciplinary record. In April 2018, four plainclothes police officers shot Mr. Saheed Vassell dead in broad daylight. The Mayor and Police Commissioner

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never named these officers, while the NYPD aggressively sought to manipulate public opinion towards a conclusion that the officers' shooting was justified and more generally that NYPD officers are restrained in using violence against unarmed civilians.

This article argues that police privacy protections enacted in state statutes across the country cause greater harm to individuals, public trust in justice systems, and democratic decision-making than access to police misconduct information harms individual police officers. People harmed by hiding police officer misconduct include families who lost loved ones to police violence, communities uncertain if dangerous officers are still a threat, and everyone who witnesses how impossible it seems to hold officers accountable. These harms spread across cities and states and are passed down through generations.

Previously prioritized police privacy concerns will be examined closely and weighed carefully in relation to the actual harms they can cause. A new balance will conclude that the harms caused by police privacy protections to the public significantly outweigh transparency's potential harm to police officers' privacy.

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INTRODUCTION

“Not everything that is faced can be changed; but nothing can be changed until it is faced.”- James Baldwin¹

This Article was written from the “blackout” of police misconduct information in New York City.² The state of police misconduct in late 2018 has been fueled by the New York Police Department’s (NYPD) broad interpretation of Civil Rights Law section 50-a and was recently adopted by a majority of New York’s highest court.³ In the past two years, the City of New York removed decades of police disciplinary information from publicly accessible City Hall archives,⁴ closed a public courtroom to mask a former officer’s police disciplinary record,⁵ and allowed officers who killed Saheed Vassell in broad daylight to remain nameless and faceless.⁶ These decisions have been justified by strict allegiance to New York State’s Civil Rights Law section 50-a, a law built on police claims to privacy. The City’s fidelity to 50-a—despite the harm that hiding police information does to all New Yorkers, especially families and communities of people directly harmed by police violence—is a result of its own failure to weigh these harms against claims of police privacy rights. This article discusses the harms of hiding police misconduct information, in the events above, in reverse chronological order, starting with the recent 2018 police killing of Saheed Vassell. The purpose of balancing the harms to the community from secrecy against harms to police from publicity is to facilitate comparisons between these competing tensions. Rather than

¹ James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES BOOK REV., Jan. 14, 1962, at 38.

² Daily News Editorial Board, *NYPD in View: Police Records Must Be Made Public*, N.Y. DAILY NEWS (Dec. 17, 2018, 4:10 AM), <https://perma.cc/AC4V-E5LS>.

³ *Id.*; see NYCLU v. NYPD, No. 133, 2018 WL 6492733 (N.Y. Dec. 11, 2018).

⁴ Verified Answer, *Luongo v. Records Access Officer at 3*, No. 6316 160232/2016 (N.Y. Sup. Ct. Mar. 15, 2017) (admitting history of public availability at NYPD headquarters and City Hall library); *Luongo v. Records Access Appeals Officer*, 2019 WL 237463 (N.Y. App. Div. Jan. 17, 2019) (affirming denial of author’s demand for release of records). See Kendall Taggart, et al., *Here are the Records on Thousands of New York Police Misconduct Cases*, BUZZFEED NEWS (Apr. 16, 2018), <https://perma.cc/7S6W-H37U>, for a set of these records that has since been published. These were not the original records of discipline for individual officers but summaries of police discipline distributed quarterly, including a summary of the facts, outcome, and penalty.

⁵ See Ashley Southall, *At James Blake Trial, Judge Invokes Law Shielding Police Records*, N.Y. TIMES (Sept. 20, 2017), <https://perma.cc/8NKZ-BZPR>.

⁶ See Rocco Parascandola & Thomas Tracy, *Cops Who Killed Saheed Vassell Identified*, N.Y. DAILY NEWS (July 27, 2018, 6:00 PM), <https://perma.cc/BDA4-4RY6>. The NYPD also refused to name the officers involved in forcibly removing a baby from a mother’s arms and accusing her of criminal conduct as she waited to be seen at a food assistance center. Jake Offenhardt, *‘Appalling’ Video Shows NYPD Officers Ripping Infant from Brooklyn Mother’s Arms*, GOTHAMIST (Dec. 10, 2018, 8:52 AM), <https://perma.cc/TBK9-4B5V>.

speaking about more esoteric benefits of transparency, this article explores how secrecy harms the public.⁷ Through this reframing of what society sacrifices in favor of police privacy, a stronger policy argument for making police misconduct information public can develop.

Part I first reflects on how the recent decisions to hide police misconduct information have traumatized families and communities. It next examines, using rationale derived from First Amendment right of access cases, how hiding misconduct information, administrative decisions, and data undermines the public's and the police officers' trust in the police disciplinary system and legal system generally. Part I ends with a discussion about how hiding police disciplinary information hinders public discourse around questions of police discipline and accountability, both currently and historically. Similar to the analysis done in cases finding a right of access, Part I walks through the many ways that more information, not less, serves the public interest.

It is worth pausing here to define who "the public," referred to in this section, includes: people harmed or killed by police, their family members, all of the people they know, protesters, police reform advocates, investigative reporters, people accused of crimes by police, people who vote and people who don't vote, parents who counsel their children about police encounters, jurors, laundromat gossips, teachers, bartenders, students, historians, plumbers, radio show hosts, everyone who consumes information and everyone who doesn't consume information, and everyone who discusses politics at the water cooler, at the barbershop, or on Facebook, regardless of their level of education. As members of the "public," we all share various capacities for and commitments to discerning the meaning of information, pursuing reports that put events in context, and educating ourselves about how we can change the world we live in. But we cannot change anything without first facing it.

One place facing police accountability reform is Chicago, where thirty years of police civilian complaint records were recently made public in a visually stunning database.⁸ Chicago stands in stark contrast to New York City and will be discussed throughout as a rare example of how transparency of police disciplinary records actually, not hypothetically, benefits society. Despite Chicago's many mentions, this article has an unmistakable New York City bias. Some conclusions made in this article may not be applicable to other jurisdictions because their local laws are

⁷ Cf. Kate Levine, *Discipline and Policing*, 68 DUKE L.J. (forthcoming 2018) (articulating the balancing as the benefits of transparency in improving police accountability weighed against police privacy harms).

⁸ See *Citizens Police Data Project*, <http://perma.cc/32DT-RQRK> (last visited Dec. 11, 2018).

different. For example, the NYPD disciplinary trials are open to the public under local law,⁹ yet the written decisions resulting from the proceedings are not.¹⁰

The disciplinary charges discussed below are also informed by New York City norms. These norms can include everything from use of on-duty excessive force to administrative violations related to sick days and to off-duty misconduct. Because these records are not public, it is unclear to advocates, the public, and even to elected officials what proportion of misconduct directly impacts New Yorkers. There is no exhaustive list of potential charges that an officer might face.¹¹ For the purposes of this article, police misconduct information generally refers to information about on-duty misconduct related to encounters with the public and policing powers, and the resulting outcome of that discipline. As the section on public discourse explores in depth, limiting what categories of police misconduct the public has an interest in before allowing access to the spectrum of misconduct is premature; the public cannot make informed decisions without full access.

A final term to clarify for the discussion in Part I is what this article means when it refers to information. “Information” encompasses specific intake reports, interview reports, exhibits, video, body worn camera footage, charges, court transcripts, written summations, reports and recommendations, final penalties, and disciplinary summaries, unless specified otherwise. Some types of information may be more digestible for the public than others, separate from the question of what privacy claims police have in it.

Part II reviews how police officers’ attempts to find constitutional and other legal protections for their misconduct information historically failed with respect to on-duty misconduct. In light of these failures, some police unions have successfully lobbied for powerful privacy protections, such as New York State’s Civil Rights Law section 50-a, through well-funded political campaigns that intentionally prioritize police officers’

⁹ 38 R.C.N.Y. 15-04(g) (2018); *Doe v. City of Schenectady*, 84 A.D.3d 1455, 1456 (3d Dep’t 2011).

¹⁰ *NYCLU v. NYPD*, No. 133, 2018 WL 6492733 (N.Y. Dec. 11, 2018).

¹¹ See NYPD, PATROL GUIDE PROCEDURE NO. 206-03: VIOLATIONS SUBJECT TO COMMAND DISCIPLINE (2017), <https://perma.cc/L8DN-RT37>, providing that discipline may be imposed based on charges brought under Schedule A, “[a]ny other minor violation that, in the opinion of the commanding/executive officer is appropriate for Schedule A command discipline procedure;” under Schedule B, “[a]ny other violation, which, in the opinion of the commanding/executive officer and after notification to the patrol borough adjutant and consultation with the Department Advocate, is appropriate for Schedule ‘B’ command discipline procedure;” under Schedule C, “[a]ny violation reviewed and determined by the Department Advocate to be suitable for Schedule ‘C’ command discipline.”

privacy claims above the public harms discussed in Part I. Part II scrutinizes police representatives' claims that have justified these broad protections and discerns, more narrowly, which police officers' concerns about publicity actually justify regulating public disclosure of police misconduct information.

Like the description of the public above, who is speaking for the police should also be addressed. The claims described in Part II are largely made by police unions and their spokespeople or other representatives of law enforcement. Police officers are not monolithic thinkers and may hold a variety of opinions about what misconduct information should and should not be publicly available. This author does not assign to all police officers the unreasonable position that all misconduct information should be withheld. These more bloated claims of danger to public safety and lost confidence in police authority are dissected in Part II, and their rationale is probed for whether such concerns weigh in favor of opacity versus transparency.

To conclude, a leaner definition of police privacy harm derived from Part II is measured against a new articulation of harms from Part I. Instead of weighing amorphous and academic concepts of transparency and privacy, this new balance of harms grounds the debate over police misconduct information. When properly balanced, police claims of privacy concerns render the need for more, not less, informed public discussion and greater access to misconduct information.

PART I: THE HARMS OF HIDING POLICE DISCIPLINARY RECORDS

This Part discusses the harm of hiding police disciplinary records: harm to individuals, to public trust in police accountability and public justice systems, and to public discourse. Like the analysis courts apply in determining whether someone has a First Amendment right of access to courtrooms, court records, transcripts, or filings, the analysis here considers the history of a public expectation of publicity versus privacy in police misconduct information.

A. Hiding Police Misconduct Information Amplifies Trauma

Police have incredible power to use physical force that, without a badge, would otherwise be considered violence. They have power to interfere with someone navigating their day and, on their word alone, haul them out of their life and into a police car. This power requires responsibility and mechanisms for accountability because if abused, it can result in lifelong trauma and alienation for the public they are sworn to protect. Courts have recognized that transparency can have a “community thera-

peutic value”¹² that provides an “outlet[] for ‘community concern, hostility, and emotions.’”¹³ Transparency facilitates healing. Without transparency, fear of future harm continues, officers are able to exploit the power of reliable anonymity, and lack of information further deprives family and community members of informed decision-making when considering whether to pursue justice through a civil lawsuit, a civilian complaint, political campaigns, media campaigns, or criminal prosecution.

A tragic example of this occurred earlier last year. Mr. Saheed Vassell was a 34-year-old man loved by his family and community before he was shot dead by New York City Police Department officers Leon Dinham, Anthony Bottiglieri, Bekim Molic, and Omar Rafiq on the afternoon of April 4, 2018.¹⁴ These officers were never arrested or charged with any crime.¹⁵ Whether they are even under investigation by the NYPD is unknown. Their prior histories of civilian complaints also remain unknown. What the NYPD was quick to release, however, was Mr. Vassell’s sealed arrest records and mental health history.¹⁶ This smear campaign was not unique to Mr. Vassell’s death. Following any violent encounter, the power of releasing a person’s history of violence is indisputable. The police know this; they often unlawfully and recklessly release the sealed arrest history of people police have killed.¹⁷ In addition to leaking Mr.

¹² David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 895 (2017) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980) (plurality opinion)).

¹³ *Id.* at 868 (quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704 (6th Cir. 2002)).

¹⁴ We only learned the names of these officers through a leak to the press. Their names have not been confirmed by the NYPD. See Parascandola & Tracy, *Cops Who Killed Saheed Vassell Identified*, *supra* note 6.

¹⁵ *See id.*

¹⁶ See Tina Moore & Bruce Golding, *Man Killed by NYPD Had Bizarre Run-in with Cops in 2008*, N.Y. POST (Apr. 5, 2018 10:40 PM), <https://perma.cc/94PV-M973>.

¹⁷ Closed arrest records are not publicly available in New York State. N.Y. CRIM. PROC. §§ 160.50(1)(c), 160.55(1)(c) (McKinney 2018). Experience has shown that, to the extent the media reports on closed arrest records of someone killed by police, it is most likely due to an unlawful leak from NYPD. There are many examples of articles exposing the leaked arrest history of someone killed by police. See, e.g., Michael Tomasky, *Rudy’s Rap Sheet*, N.Y. MAG (Apr. 24, 2000), <https://perma.cc/6GQH-PR6V> (reporting that then-Police Commissioner Howard Safir argued that the NYPD could leak arrest records after someone dies, and detailing two instances where sealed arrest records of men who survived police encounters were released by police sources); Rebecca Davis O’Brien et al., *New York City Police Officer Won’t Face Criminal Charges in Eric Garner Death*, WALL ST. J., <https://perma.cc/H9EG-J3Y3> (last updated Dec. 4, 2014, 1:15 AM) (reporting Eric Garner’s arrest record and including information from “[a]n official” that the charges included the sale of unlicensed cigarettes); *Sources to CBS2: Officer Accidentally Shot Unarmed Man While Opening Door With Gun in Hand*, CBS N.Y. (Nov. 21, 2014, 11:04 PM), <http://perma.cc/9ZTE-CUC2> (“Gurley ha[d] 24 prior arrests on his record, police said.”); Robert Lewis, *The Double Standard of NYPD Leaks*, WNYC NEWS (Mar. 31, 2017), <https://perma.cc/4UJU-2P5Y> (discussing how the NYPD

Vassell's arrest history and disparaging his character, the NYPD monopolized surveillance footage to distort his actions immediately preceding the shooting. Detectives collected hard drives from local businesses¹⁸ and "released snippets of different surveillance videos that showed Vassell pointing a piece of soldering torch—which looked like a gun—at several pedestrians."¹⁹ The police communications strategy to paint a false narrative that Mr. Vassell posed an imminent threat to the officers retraumatized Mr. Vassell's family and community.²⁰ Through their grief for their loss, Mr. Vassell's family struggled to counter the narrative around what happened while also recovering the character of their father, son, and brother.²¹

leaked sealed arrest records of Ramarley Graham); Eric Lipton, *Giuliani Cites Criminal Past of Slain Man*, N.Y. TIMES (Mar. 20, 2000), <https://perma.cc/8UC3-5EL4> ("[M]ayor [Giuliani] . . . confirmed that he had authorized the release of Mr. Dorismond's arrest record immediately after the shooting, citing the public's 'right to know.'").

¹⁸ Local business owners have described NYPD detectives coming to their businesses, removing the hard drives from their surveillance equipment, and changing the content to fit their narrative. Interview with Victor Dempsey, Families United for Justice Regional Representative for the Tri-State Area and Community Justice Unit Organizer, The Legal Aid Society, in New York, NY (Oct. 30, 2018). Dempsey is an author and a community activist who investigated the killing of Saheed Vassell in its aftermath. His brother Delrawn Smalls was killed by off-duty Officer Wayne Isaacs.

¹⁹ Parascandola & Tracy, *Cops Who Killed Saheed Vassell Identified*, *supra* note 6.

²⁰ See Eric Vassell, *I Demand Justice for Saheed: Vassell's Father Says the NYPD is Protecting the Officers Responsible for His Son's Death*, N.Y. DAILY NEWS (Nov. 7, 2018, 5:00 AM), <https://perma.cc/Q9F6-ZUAC>; see also Janet Burns, *After NYPD Slaying, Neighbors Honor #TheRealSaheed as City Remains Silent*, FORBES (May 21, 2018, 12:57 PM), <https://perma.cc/RQ6W-LD5D> (describing how the community countered the NYPD's portrayal of Mr. Vassell through recorded interviews and published on social media under #TheRealSaheed, recalling how Mr. Vassell was known to help people with groceries and laundry, and walk neighbors to the subway late at night). For a perspective typically excluded from mainstream media, see Victor Dempsey & Nissa Tzun, *The Shooting of "Sy," FORCED TRAJECTORY PROJECT* (Apr. 5, 2018), <https://perma.cc/B4RY-NUSA> (discussing the differences between the NYPD's narrative and what the witnesses observed).

²¹ See Jillian Jorgensen, *Family, Advocates Demand City Release Names of Cops Who Shot Saheed Vassell*, N.Y. DAILY NEWS (June 21, 2018, 6:40 PM), <https://perma.cc/24ER-KC85> ("His father insisted the video that has been released of the April 4 incident does not show Vassell pointing the object at police. Several clips do show him pointing it at a passerby. Video of his interactions with cops is taken from further away."); see also Stephon Johnson, *Names of Officers Who Killed Saheed Vassell Leaked, Father and Community Call out NYPD*, N.Y. AMSTERDAM NEWS (Aug. 2, 2018, 11:18 AM), <https://perma.cc/9XJR-VR95> ("Vassell's family said members of the 71st Precinct knew of Vassell's mental illness and knew he wasn't a public danger. The police have released snippets of surveillance videos of the incident, but the family wants a full, unedited video released.").

As the police push their narrative of events, they almost never reveal an officer's history of violence.²² Mr. Vassell's family repeatedly demanded information about the officers who shot their loved one, asking for the officers' names and disciplinary records.²³ Such information could have given the shooting context, such as whether the officers had previously escalated street encounters, abused people in psychiatric crisis, used excessive force, or submitted false statements to supervisors. This is the type of information that could inform the family's decision about how to proceed. The Vassell family wanted information that may have given them, and the community, a sense of safety and a path towards healing by feeling assured the police department was preventing future violence by investigating, charging, or disciplining the officers. Mr. Vassell's community, not knowing whether the officers who killed Mr. Vassell were still patrolling their neighborhood in plainclothes, also struggled with trauma: "There's pain in our community that's being ignored When we talk about police abuse of force and power, we're forgetting that there are primary and secondary traumas that stay with these communities."²⁴ Yet, in the weeks after Saheed's killing, the Vassell family and their community were left in the dark without a name or face of a single officer who shot Saheed, trying to decide what to do next. It was only because of a leak to the media four months later that they learned who the officers were,²⁵ and that none of them even had their firearms removed.²⁶

²² See *infra* Section I.C. An important exception to this was in Chicago, where the Citizens Police Data Project made several years of police complaint data public. See *Citizens Police Data Project*, *supra* note 8. When the video of Laquan McDonald's shooting was released, the public had simultaneous access to Van Dyke's complaint history, which revealed a long history of complaints of brutality. See Elliott C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN, <https://perma.cc/SPK2-PTQ3> (last updated Nov. 26, 2015, 5:45 PM).

²³ Jim O'Grady, *Why We're Not Supposed to Know the Names of Cops who Kill Civilians, but Sometimes Do*, WNYC NEWS (Apr. 16, 2018), <https://perma.cc/ABJ5-DHGK>; Vassell, *supra* note 20 ("We deserve real accountability from the NYPD and full disclosure of what really happened. Instead, it was only through media leaks in late July that we learned about four police officers responsible for my son's death. And even after those leaks, the NYPD has not formally confirmed the names of the officers, or provided details about which officer shot first or last, or most.").

²⁴ Burns, *supra* note 20 (quoting Anthonine Pierre, Deputy Director of the Brooklyn Movement Center).

²⁵ Parascandola & Tracy, *Cops Who Killed Saheed Vassell Identified*, *supra* note 6. None of the leaked information was officially confirmed by NYPD or the City of New York. Vassell, *supra* note 20.

²⁶ Parascandola & Tracy, *Cops Who Killed Saheed Vassell Identified*, *supra* note 6 ("None of them has been put on modified assignment as the department investigates the fatal shooting of Vassell on April 4."). A modified assignment means the removal of the officers' firearms, shield, ID card, and other Department property, and the officers do not perform regular tours. NYPD, PATROL GUIDE PROCEDURE NO. 206-10: MODIFIED ASSIGNMENT 1 (2016).

The struggle against asymmetrical access to information is not unique to those impacted by Saheed Vassell's death. Constance Malcolm, Ramarley Graham's mother, had to bring a lawsuit to gain access to internal NYPD records related to the investigation and prosecution of her son's death.²⁷ The police officer who shot Ramarley was not successfully indicted in state criminal court, was never charged with federal civil rights crimes, and was allowed to quietly resign.²⁸ Gwen Carr, Eric Garner's mother, has fought for the NYPD to fire Officer Daniel Pantaleo and the other officers involved for illegally using a chokehold and killing her son.²⁹ She, along with Ms. Malcolm and other family members, led New Yorkers in marches and rallies and wrote op-eds calling for more responsive action from NYPD,³⁰ but was told the NYPD was waiting for the Department of Justice (DOJ) to act, only to be told four years later the NYPD would go ahead without DOJ action.³¹

²⁷ See Graham Rayman, *Judge Orders City to Turn over Internal NYPD Records in Ramarley Graham Case*, N.Y. DAILY NEWS (Aug. 8, 2018, 6:00 AM), <https://perma.cc/VG2T-33CZ> ("It's outrageous, but under de Blasio's NYPD, it's not surprising that I had to sue to get information related to the murder of my son and that they've fought the release of these files for so long. I am glad Judge Mendez has ruled in my favor and that he saw through the NYPD's lies.") (quoting Constance Malcolm).

²⁸ See Matthew Haag & Ashley Southall, *Officer Who Killed Ramarley Graham Leaves New York Police Department*, N.Y. TIMES (Mar. 27, 2017), <https://perma.cc/YMS2-RSQU>. This is not uncommon; police who kill people on-duty often evade criminal accountability in a courtroom. Madison Park, *Police Shootings: Trials, Convictions are Rare for Officers*, CNN, <https://perma.cc/DN8S-GXNN> (last updated Oct. 3, 2018, 4:41 PM) (providing examples of high-profile police killings across the country that did not result in charges or convictions against the officers including Lamar Anthony Smith in 2011, Sylville Smith in 2016, Philando Castile in 2016, Terrance Crutcher in 2016, Freddie Gray in 2015, Samuel DuBose in 2015, Eric Garner in 2014, Michael Brown in 2014, Tamir Rice in 2014, Sandra Bland in July 2015, Alton Sterling in 2016).

²⁹ Thomas Tracy, *Mother of Eric Garner Demands NYPD Fire Cop Who Used Banned Chokehold that Led to His Death as Disciplinary Trial Nears*, N.Y. DAILY NEWS (Nov. 20, 2018, 12:55 PM), <https://perma.cc/G2QU-SHMB> ("The NYPD should fire Pantaleo and all of the other officers who were responsible for misconduct related to my son's murder In order for this to happen, Mayor de Blasio must release all of their names and ensure that the NYPD bring charges against the other officers who engaged in misconduct.") (quoting Gwen Carr); Gwen Carr, *Four Years Ago the NYPD Killed my Son. I'm Still Waiting for Justice.*, BUZZFEED NEWS (Oct. 12, 2018, 4:42 PM), <https://perma.cc/C9YR-ULQ3>.

³⁰ Gwen Carr & Constance Malcolm, *Cuomo's Unkept Justice Promise*, N.Y. DAILY NEWS (July 6, 2015), <https://perma.cc/LYT2-JE5Y> (op-ed); Vincent Barone, *Peaceful Rally, March for Eric Garner Finishes Up Outside 120th Precinct Stationhouse*, STATEN ISLAND ADVANCE, <https://perma.cc/7UVD-4X56> (last visited Jan. 23, 2019) (leading march with family and Al Sharpton); Aaron Morrison, *After Her NYPD Arrest, Eric Garner's Mother Gwen Carr Says It's Her Duty to Fight Trump*, MIC (Feb. 2, 2017), <https://perma.cc/Z4BV-KQZF> (describing Gwen Carr's participation in civil disobedience to "fight for [her] son" against Trump and all politicians).

³¹ See Benjamin Weiser & J. David Goodman, *Police Dept. Gives Federal Investigators Ultimatum in Eric Garner Case*, N.Y. TIMES (July 16, 2018), <https://perma.cc/VN5K-TGPV>.

The deflections, delays, and denials of responsibility for police violence cause more unrest and distrust. Similarly, public perceptions of governmental abuse of power cause widespread harm to a community and a family reeling from the death of a loved one.³² As the Vassells said in a statement to the press, “[t]hese are not the actions of a city government committed to the truth – instead it seems like public officials and the NYPD trying to hide something.”³³ Similarly, Gwen Carr, the mother of Eric Garner, and Constance Malcolm, the mother of Ramarley Graham, jointly wrote that the failures of the legal system “to hold officers accountable exacerbated [the] pain and suffering [of burying their children].”³⁴ Families and communities rightfully fear that anonymity empowers officers to act with impunity. Trauma takes long to heal and spreads quickly across neighborhoods, cities, states, countries, and lasts generations.

Family members of those killed by police experience the effects of that trauma first hand. Ramarley Graham’s brother saw his unarmed big brother get chased inside of his home by a police officer who then shot him in the bathroom.³⁵ Eric Garner’s daughter, Erica Garner, died of a heart attack at 27-years-old fighting for justice for her father.³⁶ The month before her death, on the third anniversary of the Staten Island Grand Jury’s failure to return an indictment of the man who killed her father, Erica said in an interview, “I’m struggling right now with the stress and everything The system beats you down to where you can’t win.”³⁷

³² The effects of abuse of power by the government parallel the City’s use of stop-and-frisk tactics. See Andy Cush, *The Harrowing Psychological Side Effects of Stop-and-Frisk*, GAWKER (Oct. 17, 2014, 9:36 AM), <https://perma.cc/V6QH-U8HA> (“The analysis found anxiety symptoms were related to the number of times men were stopped and how they perceived the encounter, and [it found] more anxiety among participants who have had more intrusive encounters.”); see also Jesse Singal, *What Are the Psychological Effects of Stop-and-Frisk?*, CUT (Sept. 23, 2016), <https://perma.cc/6RQW-T43A> (“[Stop-and-frisk] affected how people lived their lives, the extent to which they felt comfortable simply hanging out in their own neighborhoods, and — perhaps most important, from a policy perspective — their trust in and willingness to help the police.”).

³³ Ciara McCarthy, *Saheed Vassell’s Family Demand Answers After Police Shooting*, PROSPECT HEIGHTS PATCH (May 2, 2018, 5:58 PM), <https://perma.cc/WZ3R-RJ8N> (quoting Lorna and Eric Vassell, Saheed Vassell’s parents).

³⁴ Carr & Malcolm, *supra* note 30.

³⁵ *Police Shoot and Kill 18-Year-Old Inside Bathroom of Bronx Home*, CBS N.Y. (Feb. 2, 2012, 9:52 PM), <https://perma.cc/3VDT-PXVS> (“In the bathroom they shot [Ramarley]. My 6-year-old son was there and saw everything”) (quoting Constance Malcolm, Ramarley Graham’s mother).

³⁶ Vivian Wang, *Erica Garner, Activist and Daughter of Eric Garner, Dies at 27*, N.Y. TIMES (Dec. 30, 2017), <https://perma.cc/8V3Z-JXTW>.

³⁷ Benjamin Dixon (@BenjaminPDixon), TWITTER (Dec. 28, 2017, 9:44 AM), <https://twitter.com/BenjaminPDixon/status/946436687588192257> [<http://perma.cc/C3P2-P6MS>] (video interview with Erica Garner).

Saheed Vassell's 4-year-old niece asks how long her uncle will be dead, and his teenage son lost his father.³⁸

Family members grieve their families' deaths and fight for their loved one's humanity in the face of the stories told by police to justify or mitigate the wrongful death. They fight through the fear of knowing that some officers will correctly assume that their violence will remain anonymous—a power historically and currently used to specifically terrorize people of color.³⁹ Many people avoid calling the police, even when in danger, wanting to avoid future encounters, especially after high-profile police violence.⁴⁰ This fear of an official yet faceless threat—and the resultant refusal of communities to engage with the police—causes broader harm to the legitimacy of police disciplinary systems, police authority, and the criminal legal system in general.

Harm is also caused by not allowing family members full decision-making power in the weeks following their loved one's death. People feel differently when an officer may have made a mistake one time or had one bad day as opposed to an officer who routinely abused their authority. In the author's seven years in private civil rights practice, she heard people express a desire to prevent future harm from officers repeatedly escalating violence in their community more frequently than they expressed a desire for money. Yet many people do not engage with the governmental oversight systems because they cannot learn what penalty, if any, an officer receives.⁴¹ This creates a system where people are more likely to sue for costly money damages rather than pursue administrative remedies that could actually penalize officers or result in positive reforms.⁴²

³⁸ Van Tieu, *Father Slams NYPD Narrative After Police Fatally Shoot Man*, SPECTRUM NEWS (Apr. 4, 2018, 10:38 PM), <https://perma.cc/D39W-46NZ>.

³⁹ See Corinne Segal, *White Supremacists Once Wore Hoods. Now, an Internet Mob Won't Let Them Stay Anonymous*, PBS (Aug. 20, 2017, 6:18 PM), <https://perma.cc/9XP9-XAMX> (discussing the power of anonymity in the growth and preservation of white supremacy, from early use of physical masks, costumes, makeup and even accents to disguise identity, to more recent proliferation of online forums and how anonymity strengthens group norms).

⁴⁰ Juleyka Lantigua-Williams, *Police Brutality Leads to Thousands Fewer Calls to 911*, ATLANTIC (Sept. 28, 2016), <https://perma.cc/4HD9-DDCP> (covering the research of sociologists who studied significant drops in 911 calls following high-profile incidents of police brutality).

⁴¹ For an example of the NYPD's refusal to disclose officer penalties, see Laura Dimon & Graham Rayman, *Exclusive: Cop Who Tackled Tennis Star James Blake Hit with Five-Day Penalty, Half What Board Recommended*, N.Y. DAILY NEWS (June 8, 2016, 4:00 AM), <https://perma.cc/96VV-YACX> ("The NYPD did not disclose the decision in the excessive force case publicly because of a policy to withhold disciplinary outcomes, citing Section 50-a of the state Civil Rights Law.").

⁴² See Daniel Moritz-Rabson, *NYPD Abuse: City Paid \$384 Million to Settle Lawsuits*, NEWSWEEK (Sept. 4, 2018, 2:01 PM), <https://perma.cc/PG36-ZBPC> ("New York City

B. *Hiding Police Disciplinary Records Undermines the Public's Trust in the Police Disciplinary System*

The right of access to trials was not always a right to which the accused or the public were entitled.⁴³ The 17th century English trial of King Charles I for wide-scale human rights abuses changed that. For that trial, the government decided that to be legitimate, “justice must be seen to be done,” and arranged for a large courtroom to conduct the trial as openly and audibly as possible.⁴⁴ The English government, motivated as much by fear of violent public opposition as by what they believed was a righteous cause, recognized then, as did the founders of the American government later, that the practice of justice has a dual nature: actual and theatrical.

American courts, both criminal and civil, have historically favored public proceedings and filings.⁴⁵ The United States Supreme Court explained the important role that publicity plays specifically in criminal trials:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process - an essential component in our structure of self-government.

has paid \$384 million settling about 5,800 police misconduct claims in the past five years . . .”).

⁴³ See GEOFFREY ROBERTSON, *THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD* 151 (2005) (“Charles I was brought to trial at a time when defendants had no rights other than to be tried quickly . . .”).

⁴⁴ *Id.* at 145-47 (“Cromwell wanted to play to the larger gallery . . . so that the justice of the proceedings could be more widely appreciated . . . [because of terrible acoustics in the Hall] the judges were particularly concerned that justice must be seen to be done, because it would not be heard to be done. It would be read, at least: twelve short-hand reporters were permitted to form the first press gallery.”). In this article, I extrapolate this concern for “justice to be seen” from the logistical, literal concern for physical access, visibility, and audible acoustics during Charles I’s trial to the political rationale for public access to information and governmental proceedings.

⁴⁵ See Ardia, *supra* note 12, at 839 n.20 (citing 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)) (“Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”). Ardia also warns against recent judicial trends towards sealing. *Id.* at 916.

In sum, the institutional value of the open criminal trial is recognized in both logic and experience.⁴⁶

While the Supreme Court has not clearly extended a constitutional right for public access to civil trials, judges have similarly opined about the value of publicly dealing with private matters in civil cases:

It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.⁴⁷

A central principle of our government is that its actual and perceived functionality is improved by its openness to the public; an open society “sets free the critical powers of man.”⁴⁸ Similar to the English government’s conclusion that the trial of the King must be literally seen and heard for the legitimacy of the trial to be preserved, American courts have repeatedly concluded that it is not enough for a process to be fair behind closed doors, or for a legal body to reach an ostensibly right outcome without publicly demonstrating how it was reached. Some jurisdictions, like New York, will extend public right to access beyond judicial courts to quasi-judicial and administrative proceedings,⁴⁹ because “[t]he public’s right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding.”⁵⁰

⁴⁶ *Globe Newspaper Co. v. Superior Court for the Cty. of Norfolk*, 457 U.S. 596, 606 (1982) (citations omitted) (finding that the government’s justification for barring press and public from the courtroom must be “weighty;” the closure must serve a compelling governmental interest that is narrowly tailored).

⁴⁷ *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

⁴⁸ KARL R. POPPER, *Author’s introduction to 1 THE OPEN SOCIETY AND ITS ENEMIES 1* (5th ed. 1966).

⁴⁹ *Associated Press v. Bell*, 70 N.Y.2d 32, 36-38 (1987) (“Plainly the First Amendment right of access is not limited to the criminal trial itself.”); *but see Johnson Newspaper Corp. v. Clary*, 167 A.D.2d 968 (4th Dep’t 1990) (finding no First Amendment right of public access because defendant had not previously made the subject of the proceedings public).

⁵⁰ *NYCLU v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290 (2d Cir. 2012) (extended the right of access to quasi-judicial proceedings before the New York City Transit Authority’s (“NYCTA”) Transit Adjudication Bureau (“TAB”)). Not every state’s law recognizes its citizenry’s expectation of publicity for its police disciplinary hearings. *See, e.g., Copley Press, Inc. v. Superior Court of San Diego Cty.*, 141 P.3d 288, 307 (Cal. 2006) (holding that a First Amendment argument failed to prevent police disciplinary hearings from being closed to the public). However, because some criminal conduct may be adjudicated in these closed proceedings, an argument for access under the First Amendment may be available to the extent officers are administratively prosecuted for criminal conduct.

In 2018, BuzzFeed filed a brief seeking First Amendment right of access to police disciplinary hearing transcripts.⁵¹ In early 2018, a BuzzFeed investigative reporter arrived mid-way through a disciplinary hearing for an officer who claimed she was targeted for punishment based on her race.⁵² When BuzzFeed formally requested the transcript at the beginning and the end of the hearing, the NYPD responded that it would determine the request under New York's Freedom of Information laws.⁵³ BuzzFeed sued for its right to the transcripts of the proceeding under the First Amendment on the basis that the hearings are public proceedings, rejecting the NYPD's attempt to address the request under Freedom of Information laws.⁵⁴

Two showings are required to establish a First Amendment right of access.⁵⁵ First, the plaintiff must show that the administrative hearing is an adjudicatory proceeding that has a historical expectation of publicity and access to such proceedings.⁵⁶ Second, the plaintiff must demonstrate that related records play a "significant positive role in the functioning" of the system in question.⁵⁷ BuzzFeed argued police departmental trials are "[l]ike any other civil or criminal proceeding, . . . serv[ing] a fact finding

⁵¹ Memorandum of Law in Support of Petitioner's Application Pursuant to Article 78 at 10-27, *BuzzFeed, Inc. v. Deputy Commissioner*, Index No. 155278/2018 (N.Y. Sup. Ct. June 5, 2018) [hereinafter *BuzzFeed Memorandum of Law*].

⁵² *Id.* at 6, 20.

⁵³ *Id.* at 8.

⁵⁴ *Id.* at 10-27. Contrast this argument with NYCLU, who also brought a suit seeking administrative law decisions, as opposed to hearing transcripts. *NYCLU v. NYPD*, No. 133, 2018 WL 6492733 (Dec. 11, 2018). While NYCLU, a New York-based civil rights organization, also sought the decisions on the basis that the hearings are public proceedings, its arguments focused on interpretations of New York State Freedom of Information laws ("FOIL") and Civil Rights Law § 50-a and not the constitutional First Amendment arguments that BuzzFeed, a national news organization, made. *See NYCLU v. NYPD*, 148 A.D.3d 642, 642 (N.Y. App. Div. 2017). The Court of Appeals decision did not address whether NYCLU had a right to access the administrative law decisions under the First Amendment because it was not argued. Judge Wilson's dissent, while not citing the First Amendment analysis, argued along similar lines that because the proceedings were public, related documents used in the proceedings should presumptively be public, as well. *See NYCLU v. NYPD*, 2018 WL 6492733, at *17 (Wilson, J., dissenting) ("By opening the Trial Room proceedings to the public, the City has chosen to disclose information relevant to that proceeding. In doing so, the City has determined that the confidentiality of an officer's identity, the nature of the charged offense, or the evidence supporting that charge—otherwise protected by section 50-a—is of insubstantial weight compared to the countervailing interest in public disclosure.").

⁵⁵ *See Press-Enterprise Co. v. Superior Court of California for the Cty. of Riverside* (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

⁵⁶ *Id.*

⁵⁷ *Id.*

purpose and culminat[ing] in a legal decision through an adversarial process—making public access essential to the efficacy of the proceeding.”⁵⁸ Their brief outlined all of the parallels between court proceedings and police disciplinary hearings to demonstrate that since “departmental trials are close cousins of traditional adjudicatory proceedings, the benefits of openness in [the adjudicatory] context[] apply equally [to the former].”⁵⁹ To demonstrate a historical expectation of publicity, BuzzFeed reviewed public police misconduct trials from 150 years ago through the present.⁶⁰

BuzzFeed addressed the second prong of the test by outlining multiple benefits served by transparency of police disciplinary transcripts.⁶¹ These benefits mirror those named by David Ardia, Co-Director of the University of North Carolina Center for Media Law and Policy, in favor of a First Amendment right of access to court proceedings and filings.⁶² Ardia’s benefits inventory includes improving the outcomes of individual court proceedings by keeping participants honest and deterring unjust prosecutions.⁶³ He also analyzes how transparency benefits a system by “mak[ing] it more likely that systemic problems will be *identified, corrected, and deterred*.”⁶⁴ Finally, Ardia’s framework warns against the harms of secrecy. He examines decisions discussing how secretive systems breed “corruption, incompetence, inefficiency, prejudice, and favoritism,” ultimately undermining public confidence in those systems’ functionality.⁶⁵

Despite allowing public access to hearings conducted by the Deputy Commissioner of Trials at One Police Plaza, the NYPD’s disciplinary system is secretive.⁶⁶ Findings of fact and final penalty recommendations

⁵⁸ See BuzzFeed Memorandum of Law, *supra* note 51, at 19 (citing 38 R.C.N.Y. § 15-01, *et seq.* (2018)).

⁵⁹ *Id.* at 19-20. For more information about procedures of departmental trials, including discovery, motion practice, opening and closing statements, witnesses to be called and cross examined, evidence introduced, and findings of fact formulated, see 38 R.C.N.Y. §§ 15-03(f)(2), 15-03(g) and §§ 15-04(b), 15-04(e)(3), 15-04(e)(1), 15-04(f) (2018), which BuzzFeed cited in their memorandum of law. BuzzFeed Memorandum of Law, *supra* note 51, at 2-3.

⁶⁰ BuzzFeed Memorandum of Law, *supra* note 51, at 14-17 (citations omitted).

⁶¹ *Id.* at 17-21.

⁶² Ardia, *supra* note 12, at 894-97.

⁶³ *Id.* at 895-96.

⁶⁴ *Id.* at 896-97 (emphasis added).

⁶⁵ NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of Los Angeles Cty., 980 P.2d 337, 360 n.28 (1999) (quoting Estate of Hearst, 67 Cal. App. 3d 777, 784 (Ct. App. 1977) (noting the function of accessible civil cases)).

⁶⁶ *The Administrative Prosecution Unit (APU)*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., <https://perma.cc/MS9P-2QRN> (last visited Jan. 2, 2019) (“[i]n the most serious cases the CCRB prosecutes members of the NYPD in front of the Deputy Commissioner of Trials at 1 Police Plaza. These trials are open to the public. Penalties for officers found guilty range from

by NYPD administrative law judges (ALJs) resulting from those hearings, even in cases prosecuted by Civilian Complaint Review Board (CCRB), are not public, nor are final decisions made by the Police Commissioner.⁶⁷ The Commissioner's sole authority over final disciplinary decisions makes the need for public oversight all the more important.⁶⁸ Yet in 2017, the NYPD took a step further away from this already slim amount of public oversight.

The 2017 trial of Officer James Frascatore, who tackled professional tennis player James Blake after mistaking him for someone suspected of a crime, demonstrates how a courtroom closure impacted the public trust in the police disciplinary system. Before Frascatore's trial, in January 2017, former officer Daniel Modell testified as an expert witness on behalf of officer Richard Haste for the killing of Ramarley Graham.⁶⁹ He was questioned, at Haste's departmental trial, in open court about his own disciplinary history without limitation and it was reported on by the press.⁷⁰ The public audience could judge whether the prior misconduct made Modell's expert testimony unreliable. Later, in September 2017, Modell was again called as an expert, this time by officer James Frascatore. The prosecutor, in front of the same ALJ as in January 2017, attempted to confront the same expert, about the same prior disciplinary history. The public and the press were in the room, as before, but this time the NYPD's ALJ prevented the questioning to protect disclosure of the

warning and admonishment, loss of vacation days, suspension without pay, dismissal probation, or termination from the NYPD. The Police Commissioner remains the final arbiter of discipline, but gives written explanations when he deviates from the CCRB's recommendations"). Some officers are prosecuted by the Department Advocate administrative prosecutors and some, pursuant to a Memorandum of Understanding between NYPD and CCRB, are prosecuted by the CCRB's Administrative Prosecution Unit ("APU"). *APU Memorandum of Understanding*, N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., <https://perma.cc/ND3T-9VCQ> (last visited Jan. 30, 2019). The public nature of these administrative trials was unsuccessfully challenged by Schenectady officers in 2011 in *Doe v. City of Schenectady*. The police union "on behalf of all its similarly-situated members--commenced the instant combined declaratory judgment action and proceeding pursuant to CPLR article 78 seeking, among other things, an order permanently enjoining respondents from conducting public hearings in connection with police disciplinary proceedings." *Doe v. City of Schenectady*, 84 A.D.3d 1455, 1456 (3d Dep't 2011).

⁶⁷ MEMORANDUM OF UNDERSTANDING BETWEEN THE CIVILIAN COMPLAINT REVIEW BOARD (CCRB) AND THE POLICE DEPARTMENT (NYPD) OF THE CITY OF NEW YORK CONCERNING THE PROCESSING OF SUBSTANTIATED COMPLAINTS 4 (Apr. 4, 2012).

⁶⁸ Graham Rayman & Rocco Parascandola, *Critics of NYPD Disciplinary Process Push for Dramatic Changes*, N.Y. DAILY NEWS (Dec. 2, 2018, 4:00 AM), <https://perma.cc/M2SN-XMHT> (outlining advocates' view that NYPD disciplinary hearings should be conducted by an outside agency, rather than the Commissioner of Trials).

⁶⁹ Southall, *supra* note 5.

⁷⁰ *See, e.g., id.*

officer's misconduct history.⁷¹ After the prosecutor pressed the ALJ to allow the questions, the judge forced the public and the press to leave the room, and then limited the questions, citing New York State's Civil Rights Law 50-a.⁷²

The NYPD judge's decision to close the courtroom in the James Blake trial disrupted that proceeding's integrity by forcing the public out. The press was not there to report how prohibitive the limitations were and the public was not able to consider whether that former officer's prior bad acts lessened his reliability as an expert defending Frascatore's conduct. This lack of access harmed the public's ability to judge for itself the reasonableness of that individual proceeding's outcome.⁷³ It is not enough, as the court trying Charles I knew, to find the right outcome; "justice must be seen to be done."⁷⁴ Regardless of how that judge ruled on the expert's credibility, which we will also never know under the current interpretation of the law, the public was not able to see justice be done,⁷⁵ a "vital" feature of the disciplinary process according to CCRB Director Jonathan Darche.⁷⁶ Closing the courtroom poisoned the public's perception of that trial with cynicism and distrust as evidenced by the N.Y. Times headline, *At James Blake Trial, Judge Invokes Law Shielding Police Records*, emphasizing the closure rather than anything that happened during the trial.⁷⁷ As a result, the NYPD judge undermined the principle that "those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."⁷⁸

⁷¹ See *id.*

⁷² *Id.*

⁷³ Professor Kate Levine recently argued that a "proper balance" of transparency and privacy for police complaint and disciplinary records would be the availability of records for all parties in litigation pursuant to sealing, gag orders, and courtroom closures as deemed appropriate by the courts. Levine, *supra* note 7 (recommending that information about officer misconduct should be collected in a federal database and accessible by all law enforcement agencies for the purpose of vetting officers applying for positions). But, the availability of those records in litigation is not transparency, it is discovery; it should already be available as needed. To the extent this compromise introduces increased sealing or court closures into a judicial process still operating with some expectation of transparency, especially in the criminal context, such a compromise would deteriorate fairness, legitimacy, and trust in the court system as it has in the police disciplinary system.

⁷⁴ ROBERTSON, *supra* note 43, at 146.

⁷⁵ See BuzzFeed Memorandum of Law, *supra* note 51, at 18, for a description of how open proceedings enhance efficacy and increases just outcomes.

⁷⁶ Southall, *supra* note 5. See also BuzzFeed Memorandum of Law, *supra* note 51 for an explanation of how access to proceedings promotes fairness.

⁷⁷ Southall, *supra* note 5.

⁷⁸ *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

Hiding misconduct records of public officials further harms the legitimacy of the police and the authority of government by obstructing the public's "checking function."⁷⁹ This can result not only in people harmed by police not pursuing administrative remedies, they may also not trust the system when in danger. Sunita Patel is an Associate Professor at UCLA who researches social movement theory, police misconduct, and civil rights. Describing legitimacy in relation to policing, she explains that, "when police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective."⁸⁰ In order to foster this perception communities need access to the charges, common law decisions, proceedings, and outcomes in order to see justice for themselves. Legitimacy must be built upon both actual and theatrical access to the system.

Contrary to the increased opacity many union representatives claim will improve the fairness of the disciplinary system, officers also lose out when police departments hide their misconduct. When departments conceal the average penalty for any specific offense, it prevents officers who have been treated unfairly from analyzing whether their penalty was disproportionately harsh. Investigations into racially biased or disproportionately punitive treatment could utilize data of reasonable or average penalties for similar misconduct.⁸¹ Yet, BuzzFeed's investigative reporter, attempting to write the story about a Black woman wrongly accused of misconduct by a supervisor, cannot access sufficient data for her in-depth article about racial discrimination in the police disciplinary process or even get a transcript from one hearing.⁸² This secrecy also allows abusive supervisors the same type of powerful, reliable impunity when disciplining officers that police officers have when arresting citizens.⁸³ Increased transparency of the police disciplinary process could deter unjust prosecutions of police, as well as disproportionately harsh penalties for minor misconduct.

⁷⁹ BuzzFeed Memorandum of Law, *supra* note 51, at 18 (providing support for how publicity provides a "checking function").

⁸⁰ Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 802 (2016).

⁸¹ See Levine, *supra* note 7 (suggesting that publicizing police disciplinary records in the correct context would address concerns officers claim over minor misconduct stigmatizing officers unfairly).

⁸² BuzzFeed Memorandum of Law, *supra* note 51, at 6.

⁸³ For an example of this power dynamic, see Graham Rayman, *Exclusive: NYPD Sergeant Says Promotion to Lieutenant Was Blocked Due to His Support of Colin Kaepernick*, N.Y. DAILY NEWS (Oct. 01, 2018, 5:30 AM), <https://perma.cc/M398-BMDQ> ("[T]he case is yet another example of a double standard ingrained in the NYPD's disciplinary system.").

When no participant in either system trusts the process or the fairness of the outcomes, the result is alienation of all parties impacted by the system, both officers and harmed civilians. People harmed by police may feel pursuing justice is hopeless. Individual police officers feel isolated from the department and unfairly persecuted for following supervisors' orders.⁸⁴ Without the benefit of statistics and data to ground the harm experienced by both community members and police officers, their stories remain isolated tragedies, at best resolved with money settlements. This not only hinders people fighting for systemic changes, it harms the public from learning about the system and what changes it needs.

C. *Hiding Police Disciplinary Records Harms Public Discourse*

If “[p]ublicity is the very soul of justice,”⁸⁵ The removal of decades of police disciplinary information from the City Hall archives is itself an injustice to New Yorkers. From 1972 until 2016, the Deputy Commissioner of Public Information of the NYPD updated personnel orders with summaries of charged misconduct and disciplinary penalties that hung on a clipboard on the wall outside that office for reporters to review.⁸⁶ Following The Legal Aid Society's open record request in April 2016 for five years of these summaries, NYPD officials directed all police discipline information to be removed from this clipboard, as well as from City Hall archives.⁸⁷ In addition to the removal of disciplinary summaries from

⁸⁴ See Kendall Taggart et al., *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BUZZFEED NEWS (Apr. 16, 2018, 5:33 AM), <https://perma.cc/7S6W-H37U> (“Many officers told BuzzFeed News that the disciplinary system is unfair. Some said it lets guilty officers off the hook. Others said it punishes people for reporting misconduct or just for getting on their supervisors' bad sides.”). For Roy Richter's, President of the NYPD Captain's Endowment Association, interpretation of this balance, see Transcript of the Minutes of the Committee on Public Safety at 123-24, N.Y. CITY COUNCIL (Oct. 21, 2016), <https://perma.cc/MG6S-2XXJ> (follow the “Hearing Transcript” hyperlink) (“When a subject officer is charged with abuse of authority for violating the constitutional rights of an individual, and review of the facts reflect that the officer acted in good faith, consistent with their training, Department policy and the law, these officers should not have to put their careers on hold while defending themselves in a prolonged administrative prosecution.”).

⁸⁵ JEREMY BENTHAM, BENTHAM'S DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, in 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., 1843).

⁸⁶ See Petitioners Memorandum of Law at 7, *Luongo v. Records Access Officer of the NYPD*, Index No. 160232/2016, at 7; Rick Rojas, *New York Police Dept., Citing Law, Stops Sharing Personnel Data*, N.Y. TIMES (Aug. 25, 2016), <https://perma.cc/4UYZ-NTJW> (“The [personnel orders] include[] changes in duty, promotions, retirements and deaths, as well as information on disciplinary actions taken against officers The personnel orders typically contain an officer's name and precinct, the nature of the offense and the penalty.”).

⁸⁷ Petitioners Memorandum of Law, *Luongo v. Records Access Officer of the NYPD*, *supra* note 86; See Rocco Parascandola & Graham Rayman, *Exclusive: NYPD Suddenly Stops*

city archives, the NYPD also withholds written decisions by its ALJs.⁸⁸ An entire common law exists among the administrative judges in the NYPD trial room. Their Reports and Recommendations interpreting rules in the Patrol Guide cite prior reports to support their conclusions about whether misconduct occurred,⁸⁹ but because their decisions are not available these norms are unknown to the public, hindering its understanding of how police are judged.⁹⁰ For example, NYPD judges may cite prior decisions interpreting how force may be used when a false start is material or when officers may curse.

This opacity specifically hinders First Amendment values favoring availability of information “about the exercise of governmental power, educating individuals about the implementation and impact of the law, and fostering discussion about matters of public concern.”⁹¹ When no outcomes of disciplinary hearings are made public, the police department can claim that a fully functional police accountability system exists—whether true or not—without any contradictory evidence publicly accessible.⁹² Even if it is a functional system, depriving the public of any ability to judge for itself is not justice. When a system loses the trust of the public, it has likely also lost the confidence of the people most directly impacted by it.

Sharing Records on Cop Discipline in Move Watchdogs Slam as Anti-Transparency, N.Y. DAILY NEWS (Aug. 24, 2016, 10:57 PM), <https://perma.cc/9DJV-4SQT> (illustrating that, for decades, reporters have had access to a “Personnel Orders” clipboard hanging in the department’s public information office, which listed administrative cases closed out either by a plea deal or by an internal trial held at 1 Police Plaza).

⁸⁸ Brief for Petitioner at 6, *NYCLU v. NYPD*, 148 A.D.3d 642 (2017).

⁸⁹ 38 R.C.N.Y. § 15-06 (a)(2) (2018) (directing the Deputy Commissioner of Trials (DCT) to issue a “Draft Report and Recommendation” with findings of fact and conclusions of law, plus a recommendation for disposition). The draft is sent to the parties for review and opportunity to comment. *Id.* § 15-06(c). The DCT finalizes and sends the Report and Recommendation to the Police Commissioner, with transcript of proceedings, exhibits and comments submitted by parties. *Id.*

⁹⁰ For an example of how the NYPD trial room common law plays out, see Robert Lewis & Noah Veltman, *The Hard Truth About Cops Who Lie*, WNYC NEWS (Oct. 13, 2015), <https://perma.cc/4YQL-QF6N> (relaying that, in November 2014, a Deputy Commissioner of Trials allowed an officer to keep their job despite making false statements, because officers in similar cases heard by the Commissioner of Trials had not been terminated).

⁹¹ Ardia, *supra* note 12, at 897.

⁹² See Jillian Jorgensen et al., *De Blasio, NYPD Big See No Problem with How Cops Address Police Misconduct*, N.Y. DAILY NEWS (Mar. 15, 2018, 10:06 PM), <https://perma.cc/ZQD3-JVFD> (quoting Mayor deBlasio and Deputy Commissioner Benjamin Tucker saying that the NYPD’s disciplinary system is fair in response to a Daily News investigation on disparities in punishment).

“[I]nformation is power, or, to put it more finely, disproportionate access to information is power.”⁹³ Rather than questioning the competency of community members to understand the context and significance of events, we should embrace the potential for a contested process to “elevate[]the role of stakeholders and affected individuals” to “create[] the potential for a shift in power between communities and the police.”⁹⁴ Obtaining collective clarity around complex issues calls for creative reporting, education, and conversation, not the withholding of information.⁹⁵ No matter how complex, “[t]he people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.”⁹⁶ Society also benefits from the inclusion of community perspectives. “Involving the community as an equal stakeholder in the deliberative process enables individuals to understand their roles in solving communal problems and therefore contribute more meaningfully to the implementation of solutions.”⁹⁷

Hiding police disciplinary records also harms public discourse of the police disciplinary system by preventing informed public debate about what should be considered “minor” police misconduct in determining disciplinary penalties. When an officer’s shirt is not ironed, it may obviously be a minor penalty, but other types of misconduct deserve debate. “Which offense is worse?,” a Daily News article, reporting on two offenses committed by high ranking officers who were disparately punished for, asked: dating a man with a conviction record or “fudging statistics and encouraging mass arrests?”⁹⁸ The former Captain who dated a man with a conviction record was suspended and demoted.⁹⁹ The Deputy Inspector who manipulated crime statistics only lost a few vacation days.¹⁰⁰ More regular reporting on these disparities might influence public debate, initiate campaigns by elected officials, and be the foundation for the type of systemic change needed to make the police disciplinary system more effective at

⁹³ *About: Our Mission*, SUNLIGHT FOUND., <https://perma.cc/7UGU-K2H8> (last visited Jan. 8, 2019) (“The Sunlight Foundation is a national, nonpartisan, nonprofit organization that uses civic technologies, open data, policy analysis and journalism to make our government and politics more accountable and transparent to all.”).

⁹⁴ Patel, *supra* note 80, at 798.

⁹⁵ See *infra* II.B.2.: Distortion.

⁹⁶ N.Y. PUB. OFF. LAW § 84 (McKinney 2018).

⁹⁷ Patel, *supra* note 80, at 806 (citing 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, 538-39 (2008)).

⁹⁸ Thomas Tracy et al., *Exclusive: There Are Two Sets of Rules When it Comes to Punishing Police Officers – ‘In the NYPD Disciplinary System It’s Not What You Did - It’s Who You Know’*, N.Y. DAILY NEWS (Sept. 13, 2018, 6:00 AM), <https://perma.cc/676A-5HJW>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

holding police accountable. This level of reporting is not possible without transparency of police disciplinary information.

Hiding NYPD's disciplinary data from the public also prevents the public from weighing in on whether, for example, unlawful stop-and-frisks are minor violations or something more serious. Before stopping Eric Garner in 2014, Officer Daniel Pantaleo unlawfully frisked someone in 2012.¹⁰¹ While the CCRB recommended eight vacation days forfeiture for Officer Pantaleo, the NYPD only penalized him for two vacation days.¹⁰² Even the NYPD's court-ordered revision of its stop-and-frisk policy defines "isolated" unlawful stops or unlawful frisks as minor.¹⁰³ The people subjected to unlawful stops or unlawful frisks may feel very differently based on the many psychological, social, and professional effects they report.¹⁰⁴ Yet whether these effects are considered when the police department concludes, as a policy, that unlawful stops may be considered minor is not apparent. Police departments should weigh public opinion about such questions to pierce the otherwise isolated understanding of what is minor versus significant misconduct. Business ethicists and group psychologists have identified this isolation, which afflicts social groups like police, as "ethical blindness":

[W]hether or not a person becomes aware of a decision's ethical dimension depends on the sensemaking process unfolding within

¹⁰¹ Officer Pantaleo's misconduct history was only made available through leaks, since New York State Civil Rights Law § 50-a specifically protects police officers' records. Al Baker & Benjamin Mueller, *Records Leak in Eric Garner Case Renews Debate on Police Discipline*, N.Y. TIMES (Mar. 22, 2017), <https://perma.cc/3C4J-3LYG>; Carimah Townes & Jack Jenkins, *Exclusive Documents: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINKPROGRESS (Mar. 21, 2017, 2:09 PM), <https://perma.cc/JRT7-3QLE>; see also Levine, *supra* note 7 (citing the Baker & Mueller article from the New York Times in concluding the release of Pantaleo's misconduct history was inconclusive and arguing release of his records would not have contributed anything to public sentiment or NYPD's process).

¹⁰² Townes & Jenkins, *supra* note 101. The CCRB's ability to document the difference between what the public and the NYPD might consider to be "just" is limited to administrative employment penalties, and has been further watered down by the reconsideration process. Benjamin Mueller, *New York Police Challenging More of Review Board's Findings, Study Shows*, N.Y. TIMES (July 19, 2017), <https://perma.cc/SVM5-9PCR>.

¹⁰³ NYPD, PATROL GUIDE PROCEDURE NO. 212-11: INVESTIGATIVE ENCOUNTERS: REQUESTS FOR INFORMATION, COMMON LAW RIGHT OF INQUIRY AND LEVEL 3 STOPS (2016) was enacted through a court-ordered process following the 2013 finding that New York's stop-and-frisk policy was unconstitutional in *Floyd v. City of New York*, 959 F. Supp. 2d 668, 689 (S.D.N.Y. 2013). It specifies that "[m]inor or inadvertent mistakes in documentation or isolated cases of erroneous but good-faith stops or frisks by members of the service should ordinarily be addressed through instruction and training." NYPD, PATROL GUIDE PROCEDURE NO. 212-11, *supra*.

¹⁰⁴ See sources cited, *supra* note 32.

the social group that the person is part of. We suggest that the sensemaking process leading to ethical blindness is based on the interplay between a tendency toward rigid framing and contextual pressures. Frames make us view the world from one particular and thus necessarily limited perspective. They have blind spots. The more rigidly people apply specific frames when making decisions, the lower their ability to switch to another perspective. They are locked into one frame.¹⁰⁵

Police, as a social group, create an ethical framework divorced from the framework of the communities they serve because they are locked into their own frame.¹⁰⁶ Concealing their disciplinary system's records only serves to strengthen these frames and to prevent probing them.¹⁰⁷ Transparency around disciplinary outcomes could expose other discrepancies between what officers consider minor misconduct and what the public considers significant misconduct, strengthening discussions around police accountability systems.

Having more information like this to expose discord between the public's and the police's sense of justice around specific issues would improve public discourse, educate the public about the context of minor offenses, help the police understand public perception of those offenses, and contribute to solutions for the accountability system. In other words, arming the public with the knowledge of how conduct is adjudicated internally would permit calibration with those internal processes and outside societal norms. Police acknowledging the public's perspective on, for example, why an unlawful stop-and-frisk causes major harm benefits the public discourse, could improve the perception of fairness for all, and ultimately balance the normative framework for deciding police discipline.

Police disciplinary systems benefit from checks by an informed public—not only because the public can pierce the rigid framing of police perspective—but also because they broaden the definition of the problem from bad actors to bad systems.¹⁰⁸ Deliberative democracy “emphasize[s]

¹⁰⁵ Guido Palazzo et al., *Ethical Blindness*, 109 J. BUS. ETHICS 323, 324 (2012).

¹⁰⁶ Levine, *supra* note 7 (suggesting that the police might react to the forced transparency by adopting new anti-accountability consequences due to unusually high solidarity among the police officers).

¹⁰⁷ See Matt Taibbi, *Why Baltimore Blew Up*, ROLLING STONE, (May 26, 2015 1:15 PM), <https://perma.cc/KXV7-SNET> (“Police are always complaining about the ‘Don’t snitch!’ campaigns But you almost never see police informing on each other. They’re more into ‘Don’t snitch’ than people on the street.”) (quoting Kato Simeto, a Baltimore resident).

¹⁰⁸ *Contra* Levine, *supra* note 7 ([T]here is no reason to believe that visibility alone will solve complex, institutional and organizational problems that have plagued police departments for decades.”); *but see* David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 163 (“One of the early progressives’ basic insights about transparency ought to resonate across

the right, opportunity, and capacity of anyone subject to a collectively made decision to participate in a meaningful way in deliberations regarding decisions that affect him or her.”¹⁰⁹ How police officers are held accountable, especially for their conduct towards members of the public, should be subject to our deliberative democracy. To do otherwise is undemocratic:

The very fact of exclusion from participation is a subtle form of suppression. It gives individuals no opportunity to reflect and decide upon what is good for them. Others who are supposed to be wiser and who in any case have more power decide the question for them and also decide the methods and means by which subjects may arrive at the enjoyment of what is good for them. This form of coercion and suppression is more subtle and more effective than is overt intimidation and restraint.¹¹⁰

Excluding the public from participation in an informed debate about police misconduct and leaving decisions about their daily experiences of injustice in the hands of government agencies, lawyers, and courts deprives society of the public’s solutions.¹¹¹ This is a major loss. The person experiencing injustices in their daily life knows more precisely “where the shoe pinches,”¹¹² and can contribute more valuable solutions than a judge or lawyer trying to imagine what it is like to be in the shoes of a person experiencing police abuse.

There are relatively few modern examples of public access to police misconduct information with which to elicit proof of this; but, ambitious efforts are underway to open this monopoly on information about police misconduct from government bodies.¹¹³ When the police do not tightly monopolize this information, such as in Chicago following the death of

the political spectrum. In general, they believed, the case for exposure is strongest where secrecy enables the accumulation of arbitrary political or economic power The risk of undisclosed and unchecked domination in the United States is today sourced less plausibly to legislatures or political machines, and more plausibly to institutions such as . . . law enforcement agencies—and to the computer algorithms used by all of these.”)

¹⁰⁹ Patel, *supra* note 80, at 801.

¹¹⁰ JOHN DEWEY, *Democracy and Educational Administration*, in 2 THE LATER WORKS, 1935-1937, at 217, 218 (Jo Ann Boydston ed., 1987).

¹¹¹ Levine, *supra* note 7.

¹¹² DEWEY, *supra* note 110, at 219.

¹¹³ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 396 (2016) (describing “organized copwatching patrols” in cities across the U.S. in order to increase police accountability in neighborhoods of color); Open Police Complaints, FLEX YOUR RIGHTS, <https://perma.cc/XH6Z-2ZRL> (last visited Jan. 8, 2019); see also Cynthia H. Conti-Cook, *Open Data Policing*, 106 GEO. L.J. ONLINE 1, 16-21 (2017) (detailing how “open data” about police conduct is being utilized by police reform advocates to “improve oversight and understanding of the police.”)

Laquan McDonald, the family, community, and police reform advocates retain more power and capacity to call for change from elected officials.¹¹⁴ The thousands of protesters in Chicago, for example, were not just calling for justice for Laquan McDonald, or indictment of the officer responsible for his killing, they were calling for the DOJ to hold the entire Chicago Police Department accountable through an investigation.¹¹⁵ The access to more information did not demonize a single police officer as much as it woke Chicago up to much larger structural problems.¹¹⁶

The Chicago Citizens Police Data Project, a database of thirty years of police misconduct information, and the action it supports is a great example of this.¹¹⁷ In another publication, the author discussed how transparency of police disciplinary records promotes systemic reforms by comparing Chicago following the release of recordings showing Officer Jason Van Dyke shooting Laquan McDonald, with the killing of Eric Garner.¹¹⁸ Years after Mr. McDonald was killed, the Chicago public has maintained pressure on its city officials to not only fire, indict, and eventually convict Van Dyke, but to reform its accountability system through protests, investigative reports, editorials, opinion pieces, and academic studies. This public pressure resulted in the loss of an election by the incumbent county prosecutor, the firing of the police chief, and culminated in the ultimate demonstration of electoral power on the eve of Van Dyke's trial for McDonald's death, when Mayor Rahm Emanuel announced he would not be seeking a third term.¹¹⁹ Many attribute the end of these political careers to how Chicago failed Mr. McDonald—in part by allowing

¹¹⁴ See Michael Martinez, *Protesters Disrupt Chicago Shopping, Ask Feds to Probe McDonald Killing*, CNN, <https://perma.cc/5TCB-EHY6> (last updated Nov. 28, 2015, 2:26 PM).

¹¹⁵ *Id.*

¹¹⁶ See *infra* II.B.3.: Increased Accessibility.

¹¹⁷ See *Citizens Police Data Project*, INVISIBLE INST., <https://perma.cc/HC4Z-JW3V> (last visited Jan. 8, 2019).

¹¹⁸ Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1065-66 (2016).

¹¹⁹ Dahleen Glanton, *Column: Laquan McDonald Was Shot Down by Police, and He Took the Mayor's Career Down with Him*, CHI. TRIBUNE (Sept. 6, 2018, 5:00 AM), <https://perma.cc/X98T-TURN>; Bill Ruthhart, *Chicago Mayor Rahm Emanuel Explains the Surprise That Shook the City and Why He Won't Seek Re-election*, CHI. TRIBUNE (Sept. 5, 2018, 7:50 AM), <https://perma.cc/P4VS-LAAU> ("Emanuel's advisers insisted the Van Dyke trial played no factor in his decision, but many political insiders acknowledged that if the officer were to be acquitted, the mayor's chances of winning re-election would have been significantly damaged. By making a final decision before the trial, Emanuel removed the possibility of looking reactive to a verdict, whichever way the case goes."). Emanuel was responsible for blocking the release of police videos showing officers murdering Laquan McDonald. Bernard E. Harcourt, *Cover-Up in Chicago*, N.Y. TIMES (Nov. 30, 2015), <https://perma.cc/4L59-LD6G>; Brentin Mock, *How Rahm Emanuel Blew it on Police Reform*, CITYLAB (Sept. 7, 2018), <https://perma.cc/FD3F-9A8F>.

Officer Van Dyke to accumulate so many community complaints and repeatedly escape accountability.¹²⁰ Compare New York City's backslide in the same time period under a "progressive" mayor: the NYPD has failed to fire Daniel Pantaleo who has collected thousands of dollars in overtime¹²¹ and will collect thousands more in his recently vested pension.¹²² Some claim, following a leak of Pantaleo's civilian complaint history from the CCRB, that it failed to bear the same kind of significance to Mr. Garner's death as Van Dyke's did to Mr. McDonald's death.¹²³ Yet, had the public known from the early days of Mr. Garner's death, which started as an unlawful stop-and-frisk, that Pantaleo had a recently substantiated complaint of an unlawful frisk, the marches, op-eds, and rallies may have focused more on failures of the disciplinary system to deter unlawful stop and frisks than on indicting Pantaleo.¹²⁴ Their messaging could have been more concrete, the failures more possible to solve, and the political leverage more easily obtained.

There are many differences between Chicago and New York City, but when it comes to how the issue of police accountability has been addressed for the last five years, one major difference is transparency of police disciplinary records. Rather than resulting in salacious gossip of isolated instances of misconduct, the Chicago database allows community members and reporters to focus on the commanders allowing misconduct to flourish, such as the former Chicago Police Superintendent Eddie Johnson.¹²⁵ A creative publication like Citizens Police Data Project stimulates helpful public debate over systemic reform. An informed debate about a police disciplinary system may question whether certain types of misconduct have too broad a range of penalties. It may question whether a type of lenient penalty is too often the outcome for serious misconduct like false statements. It may question whether certain types of misconduct,

¹²⁰ See Mari Cohen, *Study by Kyle Rozema: Van Dyke's Complaint History Could Have Foretold Shooting of McDonald*, INJUSTICEWATCH (Sept. 4, 2018), <http://perma.cc/D25S-YL9S> (showing Van Dyke's long history of civilian complaints was apparent at the time the video of him shooting McDonald was released).

¹²¹ Graham Rayman & Jennifer Fermino, *NYPD Cop Daniel Pantaleo's Pay Rises to \$120G While Working Desk Duty Since Killing Eric Garner*, N.Y. DAILY NEWS (Sept. 12, 2016, 11:49 PM), <https://perma.cc/7WVG-THCA>.

¹²² See Richard Steier, *'Garner' Justice: Long Wait, No End in Sight*, CHIEF (Dec. 4, 2017), <https://perma.cc/67YY-MXE3>.

¹²³ See, e.g., Levine, *supra* note 7 (concluding that release of Pantaleo's disciplinary records would have been inconsequential to messaging around police reform efforts).

¹²⁴ See Townes & Jenkins, *supra* note 101 (reporting on the gaps in NYPD's disciplinary system that allowed Officer Pantaleo to still be on the streets at the time of Eric Garner's death, in light of his records).

¹²⁵ Andrew Fan & Sam Stecklow, *Use of Force: Chicago Police Superintendent Eddie Johnson's Long Record of Justifying Police Misconduct and Shootings*, INTERCEPT (Nov. 14, 2018, 9:00 AM), <https://perma.cc/ZE8X-RRKZ>.

like unlawful stops, come more often from particular commands or whether certain high ranks are less likely to receive serious penalties. The Chicago database is the type of publication that empowers communities to push reforms with data-driven analysis, to lobby for specific policies and call on lawmakers to hold hearings, to draft legislation, to campaign for reforms, and to make systemic change. It enables the community to face the problem in order to change it.

Hiding police disciplinary information amplifies harms to families and communities, promotes distrust in justice systems, and hinders the public's ability to engage in reforming police disciplinary systems. Conversely, allowing public access to these records translates into the benefit of supporting a constitutionally significant right of public access to police disciplinary records that supports public oversight of public functions and encourages democratic engagement through informed public discourse. Against these potential benefits and traumatizing harms, nebulous privacy harms by police should be reconsidered. However, we must first precisely define what privacy harms we are placing on the other side of the scale.

PART II: MEASURING THE WEIGHT OF POLICE PRIVACY HARMS

Police unions have dominated thinking and policies around publishing of police disciplinary records for decades, usually through their extremely politically powerful and well-funded unions. The New York City Police Patrolmen's Benevolent Association (PBA), for example, paid for officers to fly Iowa to protest Mayor de Blasio, whose security detail is also staffed by NYPD officers, making the Mayor both politically and personally dependent on the NYPD.¹²⁶ As Patrick Lynch said, "[w]e've woke him up in the morning and put him to bed at night And we've met him at the gym We're going to pop up where he pops up."¹²⁷ The power of around-the-clock protest by armed officers and the influence it undoubtedly has on elected officials cannot be understated.

Police union rhetoric supporting secrecy of misconduct records heavily cites to privacy and safety concerns of officers who fear access to their residential, family, or financial information will make them vulnerable to vindictive or conspiring criminals.¹²⁸ Access to personal information about officers is undisputed private information that should not be

¹²⁶ Shane Goldmacher, *Police Union Is Sending Officers to Iowa to Protest de Blasio*, N.Y. TIMES (Dec. 18, 2017), <https://perma.cc/X3PM-ZHZV>.

¹²⁷ *Id.* (internal quotations omitted).

¹²⁸ See, e.g., *Peace Officer Records: Hearing on S.B. 1019 Before the S. Comm. Pub. Safety*, 2007-2008 Sess., (Cal. 2008) (Statement of the Riverside Sheriffs Association) ("The mandated disclosure of officer's personnel records called for in this bill will subject officers to increased risk of retribution on the streets, lost credibility, diminished effectiveness on the

disclosed and is already covered under New York State FOIL exemptions, and many other states' exemptions, as information that if disclosed would be an "unwarranted invasion of privacy."¹²⁹ Even when focused on disciplinary information alone, police still argue that they have an elevated privacy interest in their prior misconduct due to their responsibility to testify in court and vulnerability to public smear campaigns by private citizens with "an ax to grind".¹³⁰ How police articulate elevated privacy expectations in their disciplinary information above what their colleagues in state and city governments expect and above what courts have decided is reasonable will be studied in this section.

In making the argument for elevated privacy interests, police have capitalized on pliant definitions of privacy. "Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of 'privacy' do not fare well when pitted against more

beat, diminished credibility on the witness stand, increased civil liability, and general embarrassment. Maintaining the confidentiality of these records best serves the important policy goal of maintaining confidence in law enforcement by avoiding premature disclosure of groundless claims of police misconduct."); Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 141 (2017) ("By simply framing any opposition to their political agenda as endangering safety, police unions force policymakers to choose between supporting the union's political agenda and endangering public safety."); Maya Dukmasova, *The FOP's New Spokesman Believes in a Vast Left-Wing Media Conspiracy*, CHI. READER: BLEADER (Apr. 20, 2017, 5:27 PM), <https://perma.cc/9XA5-66ZH> ("The results of this 'war on police,' they argue, have been bigger than just a change in public perception. Police sources frequently—and without empirical evidence—claim that Chicago's rising homicide rate has been caused by cops being less willing to be 'proactive' on the streets due to constraints imposed by civil rights litigation, and for fear of being captured on video and shamed in the media."); Ben Fractenberg, *More NYPD Officer Misconduct Being Substantiated Due to Videos*, CCRB SAYS, DNAINFO (Oct. 15, 2015, 9:24 AM), <https://perma.cc/U6UY-3GLW> ("PBA President Patrick Lynch said in a statement . . . '[The CCRB] are part of a political apparatus that has been systematically denigrating the reputation of a fine police department and its officers and that must stop.'"); Letter from Michael J. Bowe, Attorney on Behalf of the Patrolmen's Benevolent Association of the City of New York, to Allison Lucas, Gen. Counsel, BuzzFeed (Apr. 11, 2018), <https://perma.cc/VWH8-RW8K> ("Moreover, it is a matter of public record that police officers have recently been intentionally targeted for violence, including murder, for nothing more than being police officers. This phenomenon has tragically resulted in the murders of several police officers in New York City by perpetrators inspired by sensationalized media characterizations. BuzzFeed's illegal publication of the disciplinary histories of specific individuals will put all 24,000 New York City police officers in danger.").

¹²⁹ N.Y. PUB. OFF. L. § 87(2)(b).

¹³⁰ See, e.g., Patrick J. Lynch, *Why Cops Need a Privacy Shield: The Police Union Boss Defends the N.Y. Law Preventing Release of Disciplinary Records*, N.Y. DAILY NEWS, (Dec. 14, 2018, 5:00 AM), <https://perma.cc/S5UJ-L52Y> ("[U]nscrupulous attorneys could easily derail criminal trials of the accused . . . [A]ny private citizen with an ax to grind . . . could use [records] as fodder for a public smear campaign . . .").

concretely stated countervailing interests.”¹³¹ For the purposes of balancing harms of hiding records versus harms to police privacy in determining laws and policies around public access to police disciplinary records, it is worth discerning the specific types of privacy harms applicable to police in that context rather than indiscriminately leaning on the privacy panic button.

To discern these types of privacy, this article will rely on a more defined vocabulary around police privacy harms to help us measure them more exactly against harms of hiding police disciplinary data. Using constitutional interpretations of police officers’ right to privacy in disciplinary records along with state statutes and Daniel Solove’s *Taxonomy of Privacy*, this Part will explore how police rhetoric about privacy should be recalibrated before being weighed against public harms of hiding misconduct.

A. *Legal Privacy Protections for Police Officers*

It is important to distinguish between rights to privacy that are grounded in the Constitution and the rights crafted by police through lobbying for state statutes. Federal constitutional rights to privacy do not protect officers from disclosure of misconduct committed in their public capacity. As Federal District Court Judge Jack Weinstein wrote: “The privacy interest in this kind of professional record [of a police officer] is not substantial, because it is not the kind of ‘highly personal’ information warranting constitutional safeguard.”¹³² Judge Weinstein further emphasized that “[t]he privacy interest in nondisclosure of professional records

¹³¹ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 477-78 (2006).

¹³² *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988) (citations omitted); see also *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (“[P]ublic 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.”); *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) (citations omitted) (“[P]olice internal investigation files were not protected by the right to privacy when the ‘documents related simply to the officers’ work as police officers.’”); *Pirozzi v. City of New York*, 950 F. Supp. 90, 94 (S.D.N.Y. 1996), *aff’d*, 117 F.3d 722 (2d Cir. 1997) (disclosing statements made in civilian complaint investigations to district attorney did not violate Fourteenth Amendment Due Process right to privacy); *Worden v. Provo City*, 806 F. Supp. 1512, 1516 (D. Utah 1992) (publishing information in police newsletter about events surrounding officer’s resignation did not violate Due Process right to privacy). Compare *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998) (protecting the privacy of sensitive personal information contained in personnel files including officers’ home addresses, phone numbers, social security numbers, and driver’s licenses) and *Carpenter v. Plattsburgh*, 105 A.D.2d 295, 299 (3d Dep’t 1985), *aff’d*, 66 N.Y.2d 791 (1985) (holding that police officers do not have an inherent constitutional right to privacy concerning their personnel records), with *Hall v. City of Cookeville*, 157 F. App’x 809, 812-13 (6th Cir. 2005) (denying a claim of privacy to contents of a personnel file where the officer had already made the information available to the media).

should be especially limited in view of the role played by the police officer as a public servant who must be accountable to public review.”¹³³

State constitutional rights to privacy have also not been interpreted to include blanket protection from public disclosure of police disciplinary records. The highest court in Montana agreed with Weinstein about officers’ expectation of privacy of police disciplinary records: “[I]t is not good public policy to recognize an expectation of privacy in protecting the identity of a law enforcement officer whose conduct is sufficiently reprehensible to merit discipline.”¹³⁴ While the court recognized the officer may claim some privacy interest, it held that “[w]hatever privacy interest the officers have in the release of their names as having been disciplined, it is not one which society recognizes as a strong right.”¹³⁵ Even under a Hawaiian law recently passed under pressure by police unions to give “significant privacy” protections to officers, a court still held that the “[p]rivacy interest in police officers’ disciplinary suspension records” was subject to “the public’s interest in the information.”¹³⁶

Police have also generally lost any claim to invasion of privacy for disciplinary records under state Freedom of Information Laws.¹³⁷ Open records laws have built upon the same logic as First Amendment right of access to judicial proceedings to extend the expectation of openness to other government documents and “hold the governors accountable to the

¹³³ *King*, 121 F.R.D. at 191.

¹³⁴ *Great Falls Tribune Co. v. Cascade Cty. Sheriff*, 775 P.2d 1267, 1269 (1989) (citation omitted).

¹³⁵ *Id.*; *see, e.g.*, *Jones v. Jennings*, 788 P.2d 732, 737-38 (Alaska 1990) (holding that disclosure of police officer’s disciplinary records did not violate officer’s constitutional right to privacy, which is protected as fundamental right under Alaska Constitution); *see also* *City of Los Angeles v. Superior Court of Los Angeles Cty.*, 52 P.3d 129, 145 (Cal. 2002) (“An officer’s interest in shielding this type of document from public view is arguably illegitimate. The state, too, has no legitimate reason to prohibit the disclosure of a sustained citizen complaint. Certainly, any legitimate interest in destroying such a document is disproportionate to the purpose it is designed to serve. On balance then, any privacy interest an officer, his police agency, or the state has in the nondisclosure of a sustained citizen complaint must yield to the defendant’s constitutional right to effectively cross-examine a prosecution witness with relevant impeachment evidence.”); *Ass’n for L.A. Deputy Sheriffs v. Superior Court*, 221 Cal. Rptr. 3d 51, 68 (Cal. Ct. App. 2017), *cert. granted*, 403 P.3d 144 (Cal. 2017).

¹³⁶ *Peer News L.L.C. v. City & Cty. of Honolulu Police Dep’t*, 376 P.3d 1, 15 (Haw. 2016); *see also* *Disclosure of Police Suspension Records Under the UIPA*, OIP PEER NEWS SUMMARY (Sept. 19, 2016), <https://perma.cc/62Z2-KQ6F> (discussing the context of the new law passed to protect police records).

¹³⁷ *See, e.g.*, *Farrell v. Vill. Bd. of Trs. of Vil. of Johnson City*, 83 Misc. 2d 125, 128 (N.Y. Sup. Ct. 1975) (holding that the disclosure of the written reprimands of police officers was not an invasion of privacy and supported by public interest). This case preceded and likely prompted N.Y. CIV. RIGHTS L. § 50-a (McKinney 2018).

governed.”¹³⁸ As with constitutional claims to privacy rights, courts have not found that revealing on-duty misconduct is an invasion of privacy for purposes of exempting police disciplinary files under open records requests.¹³⁹ This conforms with the expectations most government actors and state licensed professionals have, including teachers, lawyers, physicians, and other licensed professionals, such as massage therapists, veterinarians, and architects.¹⁴⁰ Having lost court battles for constitutional or state rights to privacy as well as arguments that disclosure of disciplinary records are “an invasion of privacy”, police unions have relied heavily on Police or Law Enforcement Officer Bill of Rights (POBR) statutes across the country to create special privacy rights for themselves and sometimes other unionized law enforcement officers.¹⁴¹ These privacy protections go beyond personal information, like residential addresses and social security numbers, to include confidentiality clauses, heightened subpoena standards, and sealing and expungement clauses for police disciplinary records.¹⁴²

¹³⁸ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

¹³⁹ See e.g., Obiajulu v. City of Rochester, 213 A.D.2d 1055, 1056 (N.Y. App. Div. 1995); Faulkner v. Del Giacco, 139 Misc.2d 790, 794 (N.Y. Sup. Ct. 1988); Farrell v. Village Board of Trustees, 83 Misc. 2d 125 (N.Y. Sup. Ct. 1975).

¹⁴⁰ See, e.g., Steve Reilly, *How to Look up the Background of Teachers in Every State*, USA TODAY, <https://perma.cc/755U-HJU2> (last updated Mar. 4, 2016, 3:42 PM); James Kelly, *New York Courts Put Attorney Discipline Records Online*, N.Y. L. INST. (Feb. 24, 2015), <https://perma.cc/8JR9-B3RC>; *Physician and Physician Assistants Disciplinary and Other Actions*, N.Y.S. DEP’T OF HEALTH, <https://perma.cc/RN6C-33GP> (last visited Jan. 8, 2019); *Enforcement Actions*, N.Y.S. EDUC. DEP’T, <https://perma.cc/L4VT-SL6H> (last visited Jan. 8, 2019).

¹⁴¹ Bies, *supra* note 128, at 125 (“In the 1970s, police unions also lobbied to support the development of the Police Officer Bill of Rights (POBR). Fourteen states have passed statutory POBRs. The first states were Florida and Maryland in 1974, followed by [New York,] California and Rhode Island in 1976, Virginia in 1978, and Wisconsin in 1979.”). In addition to state statutory POBRs, police unions also embedded these “rights” into police union contracts. Levine, *supra* note 7; see Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198 (2017); Radley Balko, *The Police Officers’ Bill of Rights*, WASH. POST (Apr. 24, 2015), <https://perma.cc/M94P-BAUC> (providing an overview of the history, scope and consequences POBR provisions play in preventing accountability, including criminal investigations); Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:18 PM), <https://perma.cc/VNR5-K2X2> (reviewing 82 police union contracts and how their provisions related to discipline prevent accountability); Jon Swaine & George Joseph, *Hackers Post Private Files of America’s Biggest Police Union*, GUARDIAN (Jan. 28, 2016, 8:43 PM), <https://perma.cc/G68J-B2ZT> (“Hundreds of contracts between regional authorities and local fraternal order of police lodges across the country were posted online as part of the hack. Some such deals have been sharply criticised [sic] as shielding police officers from prosecution or disciplinary action following the excessive use of force.”).

¹⁴² See Luongo v. Records Access Appeals Officer, 2019 WL 237463, at *1 (Jan. 17, 2019). Compare Levine, *supra* note 7, at 33 (discussing West Virginia law protecting personal information if its release would result in an invasion of privacy), with N.Y. CIV. RIGHTS LAW

One of these laws is New York State's Civil Rights Law section 50-a, enacted to protect officers testifying in court from "fishing expeditions" by defense attorneys.¹⁴³ The Court of Appeals in New York State recently broadly interpreted section 50-a to imply that disclosure of NYPD administrative decisions and other "quintessential" personnel records is limited only to the litigation context rather than acting as an exemption to open records laws, untethering 50-a privacy protections from historical limitations of broaden open government principles.¹⁴⁴ The City has also cited section 50-a as the reason why any identifying information about the officers who killed Saheed Vassell cannot be disclosed.¹⁴⁵ Neither the decision nor the City's justifications cited consideration of competing First Amendment constitutional principles about the right to access information.

Laws that hide police disciplinary records embody the "abstract incantation" of privacy we should be skeptical of.¹⁴⁶ It creates police-only privacy, where otherwise no privacy right is recognized by constitutional or state law, for the purposes of undoing the public's expectation of access to information about government misconduct. Additionally, these laws also shield from the public an entire class of criminal acts that, if done by anyone else, would be publicly accessible through the criminal process. To understand with more granularity what specific types of privacy harms police are claiming to support these laws, the next section will analyze police union rhetoric using more specific vocabulary.

B. *Naming Privacy Harms Relevant to Police Disciplinary Information*

In Daniel J. Solove's *Taxonomy of Privacy*, a paper presented to the International Association of Privacy Professionals, Solove identifies four categories of privacy harms: (1) information collection, (2) information processing (storage, manipulation and use), (3) dissemination of information, and (4) invasions into private affairs.¹⁴⁷ Some of the privacy

§ 50-a (McKinney 2018) (categorically covering all information stemming out of anything in personnel records regardless of whether it would be an invasion of privacy or is in the public interest).

¹⁴³ For a legislative history of section 50-a, see Conti-Cook, *Defending the Public*, *supra* note 118, at 1070 and Levine, *supra* note 7.

¹⁴⁴ NYCLU v. NYPD, 2018 WL 6492733, at *9 (N.Y. Ct. App. Dec. 11, 2018).

¹⁴⁵ Rajvi Desai, *Crown Heights Shooting Victim Saheed Vassell's Family Demands NYPD Release All Videos, Officers' Names*, AM N.Y., <https://perma.cc/S5Q8-ZCDK> (last updated Apr. 12, 2018, 6:34 PM).

¹⁴⁶ See Solove, *supra* note 131, at 477-78.

¹⁴⁷ Solove, *supra* note 131, at 488.

harms (surveillance, social media, corporate data entities) are not applicable to balancing privacy concerns related to police discipline because the concerns do not relate to the collection of new data or its storage, for example.¹⁴⁸ Rather, any privacy harms at stake in making police disciplinary information accessible all fall under one category: dissemination of information, or how information that has already been collected and is being stored is shared or distributed publicly. Under that broader category, the types of privacy harms claimed by policy, according to Solove's labels, include disclosure, distortion, and increased accessibility. The following sections ask whether, according to these labels, police have strong claims to privacy harms.

1. Disclosure

Disclosure, or the “protections against disclosures of true information about people” is one privacy concern that police claim.¹⁴⁹ The tort of public disclosure of private facts “creates a cause of action for one who publicly discloses a private matter that is ‘highly offensive to a reasonable person’ and ‘is not of legitimate concern to the public.’”¹⁵⁰ Courts have held that events are not private if they are “left open to the public eye,” let alone committed by an on-duty public official.¹⁵¹ Facts are also not private when they are facts about official government functions, which bends the balance in favor of transparency because it concerns official functions that the public should be informed about in order to make educated decisions about reform.

This leads to the second part of the inquiry. Would a reasonable person be highly offended by the disclosure of police misconduct information? Other public officials and licensed professionals, as described above, have disciplinary information that is publicly available. In many instances their misconduct is searchable online.¹⁵² Police often claim that official findings of misconduct are not evidence that the misconduct oc-

¹⁴⁸ See *id.* at 491 (“Information collection creates disruption based on the process of data gathering. Even if no information is revealed publicly, information collection can create harm. I will identify two forms of information collection: (1) surveillance and (2) interrogation.”); *id.* at 505 (“[P]rocessing diverges from dissemination because the data transfer does not involve the disclosure of the information to the public—or even to another person. Rather, data is often transferred between various record systems and consolidated with other data.”).

¹⁴⁹ *Id.* at 527.

¹⁵⁰ *Id.* at 527-28 (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

¹⁵¹ *Id.* at 531 (quoting *Penwell v. Taft Broadcasting Co.*, 469 N.E.2d 1025, 1028 (Ohio Ct. App. 1984)) (holding that a couple wrongfully arrested in public “open to the public eye” had no privacy interest against the broadcast of video footage of the arrest).

¹⁵² See sources cited, *supra* note 140.

curred because they generally do not agree with substantiated investigations of misconduct. Patrick Lynch, president of New York's Patrolmen's Benevolent Association, for example, has repeatedly publicly attacked the findings of the Civilian Complaint Review Board: "The CCRB has always been infected with an anti-police bias, and has never lived up to its responsibility under the city charter to conduct 'complete, thorough and impartial' investigations of civilian complaints 'in a manner in which the public and police department have confidence.'"¹⁵³ Regardless of police union representatives' claims to privacy, even for on-duty official misconduct substantiated by independent investigations, courts have never extended any reasonable expectation of privacy so far.¹⁵⁴

Third, police misconduct information is obviously a matter of public concern, as discussed above in Part I.¹⁵⁵ Police often argue it is not. Supporters of secrecy argue that the public lacks a general understanding about the disciplinary system and will not be able to make informed decisions based on misconduct without more context.¹⁵⁶ Responding to a similar argument by the NYPD that disclosures should not be made because it was in the public's best interest to withhold information they could not digest, Judge Jenny Rivera wrote in dissent:

It would turn FOIL on its head to apply it as a means by which government may withhold information based on some amorphous concept of what the general public understands. It is not for government to decide what the public makes of the information disclosed. Indeed, the NYPD's implicit suggestion—that the public is better served by withholding information it cannot understand—ignores the legislative declaration that "government is the public's business."¹⁵⁷

As discussed in Part I, withholding information about police misconduct, out of a belief the public cannot understand harms public confidence in justice and disciplinary systems, and public discourse and is not a reason to hide misconduct but to the contrary, a reason to produce it.

¹⁵³ Josh Russell, *NYC Cops Push Back on Civilians' Sex-Misconduct Oversight*, COURTHOUSE NEWS (Mar. 13, 2018), <https://perma.cc/UD6D-9259> (quoting Patrick J. Lynch, President of the Patrolmen's Benevolent Association of New York City).

¹⁵⁴ See sources cited, *supra* note 132.

¹⁵⁵ See, *supra* Section I.B., for a discussion of the role of for transparency in public perception of and participation in justice systems.

¹⁵⁶ See Levine, *supra* note 7.

¹⁵⁷ *NYCLU v. NYPD*, No. 133, 2018 WL 6492733, at *14 (N.Y. Dec. 11, 2018) (Rivera, J., dissenting) (citations omitted).

Accessibility of police misconduct information, at least for on-duty misconduct, does not create a disclosure harm under this definition because it is not about a private matter, disclosure should not offend a reasonable person, and the information is squarely of public concern.

2. Distortion

“Distortion is the manipulation of the way a person is perceived and judged by others, and involves the victim being inaccurately exposed to the public.”¹⁵⁸ It is different from disclosure, under Solove’s definition, because “with distortion, the information revealed is false and misleading.”¹⁵⁹ The harm is an undeserved blemish on an individual’s reputation. This concern captures the bulk of concerns identified by officers, who usually claim privacy rights while simultaneously identifying all allegations against them as false, retaliatory, or out of context, regardless of the evidence to the contrary.¹⁶⁰ Again, Pat Lynch’s statements against the CCRB beat this drum routinely: “Our problem with the CCRB has always been first, their predisposition that police officers are always wrong. Second, their inexperienced investigators who conduct faulty investigations that arrive at improper conclusions and now those wrong conclusions will now be prosecuted at these kangaroo trials.”¹⁶¹ All information coming out of the “kangaroo trials” in the NYPD disciplinary system, according to Lynch, is tainted and unreliable, making all publicity about it inherently

¹⁵⁸ Solove, *supra* note 131, at 547.

¹⁵⁹ *Id.*

¹⁶⁰ See Levine, *supra* note 7; Justin Fenton, *Baltimore Police Disciplinary Records Remain Shielded Despite Revelations of Misconduct*, BALT. SUN (Feb. 17, 2018, 8:55 AM), <https://perma.cc/P7FY-6L7Z> (“Law enforcement officials say making police personnel and disciplinary records public would invade the privacy of officers and their families, and subject them to airing of allegations that turned out to be baseless Kruger said opening up records would ‘provide fodder for plaintiffs’ attorneys,’ ‘invites a micro-examination and second-guessing of investigations . . . by non-professionals,’ and create ‘intrusive opportunities to challenge a chief or sheriff’s decision-making process.’”); Levinson, *supra* note 141 (“Jason Pappas, president of the Columbus Fraternal Order of Police, said the union contract [shielding disciplinary records] does not skew investigations or limit accountability. ‘If every officer started getting disciplined or moved because somebody started filing complaints, hell, the whole neighborhood would start filing complaints,’ he said.”); Russell, *supra* note 154 (“‘The CCRB has always been infected with an anti-police bias, and has never lived up to its responsibility under the city charter to conduct ‘complete, thorough and impartial’ investigations of civilian complaints ‘in a manner in which the public and police department have confidence,’” PBA President Lynch said.”).

¹⁶¹ Bob Hennelly, *Complaints Against Cops to Be Tried by CCRB, Not NYPD*, WNYC NEWS (Mar. 27, 2012), <https://perma.cc/F6Q9-8MUH> (quoting Patrick J. Lynch, President of the Patrolmen’s Benevolent Association of New York City).

likely to distort the reputation of officers.¹⁶² Sowing this kind of fundamental doubt in a system the public cannot access meaningfully allows these claims of distortion to resonate unchecked. Certainly we cannot categorically agree that public access to all police misconduct will result in “false and misleading” information about individual acts of misconduct being revealed. Indeed, the corruption, favoritism, and overly broad discretion creating unfairness in the police disciplinary system that Lynch opposes may be the result of secrecy, not a reason to push for more of it.

Police rhetoric usually does not center on individual distortion harms, however; the harms police amplify are a collective kind of distortion.¹⁶³ Testifying against a transparency bill, Karen Kruger, general counsel for the Maryland Chiefs of Police, claimed that releasing information about police disciplinary records would “undermine community confidence in the law enforcement agency in its entirety.”¹⁶⁴ The PBA also claims this collective harm. Responding to an announcement by the CCRB that reported a higher complaint substantiation rate in 2015, the PBA warned: “[CCRB is] part of a political apparatus that has been systematically denigrating the reputation of a fine police department and its officers and that must stop.”¹⁶⁵ Police even extend this argument of harm to the community, arguing the community’s confidence in officers will be harmed if individual officers’ misconduct is publicized. California police made similar arguments when testifying against transparency measures in 2008.

The mandated disclosure of officer’s personnel records called for in this bill will subject officers to increased risk of retribution on the streets, lost credibility, diminished effectiveness on the beat, diminished credibility on the witness stand, increased civil liability, and general embarrassment. Maintaining the confidentiality of these records best serves the important policy goal of maintaining confidence in law enforcement by avoiding premature disclosure of groundless claims of police misconduct.¹⁶⁶

When distortion harms claimed are no longer about preventing disclosure of false and misleading information about an individual, but about

¹⁶² This strategy is typical of government officials accused of misconduct, Charles I also “turned every exchange into an opportunity to insult the court.” ROBERTSON, *supra* note 43, at 171.

¹⁶³ Levine, *supra* note 7, at 45.

¹⁶⁴ Fenton, *supra* note 161 (quoting Karen Kruger, General Counsel for the Maryland Chiefs of Police).

¹⁶⁵ Fractenberg, *supra* note 128.

¹⁶⁶ *Peace Officer Records: Hearing on S.B. 1019 Before the S. Comm. Pub. Safety*, 2007-2008 Sess., (Cal. 2008).

isolating a government entity from community criticism, they are no longer about protecting privacy, but about preserving the power of anonymity. This concern should not justify withholding police disciplinary information. More transparency around police misconduct information may actually improve the collective reputation of the majority of officers who do not accumulate misconduct records. More access to information about charges, penalties, and filings related to proceedings and increased public discourse could give the public the context it needs to understand the significance of minor charges. Such pressure could result not only in more swift and certain accountability for officers who committed misconduct but more fairness and equity for officers unjustly accused by abusive supervisors.

A more reasonable concern about potential harm from “airing of allegations that turned out to be baseless”¹⁶⁷ should be considered separately from this collective claim to harm. It is more reasonable because it implicitly discerns public value in some allegations rather than broadly painting all allegations as baseless. Thus far police unions have muddied this debate with general protections about all disciplinary information despite the outcome of an investigation or prosecution. In states that block access to records the public is deprived of enough information to participate in such a debate and often deemed “incompetent” to even engage in such a debate based on its lack of context.¹⁶⁸ Certainly a “thoughtful publication regime” should be debated by all stakeholders, including members of the public who have been through the process of filing complaints, and participating in investigations and prosecutions, but they must have the same access to information.¹⁶⁹ Thus far, the regime has been dictated by the police unions rather than deliberated through discourse.

A real debate may consider, for example, whether allegations exonerated by an investigation do not need to be publicly available. Of course releasing the outcome of the allegations with the findings may mitigate any resulting distortion harm. On the other end, allegations substantiated by investigations (falling more squarely under the “disclosure” analysis above) should perhaps always be available.¹⁷⁰ District Court Judge Weinstein even found that allegations deemed inconclusive (or “unsubstantiated”) could lead to discoverable evidence for a civil rights plaintiff and

¹⁶⁷ Fenton, *supra* note 161.

¹⁶⁸ Levine, *supra* note 7 (“[The] institutional competence of the public [is] to read such records . . .”).

¹⁶⁹ *Id.*

¹⁷⁰ Some officers would disagree due to their skepticism of CCRB’s investigations. *See, e.g.,* Hennelly, *supra* note 162 (“PBA President Patrick J. Lynch, an outspoken critic of the CCRB, was sharply critical of [CCRB’s] new powers [to prosecute officers in administrative trials].”).

a similar argument could be made in favor of making inconclusive outcomes available to public as well.¹⁷¹

Acknowledging that some distortion harms may result from publication of exonerated allegations is not the same thing as acknowledging that police have the same constitutional rights as people accused of crimes.¹⁷² Equating advocacy around sealing of criminal convictions to the claims of police privacy in disciplinary records is a pathos appeal to advocates for people accused of crimes that relies on a false equivalency.¹⁷³ Private citizens should be able to have greater expectations of privacy in their misconduct than officers deputized by the state with a gun and badge. When police officers walk into courtrooms in uniform, their uniform represents unspoken trust that the state has confirmed in their credibility and reliability. Jurors assume if they are trustworthy enough to carry a gun and a badge then their testimony must also be trustworthy. Many other public employees with uniforms, licenses, or other credentials do expect their disciplinary information to be available publicly despite their similarly situated vulnerability in public proceedings and in the media. Private citizens are not operating daily with the same state-sanctioned voucher and should expect greater privacy in their own non-criminal misdeeds yet would still, if called to testify against someone in a criminal proceeding, be subject to impeachment based on any prior bad acts the court considers material and relevant.¹⁷⁴

In addition to investigation outcomes needing debate, there are some types of misconduct the public is more concerned about than others. California recently modified their police privacy laws to allow public access to specific categories of information: uses of force, sexual assault, and

¹⁷¹ See *King v. Conde*, 121 F.R.D. 180, 198 (E.D.N.Y. 1988). The CCRB uses the term “unsubstantiated” to refer to inconclusive findings. *Data Transparency Initiative*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., <https://perma.cc/AN5N-4VYS> (“An allegation is unsubstantiated if there is not enough evidence to determine whether or not misconduct occurred.”) (last visited Feb. 2, 2019).

¹⁷² See *Levine*, *supra* note 7 (quoting a California law enforcement official equating police concerns about being falsely accused of misconduct with those of people falsely accused by police of criminal conduct).

¹⁷³ *Id.* at 8 (“[T]he release of [police disciplinary records has] . . . downstream implications for a far less powerful group whose lives are constantly affected by the specter of publicizing: individuals with criminal convictions”).

¹⁷⁴ *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (temporary embarrassment to witness and family by disclosure of juvenile record is outweighed by criminal defendant’s right to develop a record of bias during cross examination); *People v. Smith*, 27 N.Y.3d 652 (2016); *People v. Kozlowski*, 11 N.Y.3d 223, 242 (2008) (citation omitted) (“material facts in a criminal trial are those bearing upon the ‘unreliability of either the criminal charge or of a witness upon whose testimony it depends.’”).

false statements.¹⁷⁵ All allegations of force are now publicly available, along with allegations of sexual assault, and false statements that have been substantiated through an investigation. Before committing to a prescribed set of types of misconduct the public should access, the public should demand more information about the types of charges routinely brought. Some charges may be obviously in the public interest, such as all charges that overlap with crimes like assault, sexual assault, and perjury. Other types of charges may also be in the public interest, for example, manipulating crime reports to change statistics.¹⁷⁶ Types of charges probably not in the public interest might be that an officer is accused of dating someone with a felony record.¹⁷⁷

Police privacy advocates' concerns about distortion harms are not comparable to the concerns of people convicted of crimes and, inversely, advocates could not invoke police advocates' arguments without their lobbying and political power (including the leverage that comes from staffing elected officials' security detail, knowing their schedules and having resources to protest them around the clock). Fear of unfounded allegations, retaliatory complaints, scandalous media, and accusations taken out of context are fears held equally by all who are arrested, charged in open court, and prosecuted. The same goes for anyone called to testify in court, whether in the course of their employment with the state or city, or civilians called to testify as witnesses. Yet none, with the exception of minors, can claim successfully that records related to their arrest and prosecution should be made inaccessible, at least until their case has been dismissed. To the extent many of those issues persist for people with conviction histories, the answer is not only to seal more convictions, but to collect information about the problems in the system, like police misconduct, and work towards solutions that prevent false arrests and other abuses in the first place.¹⁷⁸

3. Increased Accessibility

Another possible privacy harm that police claim is increased accessibility. Solove defines increased accessibility as taking, for example,

¹⁷⁵ Liam Dillon, *California Legislature Passes Major Police Transparency Measures on Internal Investigations and Body Cameras*, L.A. TIMES (Sept. 1, 2018, 3:25 PM), <https://perma.cc/MH6G-7676>.

¹⁷⁶ See Thomas Tracy et al., *Exclusive: There Are Two Sets of Rules When it Comes to Punishing Police Officers – 'In the NYPD Disciplinary System It's Not What You Did - It's Who You Know'*, N.Y. DAILY NEWS (Sept. 13, 2018, 6:00 AM), <https://perma.cc/676A-5HJW>.

¹⁷⁷ See *id.*

¹⁷⁸ See Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1135 (2013) ("In contrast, wrongful convictions in the mass exoneration cases are tied together by a single dominant causal factor: police misconduct.").

documents that are already publicly accessible, and collecting them in online databases, making them easier to access.¹⁷⁹ Police consider this a harm because they believe they are more visible than other public officials due to their daily interactions with the public, usually in easily identifiable uniform or vehicles.¹⁸⁰ Police worry that increased accessibility will lead to everything from less initiative amongst officers in making arrests to attacks on specific officers.¹⁸¹ But whether these concerns will come to pass is an empirical question and, as more jurisdictions adopt transparency measures for police disciplinary records without such harms arising, it is becoming increasingly clear that the answer to the empirical question is no.

Arguments about the potential harm of increased accessibility to police disciplinary records were made recently in Chicago, where the founder of Invisible Institute, Jamie Kalven, won his petition against the City of Chicago “seeking two types of documents: (1) lists of Chicago police officers who amassed the most misconduct complaints (referred to as Repeater Lists or RLs); and (2) complaint register files (referred to as CRs) related to CPD’s completed investigations into allegations of police misconduct.”¹⁸² That decision affirmed that the purpose of Freedom of Information laws is “to open governmental records to the light of public scrutiny.”¹⁸³ The impact of this decision on public discourse around CPD secrecy cannot be overstated:

For decades, the city of Chicago, the police department, and the police unions argued that various horrible consequences would ensue if officer names were made public – officers would be targeted, their families harassed, the security of police operations undermined, etc.¹⁸⁴

¹⁷⁹ Solove, *supra* note 131, at 537.

¹⁸⁰ Consider the apparent satire from the Twitter account OverheardOnDuty. Overheard On Duty (@ShitIHearOnDuty), TWITTER (Dec. 18, 2018, 7:55 AM), <https://perma.cc/LH6N-JDLM> (“Living in a glass bowl as a cop gets annoying. My neighbor called internal affairs and made a complaint against me because I haven’t raked the leaves and she says it looks ‘unprofessional.’”).

¹⁸¹ Lynch, *supra* note 130 (“A publicly available trove of police records would make it far easier for unstable individuals to target specific officers, using even false misconduct allegations to justify their violent ends.”).

¹⁸² Kalven v. City of Chicago, 2014 IL App (1st) 121846, ¶ 2, *overruled on other grounds sub nom. by* Perry v. Dep’t of Fin. and Prof’l Regulation, 2018 IL 122349.

¹⁸³ *Id.* at ¶ 19 (quoting Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 910 N.E.2d 85, 91 (Ill. 2009)).

¹⁸⁴ Jamie Kalven, *Invisible Institute Relaunches the Citizens Police Data Project*, INTERCEPT (Aug. 16, 2018, 9:00 AM), <https://perma.cc/9NFQ-M46G>.

Despite the alarmist cries over these concerns, their fears have not materialized.

Although Kalven faced backlash from the Fraternal Order of Police, he founded the Invisible Institute to “under[take] the task of *operationalizing transparency*” after winning access to decades of complaint register files.¹⁸⁵ Kalven and “a team of programmers, designers and data scientists” then took up the challenge of making police disciplinary records accessible and usable by the public.¹⁸⁶ The result is a public database online called the Citizens’ Police Data Project (CPDP).¹⁸⁷ The database allows users to not only analyze one officer’s history of misconduct, but patterns of misconduct geographically, across a group of officers, and across a type of misconduct. One can analyze not only the misconduct allegations but also the department’s accountability in response:

“Beyond its utility to particular sets of users, CPDP served as a biopsy of the system, a statistical portrait of impunity, and a demonstration of how the Chicago Police Department goes about not connecting the dots about patterns of human rights abuse they have the means to identify.”¹⁸⁸

The Fraternal Order of Police immediately moved to block the disclosure, claiming that it was a violation of their contract with the city.¹⁸⁹ CPDP came online in 2015 with a limited dataset. None of the parade of horrors promised by the police prior to the release of this information transpired: “In the three years since we made the first limited release of police disciplinary information, nothing of that nature has been reported.”¹⁹⁰ The actual result in Chicago was an indictment of a system which failed to address complaints of police misconduct.¹⁹¹ Once again, the balance tips towards transparency.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Citizens Police Data Project*, INVISIBLE INST., *supra* note 117. New Jersey journalists recently published a similar database. *The Force Report*, NJ.COM: PROJECTS & INVESTIGATIONS, <https://perma.cc/U99S-A2MC>. In New York City, this author will soon launch a similar public website at “<https://CAPstat.nyc>” with publicly available lawsuit data collected under the author’s supervision at The Legal Aid Society Cop Accountability Project. Open Data Policing makes officers’ stop histories publicly available. OPEN DATA POLICING, <https://perma.cc/M6QE-8WV9>. Other cities, like New Orleans, make the information available without officer identifying information. *NOPD Misconduct Complaints*, CITY OF NEW ORLEANS OPEN DATA, <https://perma.cc/Y66Q-SNK5>.

¹⁸⁸ Kalven, *supra* note 185.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

Through this analysis of disclosure, distortion, and increased accessibility, the only privacy harm that supports some careful deliberation about public access is potential distortion of individuals whose allegations are repudiated by an investigation. Distortion of the collective reputation of officers should be rejected as a basis for hiding police disciplinary records from public access. This does not mean that during the public debate about charges, processes, or penalties, the public should not discern the significance of a fraction of officers' misconduct in relation to the remaining members of the department. They absolutely should. But that debate must happen with all participants having equal access to the information their points and counterpoints rely on. Disclosure and increased accessibility are not privacy harms that favor hiding police disciplinary records.

Police concerns of professional privacy are not equivalent to the privacy concerns of people who are not weaponized by the government and entrusted to act on behalf of the public's interest. Police cannot have the option of wearing a mask to hide their identity or claim a "right to be forgotten," as some private citizens may.¹⁹² Police and civilian concerns are also not equivalent when government access and technology allow for far greater levels of surveillance, interrogation, aggregation, identification, exclusion, disclosure, and distortion of the public, than public access to police officers.¹⁹³

CONCLUSION

On one side of the scale, we have the harms of hiding police misconduct; including trauma, distrust in justice systems, and a limited public discourse around police accountability.¹⁹⁴ Mothers and fathers who have

¹⁹² For more information on the "right to be forgotten," see *GDPR: Right to Be Forgotten*, INTERSOFT CONSULTING, <https://perma.cc/4RUR-K55J> (lasted visited Jan. 3, 2019) (describing that the "right to be forgotten" established in the 2014 . . . requiring the erasure of personal data where no longer needed or where consent is withdrawn).

¹⁹³ See Solove, *supra* note 131, at 497, 501; Kristen V. Brown, *Report: Police Forced a DNA Testing Company to Share a Customer's Identity in the Golden State Killer Case*, GIZMODO (May 1, 2018, 1:55 PM), <https://perma.cc/62DR-TRK6>; Samantha Schmidt, *This Site Will Remove Your Mug Shot – for a Price, Authorities Say. Its Owners are Charged with Extortion.*, WASH. POST (May 18, 2018), <https://perma.cc/DY7L-KEWY>; Tom Simonite, *Few Rules Govern Police Use of Facial-Recognition Technology*, WIRED (May 22, 2018, 9:35 PM), <https://perma.cc/P9UK-LB8W>; *A Guide To Law Enforcement Spying Technology*, ELECTRONIC FRONTIER FOUND., <https://perma.cc/JTE2-D7FE> (last visited Jan. 8, 2019); *Japan Tapping Gait Recognition Tech in Criminal Probes*, JAPAN TIMES (May 8, 2018), <https://perma.cc/WE46-YRBV>.

¹⁹⁴ See Claire Bushey, *Chicago Police Misconduct Records Published Online*, CRAIN'S CHI. BUS. (Nov. 10, 2015, 6:00 AM), <https://perma.cc/MWJ7-6ST7> ("For basically the entire history of the city, citizens who had issues with police misconduct had no information about whether officers that they had problems with were accused of similar mistreatment of others It was literally a black box, and that created a problem.").

lost their children to police killings have the right to seek the truth about their children's last moments and a better understanding of why they were killed, as well as the depth of fault they can assign to the state. Their communities deserve to feel safe knowing that anonymous, faceless officers are not riding around their neighborhood abusing the power of their privacy. "Nothing can be changed until it is faced" and no one without a face can be changed if given the troublesome twin power of state-sanctioned violence and anonymity.¹⁹⁵ Such an asymmetrical system does not cultivate public trust, no matter how many assurances of fairness and functionality a politician makes. "Justice must be seen to be done" so that it can be witnessed, probed, debated, and even if the outcome is disagreeable, the path of the decision-maker is apparent. Without having access to police misconduct information, the public speculates on scraps of anecdotes leaked, rumored, and unstudied, while corruption, incompetence, and prejudice breed unabated. The final harm is to us all. We cannot engage in an educated way in debates with police union officials or police department officials about what is happening in the police disciplinary system. Public discourse is stunted and government is deprived of many potential creative solutions members of the public could contribute. Deliberative democracy in an open society encourages critical debate. Rather than disparaging the public as incompetent in understanding complex systems, give them the information that will allow them to make an educated decision about how to improve the functionality of their local police disciplinary system.

On the other side of the scale are police privacy harms. Not the bloated amorphous specter of privacy, but fairly discrete harms of disclosure, distortion, and increased accessibility. The most legitimate of these concerns is about distortion. Whether exonerated complaints should ever be public, for example, deserves deeper informed discussion *with* stakeholders, including the public and police, about what standards of substantiation serve the public interest more than obscure it. This decision depends primarily on the public's confidence in exonerations to truly reflect thorough and fair investigations that weigh, and not dismiss, complaints of misconduct. The remaining privacy harms of disclosure, distortion of police generally, and increased accessibility, not only fail to weigh heavily against public access, they weigh in favor of transparency. These feared harms call for more openness, not less.

The alternative to a more transparent system is to retreat to a closed system of state secrets where we are divided in the dark. The blackout is where we currently reside. Families in New York City, like Saheed

¹⁹⁵ In some states police have literally sought anonymity by prohibiting disclosure of police department rosters. *See, e.g.*, H.B. 378, 149th Gen. Assemb., 2d Reg. Sess. (Del. 2018).

Vassell's, Ramarley Graham's, Shantal Davis's, Mohammad Bah's, Sean Bell's, Eric Garner's, Akai Gurley's, Delrawn Small's, and many more, continue to fight for equal access to information about all participants in violent police encounters to balance a currently distorted public narrative. Following each of these violent deaths and the aggressive police media campaigns relying heavily on releasing sealed arrest records of the people killed by police, it is clear why police fear public disclosure of disciplinary information. They fear the public will weaponize it the same way police have. While it may be reasonable for police to fear the public will use prior misconduct the way that police have used similar information about people killed by police, the power dynamics of our current "justice" system will never leave them as vulnerable to the people as the people are to them.