



## **POLICING THE POLICE: A ROADMAP TO POLICE ACCOUNTABILITY USING PROFESSIONAL LIABILITY INSURANCE**

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*We dedicate this Article to the memory of Chief Justice Ralph D. Gants, Chief of the Massachusetts Supreme Judicial Court and loving spouse to Professor Ramirez.\*\*\**

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## ABSTRACT

*"I can't breathe," pleaded George Floyd in May 2020 after an officer stopped him for allegedly using a phony \$20 bill. Police officer Derek Chauvin knelt on Floyd's neck for over nine minutes, killing Floyd and sparking protests around the country that continue to this day. A few years earlier, in Staten Island, Eric Garner uttered the same words as Officer Pantaleo used an illegal chokehold on Garner that ended his life for allegedly selling untaxed cigarettes.*

*In light of recent police shootings and violence, there have been rampant discussions about defunding and abolishing the police, the abolition of qualified immunity, and police accountability more generally. These discussions have revealed that it is nearly impossible to weed out the bad officers so that the good officers can thrive. Incident after incident demonstrates to the nation what many of those in communities of color have long known: there is currently no real police accountability for police misconduct.*

*It is our thesis that even if we defund, dismantle, and reimagine a narrowed police force by transferring responsibilities to other professionals such as social services, healthcare, and community services, we will still need a system of accountability for a police force focused more narrowly on routine, on-going, and violent crimes.*

*This Article proposes a four-part solution to the current lack of real police accountability by restricting police unions' collective bargaining, narrowing qualified immunity, and using professional liability insurance as an instrument for identifying officers engaged in risky policing behaviors and pricing them out. Just as physicians, lawyers, accountants, and other professionals carry insurance for protection against claims made by their clients, our solution proposes that police officers carry insurance to mitigate police misconduct. Our proposal offers a constructive roadmap to police accountability and aims to create a system that will save lives by detecting, preventing, and deterring police misconduct, while at the same time reducing taxpayer costs and compensating victims fairly.*

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*POLICING THE POLICE*

309

## TABLE OF CONTENTS

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 310 |
| II.  | THE NEED FOR POLICE ACCOUNTABILITY .....  | 312 |
|      | A. <i>The Need for Police Union Review</i> .....  | 313 |
|      | B. <i>The Perils of Collective Bargaining Agreements</i> .....                                    | 316 |
|      | 1. Destruction of Disciplinary Records .....  | 317 |
|      | 2. Arbitration .....  | 318 |
|      | 3. Officer Indemnification .....  | 321 |
|      | C. <i>The Protection of Qualified Immunity</i> .....  | 322 |
|      | D. <i>Municipalities Pay for Police Misconduct with</i><br><i>Taxpayer Money</i> .....            | 323 |
| III. | PROPOSED SOLUTION .....   | 324 |
|      | A. <i>Restricting Collective Bargaining Agreements</i> .....                                      | 325 |
|      | B. <i>Transparency of Disciplinary Records</i> .....  | 326 |
|      | C. <i>Preventing Municipalities from</i><br><i>Indemnifying Officers Under Section 1983</i> ..... | 328 |
|      | D. <i>Professional Liability Insurance (“PLI”)</i> .....  | 328 |
|      | 1. How Professional Liability Insurance Would Work .....  | 329 |
|      | a. The Department Model .....   | 330 |
|      | b. The Officer Model .....  | 335 |
|      | c. Model Tradeoffs .....  | 336 |
|      | 2. How Premiums Change—Early Warning Indicators ...   | 339 |
|      | 3. Risky Policing is Prevented by High Premiums .....   | 340 |
|      | 4. Insurance Costs are Significantly Less<br>than Municipality Payouts .....                      | 343 |
|      | E. <i>The Lesson of Camden, New Jersey</i> .....  | 344 |
|      | F. <i>Narrowing the Scope of Policing: An Oregon Example</i> .....                                | 347 |
| IV.  | CONCLUSION .....  | 348 |

## I. INTRODUCTION

Police officers have the distinctive legal capacity to apply coercive force, to invade privacy rights, and to use their discretionary power to sweep a person into the criminal justice system. This unique ability has long raised the need for police accountability.<sup>1</sup>

This paper proposes a pragmatic solution to police accountability by restricting collective bargaining, narrowing qualified immunity, and using professional liability insurance as an instrument for identifying officers engaged in risky policing behaviors while helping them to seek help or, otherwise, pricing them out of policing by increasing their insurance premiums. Just as drivers, physicians, lawyers, accountants, and many other professionals carry insurance for protection against claims made by their clients, our solution proposes that police officers carry insurance for police misconduct resulting from unconstitutional and intrusive policing.

Police accountability and misconduct have long been the pain points of ongoing discussions. In 2014, police arrested Eric Garner for allegedly selling untaxed cigarettes on Staten Island, New York.<sup>2</sup> Video emerged of the arresting officer, Daniel Pantaleo, detaining Garner in a fatal chokehold on the sidewalk as Garner repeatedly gasped the words “I can’t breathe.”<sup>3</sup> Garner, who was unarmed, died under coercive force at the bare hands of the officer.<sup>4</sup> Despite breaching department rules by using the chokehold and being among the top 2 percent of officers by number of sustained civilian complaints,<sup>5</sup> Pantaleo remained on the force for five

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1. See generally, e.g., Deborah Ramirez et al., *Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide a New Accountability Model?*, 45 AM. J. CRIM. L. 407 (2019); Hervey A. Juris, *The Implications of Police Unionism*, 6 LAW & SOC’Y REV. 231 (1971); Nick Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability*, 52 U.S.F. L. REV. 275 (2018); 2 GUNNAR MYRDAL & SISSELA BOK, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (Routledge, Taylor, & Francis Grp. 2017) (1944); *Black Lives Matter Publishes “Campaign Zero” Plan to Reduce Police Violence*, NPR: ALL THINGS CONSIDERED (Aug. 26, 2015, 5:42 PM), <http://www.npr.org/2015/08/26/434975505/black-lives-matter-publishes-campaign-zero-plan-to-reduce-police-violence>; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Chimel v. California*, 395 U.S. 752 (1969); *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

3. *Id.*

4. *Id.*

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

years, accruing pay and pension.<sup>6</sup> That same year, Officer Jason Van Dyke murdered seventeen-year-old Laquan McDonald.<sup>7</sup> As McDonald was walking away from him, Van Dyke shot McDonald sixteen times.<sup>8</sup> “City records indicate [that] at least 20 citizen complaints have been filed” and a \$350,000 settlement awarded “against officer Jason Van Dyke since he joined the Chicago Police Department in . . . 2001.”<sup>9</sup> Van Dyke’s sentence of only eighty-one months came a day after a judge found three other Chicago police officers not guilty of falsifying police reports to protect Van Dyke.<sup>10</sup>

In May 2020, George Floyd was arrested for allegedly using counterfeit money to buy cigarettes in Minneapolis, Minnesota.<sup>11</sup> Police officer Derek Chauvin knelt on his neck for over nine minutes, killing Floyd and sparking protests around the country that continue to this day.<sup>12</sup>

Deaths at the hands of police officers have become commonplace, particularly in communities of color. Even more jarring, lack of accountability has become commonplace as well, with continued demands for greater police reforms and disciplinary action often falling on deaf ears. The first part of this Article discusses the problem and the

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6. Katie Benner, *Eric Garner’s Death Will Not Lead to Federal Charges for N.Y.P.D Officer*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-case-death-daniel-pantaleo.html>.

7. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIBUNE (Jan. 18, 2019, 7:22 PM), <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html>.

8. *Id.*

9. Phil Rogers, *City Records Show Officer in Laquan McDonald Shooting Had Previous Complaints*, NBC 5 CHI. (Nov. 24, 2015), <https://www.nbcchicago.com/news/local/city-records-show-officer-in-laquan-mcdonald-shooting-had-previous-complaints/1989540/>; Elliott C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN, <https://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/index.html> (Nov. 26, 2015, 5:45 PM).

10. See Husain, *supra* note 7; Michael Lansu, *Former Chicago Cop Jason Van Dyke Sentenced to 81 Months in Prison for 2014 Murder*, NPR (Jan. 18, 2019, 6:01 AM), <https://www.npr.org/2019/01/18/686391662/former-chicago-cop-jason-van-dyke-to-be-sentenced-for-laquan-mcdonald-murder>.

11. Catherine Thorbecke, *Derek Chauvin Had His Knee on George Floyd’s Neck for Nearly 9 Minutes, Complaint Says*, ABC NEWS (May 29, 2020, 6:42 PM), <https://abcnews.go.com/US/derek-chauvin-knee-george-floyds-neck-minutes-complaint/story?id=70961042>; Matt Furber et al., *What Happened in the Chaotic Moments Before George Floyd Died*, N.Y. TIMES (JUNE 10, 2020), <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>.

12. *Id.*

pronounced need for police accountability. The second part of this Article focuses on two conceptual and practical models of professional liability insurance as a tool to improve police accountability. The “Department Model,” enforces mandatory professional liability insurance for officers. The “Officer Model,” is a state or municipal-level model that provides elective professional liability insurance to officers. Both models offer a constructive roadmap to police accountability and aim to create systems that will save lives by detecting, preventing, and deterring police misconduct, while reducing taxpayer costs and compensating victims fairly.

## II. THE NEED FOR POLICE ACCOUNTABILITY

To date, civil service systems, labor law arbitration, and collective bargaining control hiring, disciplining, promotion, and termination of officers. These systems, working separately but with a collective effect, have created an architecture of police impunity that has allowed officers to remain unaccountable for risky and dangerous policing.<sup>13</sup> They have made it almost impossible to identify, discipline, or terminate the officers engaged in reckless behavior.<sup>14</sup> Unions, left unscrutinized, have used the collective bargaining process to strip away police chiefs’ managerial powers, including the authority to fire, promote, hire, or discipline.<sup>15</sup> Thus, police chiefs often lack the tools to keep bad cops off the street.

Victims can sue police officers for egregious and unconstitutional conduct under 42 U.S.C. § 1983 (“Section 1983”). Section 1983, in theory, provides a right of action and relief under federal law for individuals whose constitutional rights have been violated at the hands of a state actor, such as a law enforcement officer.<sup>16</sup> Section 1983 aims to provide citizens who have been mistreated by law enforcement officers with a legal avenue to collect monetary damages and hold offending officers liable for their misconduct via civil lawsuits.<sup>17</sup> However, even when victims sue police officers who engage in risky and dangerous behavior

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13. See generally Editorial, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. TIMES (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html>; Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017); Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says About the Connection*, WASH. POST (June 10, 2020, 7:54 AM), <https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/>.

14. See, e.g., Ingraham, *supra* note 13.

15. See Rushin, *supra* note 13 at 1202–07.

16. 42 U.S.C. § 1983.

17. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, APPEAL (June 20, 2019), <https://theappeal.org/qualified-immunity-explained/>.

under Section 1983, the judicially-created and vastly expanded doctrine of qualified immunity raises the burden of proof for victims by forcing them to demonstrate both that a constitutional right has been violated *and* that the law is clearly established law.<sup>18</sup> Ultimately, due to this heightened two-prong burden, qualified immunity shields law enforcement officers nationwide from civil liability, making them practically immune from civil suits.<sup>19</sup> Thus, even when victims sue, real police accountability is lacking. In the rare cases that a civil suit succeeds, municipalities are left to foot the bill with taxpayer money, money that would otherwise have been allocated to other important municipal activities such as education, research, and health. The police officer, empowered with union protection, and shielded by qualified immunity, pays absolutely nothing for police misconduct and remains on the force with few repercussions.

A. *The Need for Police Union Review*

Police unions play a critical role in providing police officers with pay, healthcare, workers compensation, and ensuring adequate working conditions.<sup>20</sup> Like other unions, they exist to protect workers' rights. However, police unions have accumulated so much power that they have expanded their role to include the usurpation of managerial oversight so that the police chiefs are left with little, if any, meaningful managerial authority.<sup>21</sup> Nearly a decade ago, Samuel Walker concluded that "virtually everyone with an interest in policing—citizens, civic leaders, reform activists, and scholars—believes that police unions . . . are a principal obstacle to change."<sup>22</sup>

Both empirical and anecdotal evidence suggest that municipalities are bargaining away the ability to hold officers accountable because collective bargaining between local governments and police unions frequently allows local officials to negotiate hiring, firing, disciplinary terms, allocation of the costs for police misconduct, and when and how disciplinary records are destroyed, alongside officer salaries and

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18. *See id.*

19. *Id.*

20. Rushin, *supra* note 13, at 1205.

21. *Id.* at 1228, 1241.

22. Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 71 (2012).

benefits.<sup>23</sup> Political leaders are foregoing “accountability in exchange for lower wages and benefits.”<sup>24</sup> Professor Stephen Rushin from the Loyola University Chicago School of Law, in a 2017 empirical analysis of nearly 200 collective bargaining agreements governing approximately 40 percent of municipal officers in states that allow or require such bargaining, found that “these contracts unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable.”<sup>25</sup> Based on an analysis done by Campaign Zero, a citizen advocacy group cited by Rushin, “the most recent Minneapolis labor agreement available for public review restricts and delays police interrogations; limits oversight discipline; requires the city to pay for costs relating to misconduct, including giving paid leave while under investigation and paying legal fees; and calls for the erasing of misconduct records.”<sup>26</sup>

Unions early on established as their central goal the protection of “officer autonomy, effectiveness, and safety by opposing” legal reform efforts and civilian oversight intended to secure police discipline.<sup>27</sup> But their pursuit of these goals goes further when at the negotiations table; unions are also involved in electoral politics, litigation, and the media as part of an overall strategy to resist reform. Oftentimes, unions employ tough-on-crime rhetoric and draw on their substantial economic resources to delay or destroy police reform efforts.<sup>28</sup> The political actions of police unions and officer associations likely exert tremendous influence over state officials, state executives, legislators, and judges.<sup>29</sup> One particularly effective strategy of police unions is to borrow the tried and true method of labeling politicians attempting to hold police accountable as “soft on crime.”<sup>30</sup> As has been extensively documented, such rhetoric

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23. See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 559–61, 586 (2019); see also Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014) (discussing how labor laws and collective bargaining agreements can “frustrate attempts to discipline individual officers” by “giv[ing] line officers more authority to define the police role . . .”).

24. Editorial, *Don't Let Labor Agreements Thwart Police Accountability*, BOS. GLOBE (June 4, 2020, 4:00 AM), <https://www.bostonglobe.com/2020/06/04/opinion/dont-let-labor-agreements-thwart-police-accountability/>.

25. Rushin, *supra* note 13, at 1198.

26. *Don't Let Labor Agreements Thwart Police Accountability*, *supra* note 24; Rushin, *supra* note 23 at 559 n.68.

27. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 737 (2017). This idea will be covered in more detail in the next Section.

28. See, e.g., *id.*

29. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 813 (2012).

30. See Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>.



can turn the tide of local and national elections and even influence judicial sentencing behavior by manipulating voter fears about the risks of criminal victimization.<sup>31</sup> The result is that police unionization has strong supporters on both sides of the political spectrum.<sup>32</sup> They attain support from liberals who support workers' rights as well as conservatives who want to be "tough on crime."

Unions have even been able to de facto manage and operate police departments. In San Francisco, the Blue Ribbon Panel found that there was essentially no difference between the police management and the police officer's union.<sup>33</sup> Moreover, as police unions have a considerable interest in state laws concerning collective bargaining, civil service regimes, and funding for local law enforcement, they are extremely adept at opposing regulations such as decertification laws and even suing in court to block the release of internal records of police shootings and officer misconduct.<sup>34</sup>

Unions not only hold tremendous sway over state elections and legislative actions, but also highjack efforts to hold police officers criminally, civilly, and administratively accountable through a collective bargaining process that allows them to trade salary dollars for less oversight.<sup>35</sup> For example, due to union bargaining, there is a "dirty secret" behind efforts to reform qualified immunity for police: even if a civil suit against police officers succeeds and the judge awards monetary damages, the judgment will be paid entirely by the municipality, and the police officer involved will not pay a penny.<sup>36</sup> In other words, the

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31. See, e.g., JOHN HAGAN, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 149–153 (rev. ed. 2010); KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf).

32. Rushin, *supra* note 23, at 558.

33. Fisk & Richardson, *supra* note 27, at 758.

34. See, e.g., Greg Moran, *Police Unions Sue Over Release of Misconduct, Shooting Records*, SAN DIEGO UNION-TRIB. (Jan. 31, 2019, 4:05 PM), <https://www.sandiegouniontribune.com/news/public-safety/sd-me-police-discipline-records-suit-20190131-story.html>; Laura Waxmann, *SF Police Union Sues to Block Retroactive Release of Officer Files Under New Transparency Law*, S.F. EXAM'R (Mar. 3, 2019, 12:00 AM), <https://www.sfexaminer.com/news/sf-police-union-sues-to-block-retroactive-release-of-officer-files-under-new-transparency-law/>.

35. Walker, *supra* note 22, at 72; Fisk & Richardson, *supra* note 27, at 715; *Don't Let Labor Agreements Thwart Police Accountability*, *supra* note 24.

36. Deborah Ramirez & Marcus Wraight, *The Dirty Secret behind Qualified Immunity for Police*, BOS. GLOBE (June 10, 2020, 10:42 AM), <https://www.bostonglobe.com/2020/06/10/opinion/dirty-secret-behind-qualified-immunity-police/>.

egregiously violent police officer is indemnified and the taxpayer pays for 100 percent of the cost of the officer's misconduct.<sup>37</sup>

*B. The Perils of Collective Bargaining Agreements*

Most states allow police unions, by statute, to collectively bargain with municipalities on matters such as wages, hours, and other “terms and conditions of employment.”<sup>38</sup> There is reason to think, however, that these agreements contribute to police misconduct. An empirical study from the University of Oxford concluded that police protections, negotiated by police unions, were positively correlated with police violence and other abuses.<sup>39</sup> Another study concluded that the acquisition of collective bargaining rights in Florida sheriffs' departments “led to a substantial increase in violent incidents of misconduct” relative to other police departments.<sup>40</sup> Both the process and content of collective bargaining agreements contribute to the failure to hold officers accountable.

This collective bargaining process typically occurs completely outside of the public view, and those present at the negotiating table usually do not include parties who can be expected to prioritize the concerns of those most vulnerable to police misconduct.<sup>41</sup> The bargaining team for the municipality may include a chief negotiator, budget director, legal counsel, police supervisor or chief, and middle management—such as captains and sergeants—from the police department; the union team will typically include a union representative, a union negotiator, and occasionally some rank and file officers.<sup>42</sup> Notably missing are any community representatives or civilian review board members.<sup>43</sup>

Moreover, because courts have interpreted officers' “terms and conditions of employment” to include negotiations of internal disciplinary procedures and protections for officers suspected of misconduct, unions and municipalities can bargain with managerial prerogatives such as hiring, firing without cause, and discipline, alongside more traditional

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37. *Id.*

38. See Rushin, *supra* note 13, at 1195.

39. Abdul N. Rad, Police Institutions and Police Abuse: Evidence from the US 67 (2018) (M.Phil. thesis, Oxford University), <https://static1.squarespace.com/static/55ad38b1e4b0185f0285195f/t/5c491ac8b91c91570026453b/1548294860533/Police+Institutions+and+Police+Abuse+-+Evidence+from+the+US+%281%29.pdf>.

40. Dhammika Dharmapala et al., *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 36 U. CHI. J.L., ECON., & ORG. (forthcoming 2020) (manuscript abstract), <https://doi.org/10.1093/jleo/ewaa025>.

41. Rushin, *supra* note 13, at 1245.

42. *Id.*

43. See *id.*

terms of employment like salary and benefits.<sup>44</sup> Research has revealed a number of problematic terms and conditions common among these agreements, including procedural protections that allow officers to cover up misconduct and foil investigations. Particularly problematic are agreements that mandate destruction of officer disciplinary records, require arbitration in cases of disciplinary action, and indemnify officers in civil suits.<sup>45</sup> These issues present roadblocks to police accountability and therefore merit further critical examination.

### 1. Destruction of Disciplinary Records

Many states already limit public access to disciplinary records by statute or personnel exemptions to state open-record laws.<sup>46</sup> With public oversight already limited, police unions are able to secure contractual terms that limit even police management from full access to officer disciplinary records.<sup>47</sup> Various provisions allow the department or city to expunge disciplinary histories and complaints after a designated time period, to delete disciplinary records and complaints at the discretion of management or even the accused officer, and even to expunge sustained complaints as if they never happened.<sup>48</sup> For example, the collective bargaining agreement between the City of Cleveland and the Cleveland Police Patrolmen's Association requires police management to purge all verbal and written reprimands from officer personnel files after six months; all disciplinary actions and penalties must be removed after two years—effectively wiping clean the officer's record.<sup>49</sup> Baltimore City's contract with its police union allows officers to actually request expungement of unfounded complaints, which some policing scholars argue interferes with a practice critical to the functioning of early intervention systems mandated by Department of Justice consent decrees and considered best practice in the law enforcement community.<sup>50</sup>

Cleveland and Baltimore are not alone: Austin, Columbus, Seattle, Chicago, Minneapolis, and Washington, D.C. are just a few of the eighty-

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44. *Id.* at 1195, 1245–46; *see also* Rushin, *supra* note 23, at 558.

45. Rushin, *supra* note 13, at 1196–98.

46. *See, e.g., id.* at 1212, 1228.

47. *Id.* at 1228.

48. Rad, *supra* note 39, at 45–46.

49. Rushin, *supra* note 13, at 1228–29.

50. Fisk & Richardson, *supra* note 27, at 752; *see also* Rushin, *supra* note 13, at 1196–97.

seven cities in Rushin's sample found to have language that requires the removal of personnel records at some point in time.<sup>51</sup>

By contrast, in June 2020, the New York Senate passed a bill to repeal section 50-a of New York State's Civil Rights Law, in place since 1976, which kept the personnel records of police officers, firefighters, and correctional officers confidential; the statute had kept the disciplinary records of Pantaleo, the officer involved in the death of Garner, from public release.<sup>52</sup> The move to repeal came after nationwide protests with the justification that the "[r]epeal of § 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct."<sup>53</sup>

## 2. Arbitration

In most police departments, because police union contracts permit or require arbitration in disciplinary review actions, arbitrators—not police management, civilian review boards, or municipal officials—have the final say in disciplinary decisions.<sup>54</sup> Arbitration clauses are one of the most common features of police union contracts.<sup>55</sup> While states frequently use arbitration to resolve labor disputes with public employees barred from striking, arbitration as a disciplinary tool for police officers frequently frustrates accountability.<sup>56</sup> As third-party outsiders, who may have other countervailing interests to make final disciplinary decisions that run counter to the will of community stakeholders and police management, arbitrators can reduce or nullify disciplinary decisions handed down by police management.<sup>57</sup> Moreover, through collective bargaining agreements, police unions are able to structure the arbitration process to effectively undermine the ability of police

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51. Rushin, *supra* note 13, at 1230–31.

52. Tommy Beer, *New York Senate Votes to Repeal Law That Kept Police Records Secret*, FORBES (June 9, 2020, 4:33 PM), <https://www.forbes.com/sites/tommybeer/2020/06/09/new-york-senate-votes-to-repeal-law-that-kept-police-records-secret/#246c0f152aff>.

53. Christopher Kurtz & Jacqueline Smith, *Repeal of Civil Rights Law Section 50-A: What This Means for the Disclosure of Police Disciplinary Records*, BOND SCHOENECK & KING PLLC (June 15, 2020), <https://www.jdsupra.com/legalnews/repeal-of-civil-rights-law-section-50-a-34956/>.

54. Rushin, *supra* note 23, at 551–52; Rushin, *supra* note 13, at 1238.

55. See Rushin, *supra* note 13, at 1238.

56. Rushin, *supra* note 13, at 1238; E-mail from Frederick Ryan, Former Arlington Police Chief, to author (June 11, 2020, 5:27 PM) (on file with author).

57. Rushin, *supra* note 13, at 1239; E-mail from Frederick Ryan, *supra* note 56; Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, ATL. (Dec. 2, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>.

management to effectively discipline officers.<sup>58</sup> Media reporting has found that as much 72 percent of disciplinary actions against police officers in the Boston Police Department are overturned in arbitration.<sup>59</sup> In another study of 624 arbitration awards done by Professor Rushin, it was found that arbitrators on appeal reduced discipline 52 percent of the time and forced departments to rehire officers 46 percent of the time.<sup>60</sup>

First, the majority of police unions can exert significant control through the selection of the third-party arbitrator. Some police unions explicitly specify a list of arbitrators in their collective bargaining agreement; such a scheme results in more favorable judgments for the officer and the union.<sup>61</sup> Even when collective bargaining agreements do not specify a list of arbitrators, structural conditions continue to favor police unions. Striking procedures in police disciplinary arbitrations closely mirror voir dire in civil and criminal cases in the selection of an arbitrator.<sup>62</sup> Theoretically as fair as jury selection, these alternative striking procedures actually incentivize arbitrators to favor unions and compromise on punishments, regardless of the merits of the case, to increase the likelihood that they will be selected for future cases.<sup>63</sup> While a particular chief only enters arbitration a handful of times per year, because unions are repeat players in arbitration disputes, arbitrators are more likely to be union-friendly. If an arbitrator is seen as too favorable to police chiefs, an arbitrator is more likely to be struck by the unions, preventing them from gaining work. This scheme thus encourages arbitrators to be lenient in disciplinary matters. In an interview, former Arlington police chief Fred Ryan put it more pithily:

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58. See Rushin, *supra* note 23, at 552.

59. Mike Beaudet, *Discipline for Boston Police Officers Frequently Overturned*, WCVB, <https://www.wcvb.com/article/discipline-for-boston-police-officers-frequently-overturned/8231852> (Feb. 18, 2016, 11:45 PM); see also Jo DePrang, *Crimes Unpunished*, TEX. OBSERVER (July 10, 2013), <https://www.texasobserver.org/crimes-unpunished/> (stating that about two thirds of arbitration cases examined for Houston Police Department result in either overturned or reduced discipline); Maxine Bernstein, *Disciplining Portland Police Proves Challenging Task*, OREGONIAN, [http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining\\_portland\\_police\\_p.html](http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining_portland_police_p.html) (Jan. 10, 2019) (showing that at least half of the small number of discipline cases for Portland Police Department are overturned at arbitration).

60. Stephen Rushin, *Police Arbitration*, VAND. L. REV. (forthcoming 2020) (manuscript abstract) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3654483](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654483).

61. See *id.* at 575–76.

62. *Id.* at 576.

63. *Id.*

Much attention has been given to the issue of qualified immunity . . . . However, we mustn't forget about the flawed arbitration system in Massachusetts that prevents chiefs from holding officers accountable. As Arlington's former police chief, with just cause, I disciplined police officers only to have a third-party arbitrator insert him/herself in my role, and rule in favor of the union. Why? Because arbitrators are selected by unions after careful review of their past decisions, and if they don't keep the unions happy, they won't get selected and they'll find themselves unemployed. While the system on paper looks fair and impartial, in practice it is heavily weighted in favor of labor. Over time the legislature has stripped police chiefs and municipal managers of their management rights to hold officers accountable in any meaningful way, and the costs associated with terminating bad cops are exorbitant.<sup>64</sup>

Once selected, the arbitrator frequently has broad de novo review powers and can relitigate issues of fact and law in cases of disciplinary action with little deference to the initial punishment handed down by the police supervisor.<sup>65</sup> Because in most jurisdictions an arbitrator's decision is binding on all parties, the arbitrator has final review of the disciplinary action, effectively rendering the punishment doled out by police management and review boards as "symbolic."<sup>66</sup> This reality combined with the limited options for municipalities to challenge the decisions of arbitrators in court means that arbitration almost always ends in reductions in disciplinary penalties for officers who appeal punishments handed down for misconduct.<sup>67</sup>

Police chiefs trying to do the right thing are barred and disempowered from taking action. Commissioner Branville Bard, the Police Commissioner for the City of Cambridge Police Department, described his experience in August 2017: "I tried to mandate counseling and treatment for officers with anger management and substance abuse disorder, but the unions overruled me because it was considered an additional condition of employment that was not part of the collective bargaining process and thus not within my managerial powers."<sup>68</sup>

In Chicago, newspaper reporting found that disciplinary action took place following complaints only 3 percent of the time during a five-year

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64. E-mail from Frederick Ryan, *supra* note 56.

65. Rushin, *supra* note 23, at 576–77.

66. *Id.* at 578.

67. Rushin, *supra* note 13, at 1238–39; Ramirez et al., *supra* note 1, at 435.

68. Cambridge Community Television, *Criminal Justice and Race: Cambridge and Beyond*, YOUTUBE (June 24, 2020), <https://youtu.be/8-KIRb3GsQs>.

duration, 2010–15.<sup>69</sup> Professor Mark Iris of Northwestern University conducted empirical examinations of the effect of appellate arbitration on disciplinary outcomes in Chicago involving allegations of police misconduct, specifically excessive force allegations.<sup>70</sup> He found that “[o]f the 1584 total days of suspension presented to arbitrators, 794 were upheld by the arbitrators, while 790 were overturned.”<sup>71</sup> In other words, for cases of excessive force, arbitrators overturned suspensions almost 50 percent of the time. “For these [officers], their disciplinary records were amended to reflect the arbitrators’ decisions, and back pay awarded.”<sup>72</sup> The reasoning used to justify such decisions often rested on a notion of fairness and equal treatment. Instilled by the labor arbitrator Carroll Daugherty, one of the factors determining whether a punishment was just was equal treatment.<sup>73</sup> “It protected Black officers from being singled out for doing the same things white officers did . . . [T]oday, this concept has become the root of impunity [because] . . . [i]t often means that an officer can’t be fired for abusive behavior or racist misconduct if other officers have committed similar offenses in the past” and have been absolved for them.<sup>74</sup>

### 3. Officer Indemnification

By allowing police unions to negotiate for officer indemnification, municipalities are effectively bargaining away tax dollars to cover police misconduct. Supreme Court jurisprudence assumes officers found at fault in civil suits under Section 1983 will pay compensatory damages.<sup>75</sup> In fact, this assumption partially justified the doctrine of qualified immunity because the Supreme Court feared that officers would be over-deterred in the course of their duties.<sup>76</sup> In reality, this assumption ignores the fact that police officers do not pay these costs due to the practical effects of collective bargaining agreements.

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69. Ramirez et al., *supra* note 1, at 431.

70. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 216 (1998) [hereinafter *Police Discipline in Chicago*]; Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132, 133 (2002).

71. *Police Discipline in Chicago*, *supra* note 70, at 234.

72. *Id.*

73. *To Hold Police Accountable, As the Arbitrators*, *supra* note 13 (citing the factors as “Daugherty’s tests”).

74. *Id.*

75. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

76. *Id.* at 890, 892–93. Qualified immunity will be discussed further in the next Section.

As we argue below, state legislatures need to limit the power of police unions. The power of police unions—though necessary for collective bargaining about wages, insurance, pension benefits, and safe working conditions—needs review; collective bargaining agreements should *not* strip police management of its ability to hold officers accountable. State legislatures therefore need to narrow the scope of collective bargaining to exclude the ability of unions to negotiate about hiring, promoting, firing without cause, allocating the costs of police misconduct, or disciplining police misconduct. This will restore managerial power to police chiefs who have direct oversight of their employees and better understand their behavior.

*C. The Protection of Qualified Immunity*

Section 1983 provides a right of action for an individual to sue state government employees and others acting under color of state law for civil rights violations. As the Supreme Court has continued to expand the doctrine of qualified immunity, it has simultaneously become increasingly more difficult for plaintiffs to successfully bring suit against law enforcement officers under Section 1983.<sup>77</sup> Qualified immunity not only permits law enforcement officers to avoid accountability for their actions, it places a heavy burden on victims of police misconduct who are required to overcome various hurdles if they hope to be successful in bringing a Section 1983 claim.<sup>78</sup>

In 2001, the Supreme Court established a two-part test to determine whether a law enforcement officer should be granted qualified immunity.<sup>79</sup> The first part is for the judge to analyze the facts alleged by the plaintiff and consider whether police used excessive force in violation of the Fourth Amendment of the Constitution.<sup>80</sup> If a violation is found, part two requires the judge to determine whether the constitutional right was “clearly established” at the time of the law enforcement officer’s misconduct.<sup>81</sup>

However, Justice Alito, writing for the Court in *Pearson*, overturned the mandatory sequencing of the test, known as the “rigid order of

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77. Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/>.

78. *Id.*

79. *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

80. *Id.* at 201.

81. *Id.*



battle.”<sup>82</sup> Courts could assess the merits or the “clearly established” prong first.<sup>83</sup> Often, courts choose to bypass the first step of the *Saucier* test.<sup>84</sup> In allowing courts to skip straight to the second step of the *Saucier* test in Section 1983 claims, there is often no decision made on whether an officer’s conduct violates the Constitution, which leads to a lack of clearly established misconduct to be relied upon by plaintiffs in future cases. The doctrine of qualified immunity, as it currently stands in most jurisdictions, requires plaintiffs to identify clearly established precedent where a court has held the same particular conduct in the same exact or “specific context” to be unconstitutional.<sup>85</sup> Ironically, though plaintiffs are still being asked to identify clearly established precedent to be successful, courts are no longer required to create such precedent in each Section 1983 case that they hear. Consequently, case law has been frozen in a loop, with limited precedent for plaintiffs to rely on. Unsurprisingly, in an analysis of appellate court records, “Reuters found that since 2005, the courts have shown an increasing tendency to grant immunity in excessive force cases—rulings that the district courts below them must follow.”<sup>86</sup> This highlights the painful paradox of qualified immunity and the need to reform the doctrine so that victims of unconstitutional police behavior receive due process.

#### D. Municipalities Pay for Police Misconduct with Taxpayer Money

The Supreme Court, through qualified immunity, has obviated vicarious liability because it would go against the intention of the law. The Supreme Court does not hold municipalities vicariously liable for a police officer’s conduct unless that conduct was part of a municipal police department’s pattern of practices or policy.<sup>87</sup> Ironically, because unions have bargained indemnification agreements, vicarious liability thrives

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82. *Pearson v. Callahan*, 555 U.S. 223, 227, 234 (2009) (quoting *Purtell v. Mason*, 527 F.3d 615, 622 (7th Cir. 2008)).

83. *See id.* at 237–40.

84. *See id.* at 227 (“*Saucier*[’s] procedure should not be regarded as an inflexible requirement.”); *see also, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 (2018) (Even if there was no probable cause to arrest defendants, defendants-petitioners are sheltered by qualified immunity because there is no settled law.).

85. *Saucier*, 533 U.S. at 201.

86. *Chung et al.*, *supra* note 77 (citing Andrea Januta et al., *Taking the Measure of Qualified Immunity: How Reuters Analyzed the Data*, REUTERS, (Dec. 23, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/>).

87. *See Monell v. Dep’t Soc. Servs.*, 436 U.S. 658, 691, 694 (1978).

because police unions have forced municipalities to agree to pay vicariously for conduct for which the municipality is not liable.

The effects of officer indemnification on municipal budgets and the lives of citizens are staggering. In a sample of 9,225 civil rights damages actions resolved in favor of the plaintiffs between 2006 and 2011, Professor Joanna Schwartz, from University of California Los Angeles School of Law, found that officers financially contributed “to just 0.02% of the over \$730 million spent by cities, counties, and states in these cases.”<sup>88</sup> Accordingly, officers were financially responsible for under \$200,000 in settlements during this period.<sup>89</sup> But the money to satisfy those judgments must come from somewhere, and when faced with large payouts, jurisdictions pull taxpayer funds from other line items in the municipal or county budget.<sup>90</sup> In 2018, Chicago spent more than \$85 million to settle police misconduct lawsuits and an additional \$28 million to outside lawyers to defend these cases, totaling around \$113 million of taxpayer money.<sup>91</sup>

A former attorney for the City of Chicago admitted, “When you had to budget more for police tort liability you had less to do lead poisoning screening for the poor children of Chicago. We had a terrible lead poisoning problem and there was a direct relationship between the two. Those kids were paying those tort judgments, not the police officers.”<sup>92</sup>

A similar argument could be made for municipalities that pay for police misconduct while struggling to pay for safe openings of public schools and improved ventilation systems needed to overcome pandemics such as COVID-19.

### III. PROPOSED SOLUTION

The roadmap to accountability focuses on the key objectives of saving lives, victim compensation, reducing taxpayer liability, and prevention of police misconduct. Our proposed solution seeks to increase police officer

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88. Schwartz, *supra* note 75, at 890.

89. *Id.* at 913.

90. *See id.* at 957.

91. Jonah Newman, *Chicago Spent More than \$113 Million on Police Misconduct Lawsuits in 2018*, CHI. REP. (Mar. 7, 2019), <https://www.chicagoreporter.com/chicago-spent-more-than-113-million-on-police-misconduct-lawsuits-in-2018/>.

92. Matthew Russell Lee, *Police Brutality Bonds Raise Questions About Investments by Federal Reserve and UN*, INNER CITY PRESS (June 6, 2020), <http://www.innercitypress.com/policebrutality1munifinfedunicp060620.html>.

accountability by: (1) amending the state public employee labor union statute to limit the scope of collective bargaining rights for police officers; (2) making all disciplinary records for police officers publicly accessible; (3) preventing municipalities from indemnifying officers' owed damages when found liable for misconduct under Section 1983;<sup>93</sup> and (4) mandating that police officers hold professional liability insurance. Through these four directives, states will better be able to hold officers accountable for their actions; they will better be able to hire, promote, fire, and discipline officers or provide support as needed; and millions of dollars currently being spent covering officers in police misconduct lawsuits would be saved and fed back into community programs. As states have differing needs, legislative structures, and degrees of already-established police accountability, these four objectives should be adopted per respective state to detect, prevent, and deter police misconduct.

A. *Restricting Collective Bargaining Agreements*

Though union functions are important to setting standards for police officer working conditions and benefits, witnessing the ability of unions through their contracts to thoroughly foil reform efforts, state legislatures should act to restrict police union activity and their collective bargaining power. Thus, police officer unions may not use their collective bargaining rights to negotiate: (1) discipline; (2) promotion; (3) hiring; (4) firing without cause; or (5) allocation of payment for damages from lawsuits filed against officers. Matters pertaining to the discipline of sworn law enforcement personnel shall be retained by department management and be nonnegotiable. Moreover, states would need to amend laws to require that municipal collective bargaining processes be

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93. See 42 U.S.C. § 1983 ("Civil action for deprivation of rights: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this Section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

open to the public.<sup>94</sup> Such a change could result in more cautious concessions on the part of the city.

There are clear public policy considerations for curtailing the power of unions and making police accountable for their misconduct. Unlike similar organizations, such as teachers' unions, police unions shield public officials with an incredible amount of discretion to wield fatal force and sometimes injury against the members of the public. By ensuring that officers do not pay the cost of their own misconduct, unions increase the likelihood that officers will engage in unlawful shootings, choking, or otherwise inappropriate activities. Unions also reinforce the entrenched police culture known as the "blue wall of silence," which encourages police to coach accused officers and conceal misconduct with the help of lawyers supplied by the union.<sup>95</sup> Therefore, because union collective bargaining agreements shield officers from paying the costs of their misconduct, entrench cultural attitudes that cover up wrongdoing, and stoke racial tensions, such collective bargaining processes must be curtailed.

#### *B. Transparency of Disciplinary Records*

Police disciplinary records should be made public much like other government records are public. Making the information public "will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct."<sup>96</sup> Personal information such as name and address will be redacted from public disclosure in adherence with privacy laws.<sup>97</sup>

Currently, police disciplinary "[r]ecords are confidential in 23 states."<sup>98</sup> They are in limited availability in fifteen states which means that "only records of severe discipline, like a suspension or termination, are public while the rest [are] confidential."<sup>99</sup> Records are public in only twelve states, but even amongst these, some "still make records of unsubstantiated complaints or active investigations confidential."<sup>100</sup>

Many states exempt police disciplinary records from their respective Freedom of Information acts, typically under a personnel or confidential

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94. See Rushin, *supra* note 13, at 1246–47.

95. Rick Bragg, *Blue Wall of Silence: Graft Shielded Behind Code*, N.Y. TIMES, Apr. 26, 1994 (§ B), at 1, <https://www.nytimes.com/1994/04/26/nyregion/blue-wall-of-silence-graft-shielded-behind-old-code.html>.

96. Kurtz & Smith, *supra* note 53.

97. *Id.*

98. *Is Police Misconduct a Secret in Your State?*, WNYC, <https://project.wnyc.org/disciplinary-records/> (last visited Nov. 11, 2020).

99. *Id.*

100. *Id.*

record exemption.<sup>101</sup> These exemptions are worrisome because they prevent the public, the most essential stakeholders in policing, from reviewing officers' disciplinary history.

In Massachusetts, for example, “[o]fficial records of disciplinary action against a police officer are exempt from disclosure under the personnel file exemption” under chapter 4, section 7(26)(C) of the Massachusetts General Law,<sup>102</sup> which exempts “personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy” from “public records.”<sup>103</sup>

In contrast, in June 2020, New York announced that all police disciplinary records would be made accessible to the public, effectively overturning a 44-year-old law known as 50-a.<sup>104</sup> Section 50-a of New York's Civil Rights Law, passed in 1976, stated that “personnel records [of police officers] used to evaluate performance toward continued employment or promotion” were confidential and could not be disclosed without the officer's permission or a court order.<sup>105</sup> This law allowed for a culture of rampant secrecy within the NYPD and ultimately prevented activists, reformers, and loved ones of individuals killed by police officers from obtaining records which could offer a clear picture of what misconduct was happening, how frequently, and perhaps most importantly, against whom.<sup>106</sup> New York Senate Majority Leader Andrea Stewart-Cousins said, “[t]he Senate is stepping up to advance reforms that will empower New Yorkers, improve transparency, and help save lives.”<sup>107</sup>

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101. *Id.*

102. *Id.*

103. MASS. GEN. LAWS ANN. ch. 4 § 7(26)(C) (2020).

104. Jason Newman, *New York Senate Votes to Overturn 44-Year-Old Law Shielding Police Disciplinary Records*, ROLLING STONE (June 9, 2020, 4:47 PM), <https://www.rollingstone.com/politics/politics-news/new-york-senate-50-a-police-misconduct-1012357/>.

105. *Id.* (quoting N.Y. CIV. RIGHTS LAW § 50-a (1976)); *see also* Stephanie Wykstra, *The Fight for Transparency in Police Misconduct, Explained*, VOX (June 16, 2020, 7:30 AM), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct>. In September 2020, the release was under temporary stay. *See* Michael R. Sisak, *Appeals Panel Won't Speed Release of NYPD Discipline Records*, AP NEWS (Sept. 17, 2020), <https://apnews.com/article/police-new-york-city-new-york-racial-injustice-court-decisions-e4a9378722606e397c53eb95a763aec0>.

106. *See* Wykstra, *supra* note 105.

107. Newman, *supra* note 104.

By making disciplinary records public and assuming that personal information is redacted, worrisome police behavior or trends in misconduct can be detected before they escalate and can be used to detect officers who are engaged in risky policing.

*C. Preventing Municipalities from Indemnifying Officers Under Section 1983*

In 1978, the Supreme Court decided that municipalities could be held liable for constitutional violations under Section 1983 but rejected respondeat superior liability for the actions of municipal employees, finding that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.”<sup>108</sup> “[T]he language of § 1983, read against the background of [its] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”<sup>109</sup> Under our proposed plan, police officers would be personally liable and not indemnified by their employer for the judgment or settlement of a liability action. We propose that municipalities should be prohibited from indemnifying officers’ owed damages so that municipalities could reallocate the money currently spent on paying out damages for police misconduct lawsuits to community services, public school systems and health. This will further officers’ accountability.

*D. Professional Liability Insurance (“PLI”)*

Insurance is a common mechanism used to protect individuals and organizations against the risk of loss by distributing the burden of losses over a large number of individuals who need coverage or protection. Doctors, lawyers, and professional drivers, for example, all carry PLI which holds them accountable.<sup>110</sup>

Individual professional liability insurance would use the large sums municipalities pay in judgment, and larger sums they will pay after the end of qualified immunity, as a lever to assess risk and to alter police behavior.<sup>111</sup> With economic and non-economic ramifications, professional liability insurance will serve several purposes: (1) saving lives by preventing or detecting bad actors, and by deterring them from engaging in reckless policing to begin with, as well as encouraging treatment when

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108. *Monell v. Dep’t Soc. Servs.*, 436 U.S. 658, 694 (1978).

109. *Id.* at 691.

110. *Ramirez et al.*, *supra* note 1, at 436.

111. *Id.* at 436–37.

they do; (2) compensating victims fairly; (3) reducing taxpayer costs on police misconduct lawsuits; and (4) holding individual police officers accountable for their reckless police action.

Insurance companies do not have any direct control over day to day of the police departments. Just as credit ratings affect rate of borrowing, insurance companies will set premium rates to reflect risk. Liability insurance will mitigate financial losses that result from litigation, thereby enabling officers and departments to focus on community safety and development, while also reducing the burden on taxpayers. The policies would cover perils such as false arrest and civil rights violations. Just as physicians with records of malpractice may be forced out of practicing by high premiums, officers with histories of dangerous behavior and indicators of future violence or recklessness may be “priced-out” of policing by premiums that reflect their actual risk of unjustified violence.<sup>112</sup>

The current models suggested herein focus on police officers; however, liability insurance according to the proposed models can and should be extended to police departments, sheriff departments, college or university police, port or airport authorities, and prisons or correctional officers.

#### 1. How Professional Liability Insurance Would Work

Under our proposal, we discuss two basic models that municipalities can adopt in order to insure the police force: the Department Model or the Officer Model. The proposal aims to address all objectives of police accountability as thoroughly as possible. The models are concept models and can be customized based on the municipality’s needs. In other words, a viable and feasible model, a just and fair balance between objectives will need to be achieved at the discretion of the municipality or state. Similarly, decisions regarding renewal and cancellation policy, notice period, and acceptable reason for cancelling will be determined by the municipality or state, along with the actuarial.<sup>113</sup>

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112. *Id.*

113. Typically, notice can be 90 days, for example. Insurance companies typically must act in good faith and have a “cause” if they decide to cancel a policy. Reasons for canceling a policy include false or fraudulent statements on an insurance application, changes in protocols, training or practice that create unacceptable exposure to claims, and failure to comply with the business relationship, i.e., refusal to pay premiums or termination from the police force.

## a. The Department Model

The Department Model is an insurance model that is offered to the police department rather than as an individual officer policy, much in the same way that hospitals or companies provide insurance to their employees. The Department Model is a hypothetical state legislative model based on New York Legislation.<sup>114</sup> New York Senate Bill S8676 amends general municipal law to require all police officers, as a condition of policing, to carry professional liability insurance.<sup>115</sup> The Department Model is built on a fixed, monthly base premium, a deductible, and a capped claim size that aims to stop the complete indemnification of officers for all police conduct cases at the municipal level, to save lives by identifying and pricing out the officers engaged in reckless policing before deadly force is used on a future victim, to lower taxpayer liability, and compensate victims fairly.

As a baseline, the average officer base premium is paid by the police department on a monthly basis for its officers, calculated as a rolling average over five years for all officers in the department. This is analogous to how hospitals pay premiums for the medical professionals in medical malpractice insurance.<sup>116</sup> Any officer who is subject to sustained civilian complaints in civil lawsuits or shows any of the early warning indicator signs of risk will be subject to a higher total premium that reflects that risk and is discussed in greater detail in the next section. The difference, or the amount above the average premium, is paid by the higher-risk officer. For example, the department pays a base premium of \$70 for an officer. If an insurance company determines that an officer is high-risk, the officer can reduce their premium by participating in proven treatment programs for substance abuse disorder or anger management, counseling, implicit bias training, de-escalation trainings, and good policing. If the officer remains in a high-risk status, the officer could be liable for as much as \$700 per month premium and ultimately be priced out of policing.

In other words, this model not only deters bad behavior, but it also creates positive incentives for officers for good policing. A police officer could pocket the difference between an average premium and their own if they have an excellent record or take additional training empirically shown to lower risk. When forced to pay the basic premiums out of their own budget, rather than allowing a city to pay claims, police departments

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114. See S.B. S8676, 2019–20 Legis. Sess. (N.Y. 2020), <https://www.nysenate.gov/legislation/bills/2019/s8676>.

115. *Id.*

116. Ramirez et al, *supra* note 1, at 440–42.



would be motivated to avoid dangerous policies and implement better de-escalation training across the board as they try to lower the average officer premium payments. Potential reductions or increases in premiums would provide fiscal carrots and sticks.<sup>117</sup> In other words, departments that require less coverage could negotiate their premiums down. The departments would also be motivated to share police disciplinary records with insurers to lower premiums.<sup>118</sup> Police departments will report quarterly to police officers' professional liability insurance providers with any disciplinary reports, employer reviews, civilian complaints and promotions relating to the officers' professional conduct. We recommend that, as an added incentive for police departments to monitor officer behavior, police departments should be eligible for rebates when their department has multiple years with reduced claims or no claims.

In the example discussed in this Section, our model proposes an officer deductible of \$5,000. The deductible serves to lower premiums across the board, without punishing the good officers. In other words, only bad actors found guilty in a civil suit are liable for the deductible and will have to pay out of pocket. The deductible also acts to ensure that officers will have a vested interest for good policing.

In order to compensate victims of police violence fairly, the officers' owed damages, which would be paid out by the insurance company, are capped at \$500,000. One of the fundamental trade-offs is to decide how to balance victim compensation with an affordable system of PLI. Insurance companies have to charge very high premiums if they are on the hook for all judgments and settlements, including, for example, a settlement of \$20 million for a single case.<sup>119</sup> We recognize that placing a cap on damages potentially reduces victim compensation from its maximum value; however, it also reduces the average base premium and allows for a professional liability insurance accountability system that addresses one of our key objectives: saving lives by preventing, detecting,

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117. *See id.* at 451.

118. *Id.* at 451–52. To address the risk of failure to report accurate data, the officer providing the data and the department must certify that the total is complete and accurate under penalty of perjury to the accuracy and completeness of the disciplinary records. *See id.*

119. Minneapolis settled for \$20 million for a single case: the fatal shooting of Justine Damond in July 2017. *See* David K. Li, *Justine Damond's Family Agrees to \$20 Million Settlement with Minneapolis over Police Shooting Death*, NBC NEWS (May 3, 2019, 2:03 PM), <https://www.nbcnews.com/news/us-news/justine-damond-s-family-agrees-20-million-settlement-minneapolis-over-n1001716>.

and deterring catastrophic, reckless policing incidents from occurring in the first place.

Different municipalities can adopt different caps based on their policing behavior and prior lawsuit trends. In New York City, the Legal Aid Society lifted “the veil on allegations of police misconduct by releasing a detailed database that collate[d] and analyze[d] about 2,300 lawsuits filed against New York City police officers since 2015.”<sup>120</sup> Of settlements in the database, only around 1.3 percent were \$500,000 or over.<sup>121</sup> Thus, for New York, capping damages and settlements by this amount ensures over 98.7 percent coverage of the cases without unreasonably increasing premiums.<sup>122</sup>

Table 1 lays out two scenarios to test the viability of the model. Our model assumes an average claim size of \$10,000. Figures used to elaborate for the remainder of this section are based on the number of settlements and number of officers in New York City in 2019.<sup>123</sup>

**Table 1**

|                           | NYC Hypothetical      | Chicago Hypothetical  |
|---------------------------|-----------------------|-----------------------|
| Number of police officers | 36,000 <sup>124</sup> | 12,515 <sup>125</sup> |
| Number of settlements     | 2,315 <sup>126</sup>  | 116 <sup>127</sup>    |

120. Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/nyregion/nypd-capstat-legal-aid-society.html>.

121. *Lawsuits Against New York City Police Officers*, CAPSTAT, <https://www.capstat.nyc/lawsuits/> (last visited Nov. 11, 2020). An average over ten years of incidents is taken because settlements in a certain year can go back to incidents from one, two, or more years ago. *See id.*

122. Although, the municipality could create an override process to pay claims for seriously injured victims who need lifetime care such as Jacob Blake, who may suffer serious, life-altering injuries.

123. There were 2,315 settlements in New York City in 2019. OFF. OF THE N.Y.C. COMPTROLLER, CLAIMS REPORT: FISCAL YEAR 2019, at 14 tbl.1 (2020), <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2019.pdf>.

124. *About NYPD*, N.Y.C. POLICE DEP'T., <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> (last visited Mar. 10, 2021).

125. *Law Enforcement Officers Per Capita for Cities, Local Departments*, GOVERNING, <https://www.governing.com/archive/law-enforcement-police-department-employee-totals-for-cities.html> (last visited Mar. 10, 2021) (providing 2010 employment data).

126. OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 123, at 14 tbl.1.

127. CITY OF CHI., REPORT ON CHICAGO POLICE DEPARTMENT: 2019 LITIGATION 2 (2019), <https://www.chicago.gov/content/dam/city/sites/police-reform/docs/LitigationReport>

|   | NYC Hypothetical            | Chicago Hypothetical |
|---|-----------------------------|----------------------|
| Average Claim Amount                                    | \$10,000                    | \$35,000             |
| Max Claim Size  | \$500,000                   | \$500,000            |
| Deductible  | \$5,000                     | \$8,500              |
| Total Deductible per year                               | \$10,996,250 <sup>128</sup> | \$936,700            |
| Base Premium  | \$70 <sup>129</sup>         | \$70                 |
| Earned Premiums   | \$55,944,000 <sup>130</sup> | \$19,466,932         |
| Total Payout needed per year for misconduct settlements | \$26,090,000 <sup>131</sup> | \$6,850,000          |
| Total Payout minus deductible                           | \$15,093,750                | \$5,913,300          |
| Profit Margin   | 73%                         | 70%                  |
| Loss Ratio  | 27%                         | 30%                  |

In the New York City example, with \$70 per month per officer base premium and a \$5,000 deductible for settlement, the municipality or department pays \$26 million per year, a mere 27 percent of the \$95.2 million paid by New York City in 2019.<sup>132</sup> Real savings come from the deductible, the \$500,000 cap, and the excess premiums—any premium

\_Apndx\_Final.pdf (supplying the total number of cases in which the city made a payment to plaintiffs).

128. This calculation for each city assumes that 95 percent of the settlements include a deductible, as 95 percent are above the respective caps of \$5,000 or \$8,500. The remaining claims, since they do not rise to the level of the deductible, are excluded because they therefore have no impact on the departments' costs.

129. Base premium is calculated as a function-percent margin. This amount will be paid by officers with good records. Higher risk officers will pay increased premiums.

130. Earned premiums are driven by the margin of officers exhibiting good policing being over 60 percent. In our calculations, we assumed 75 percent of officers have good policing and will pay base premiums of \$70, 20 percent medium policing at approximately a \$210.62 premium, and 5 percent risky policing assigned a \$700 premium. Five percent risky policing is based on a Chicago study finding that 5 percent of the officers received half the complaints. See Ramirez et al., *supra* note 1, at 432.

131. This calculation assumes for both cities that six settlements reached our \$500,000 cap, as was the case in New York City in 2019. The rest of the settlements are included as the average claim amount.

132. OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 123, at 14 tbl.1.

above the base that results from risky or dangerous behavior. The individual officer is accountable in that they are responsible for the deductible and the excess in premium. The department remains responsible for the base premium.<sup>133</sup>

Another option to private insurers is a state capital pooling. This means the state allocates the risk and pooling capital which reduces administrative costs through centralization. The concept is comparable to flood insurance. Flood damage is typically not covered by standard home insurance policies.<sup>134</sup> It is primarily sold through the National Flood Insurance Program, though one can also buy it from private insurers.<sup>135</sup> Police officer insurance can also be pooled as part of a national or state program. State capital pooling or local government investment pools (“LGIPs”) can be similarly used for the goal of reducing administrative costs through centralization.<sup>136</sup> LGIPs can also mitigate the percent earned premiums that are targeted by insurance companies. With lower percent earned premiums, LGIPs can either reduce the premiums or allocate the funds to different municipality needs such as healthcare, infrastructure, and education.<sup>137</sup>

There are numerous advantages to this model that meet police accountability objectives. Unlike the current system, this model provides 100 percent police accountability because all officers are enrolled through a mandatory system. There is no downside from a union standpoint because the premium is absorbed by the department, not the officer. The officers pay only if the premium is increased as a result of risky behavior or through the deductible if there is a claim to settle over the misconduct. Victims can be fairly compensated because the claims can be made up to a cap, \$500,000 in this case. Finally, taxpayer liability is dramatically reduced.

Taxpayers indirectly pay for the average base premiums paid through the police department because whoever pays the premium ultimately pays the settlements and damages. However, their payment is greatly reduced.

To summarize, under this system, considering the New York City model, the municipality saves 73 percent.<sup>138</sup> By way of illustration, a city that paid \$95.2 million in 2019 for police misconduct, now pays only \$26

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133. Though we recognize this is taxpayer money, it incentivizes the police department to closely look at costs.

134. *Flood Insurance*, FEMA, <https://www.fema.gov/flood-insurance> (Jan. 8, 2021).

135. *Id.*

136. *Local Government Investment Pools*, GFOA, <https://www.gfoa.org/materials/local-government-investment-pools> (last visited Mar. 10, 2021).

137. Capital pooling might also be done at the municipal level.

138. *See supra* text accompanying note 132.

million.<sup>139</sup> Note, however, that since the police department pays for the average base premium, some of those savings are merely transferred accounting. In other words, the police department pays the premium, which indirectly comes from the municipality. In New York City, taxpayer savings would equate to around \$53.4 million, around 58 percent savings.<sup>140</sup> Most importantly, this model saves lives by driving up premiums so that dangerous police officers are priced out and displaced from policing, or alternatively are encouraged to seek treatment for dangerous policing.

b. The Officer Model

The Officer Model is based on Colorado Senate Bill 20-217 which makes police officers liable only up to \$25,000 if they elect to insure.<sup>141</sup>

If the peace officer's employer determines that the officer did not act upon a good faith and reasonable belief that the action was lawful, then the peace officer is personally liable and shall not be indemnified by the peace officer's employer for five percent of the judgment or settlement or twenty-five thousand dollars, whichever is less. Notwithstanding any provision of this section to the contrary, if the peace officer's portion of the judgment is uncollectible from the peace officer, the peace officer's employer or insurance shall satisfy the full amount of the judgment or settlement.<sup>142</sup>

Thus, under this bill, officer coverage is up to \$25,000. The taxpayer continues to be liable for any and all damages or settlements above \$25,000, including a possible settlement of \$20 million,<sup>143</sup> as there is no cap. This model assumes that police officers, faced with a \$25,000 liability, will elect to purchase professional liability insurance.

The Officer Model takes the cost of insuring the officers entirely out of the hands of the officers' employing department or municipality. Police officers are responsible for providing information such as records of

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139. See *supra* text accompanying note 132.

140. This assumes a transfer of the costs from the municipality to the department in the form of elevated premiums based on risky behavior. See *supra* Table 1; see also *supra* text accompanying notes 132–33.

141. S. 217, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020), [https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a\\_217\\_enr.pdf](https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_217_enr.pdf).

142. *Id.*

143. See, e.g., Li, *supra* note 119.

Driving Under the Influence and sustained complaints to insurance policy makers.

In this model, insurance covers claims against officers for acts or omissions during any period that such officer is performing duties within the scope of their employment. The policy also needs to list acts exempted by insurance, such as intentional misconduct and acts that fall outside of the actual practice of policing, such as sexual misconduct.

c. Model Tradeoffs

Both models have tradeoffs between victim compensation, taxpayer liability, and police liability and treatment. The focus of the Department Model is high police accountability, low taxpayer costs, and medium victim compensation. High accountability results from the fact that insurance under the Department Model is mandatory. Thus, accountability is ensured for 100 percent of the officers, not only those that enroll in insurance. Victim compensation is both economic/direct and non-economic/indirect. The economic compensation results from the cap. The non-economic compensation is that an offending police officer will be priced out of policing with high premiums or alternatively will get treatment that prevents dangerous policing.

Another advantage of the Department Model is that it substantially reduces taxpayer liability and has huge potential economic savings. Though taxpayer liability can never be wholly removed, the Department Model means taxpayers are paying much less, i.e., by around 58 percent in the New York City example.<sup>144</sup> Moreover, collection is easily scaled because it is centralized by the Department.

The Department Model seeks to answer the question Gwen Carr, Garner's mother, asked a Congressional Black Caucus panel after his death: Why was the officer who killed her son still employed?<sup>145</sup> At the time, no one could answer her.<sup>146</sup> Under the Department Model, we are suggesting a plan that ultimately means no mother would ever need to ask that question again. Had the Department Model been in place in New York, Pantaleo, the police officer who strangled Garner to death, would have had premiums so high as a result of his record of reckless policing, supported by the fact that he was in the top 2 percent of sustained civil complaints, that he would have been priced out of police duty before he ever met Garner.<sup>147</sup> Thus, the Department Model is intended to price

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144. The 58 percent assumes that police departments pay the base premium, which ultimately is taxpayer money. *See supra* note 140 and accompanying text.

145. Ramirez et al., *supra* note 1, at 407.

146. *Id.*

147. *See supra* text accompanying notes 3–5.

officers out of policing before they engage again in the conduct which produced a settlement or judgment. By doing so, this model saves both money and lives.

In contrast, the Officer Model faces different tradeoffs. The focus of the Officer Model is accelerating a system whereby officers begin to enroll in insurance and are made accountable up to \$25,000.<sup>148</sup> An advantage of the Officer Model is that it is easier to implement because state legislation is not mandatory. In other words, a single municipality can decide that it will no longer pay for police misconduct, without the legislation. By comparison, a 2016 ballot initiative in Minnesota tried to introduce mandatory professional liability insurance for all police officers in Minneapolis.<sup>149</sup> The initiative, in line with the Department Model, was rejected by the city council as ineligible for the ballot on preemption grounds because it conflicted with a Minnesota state law requiring cities to back city employees in legal matters.<sup>150</sup>

By way of illustration, the Officer Model, unlike the Department Model, could be implemented immediately in Minneapolis and elsewhere without legislation. Minneapolis activists could begin a ballot initiative proposing that Minneapolis no longer pay the costs of police misconduct or that the officers pay the first \$25,000, or another amount, of police misconduct costs. As opposed to requiring mandatory professional insurance, the model mandates that the officer is responsible for the first \$25,000. In such a way, the officer initiates insurance coverage to cover that first \$25,000. This is within the purview of municipalities and could be acted upon immediately without state legislation.

The Officer Model creates an immediate market with reduced risk because insurance companies would only be insuring for a fixed, finite, small amount of \$25,000. This enables the insurance companies to

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148. *See supra* Section II.D.I.B.

149. Ramirez et al., *supra* note 1, at 438 (citing *Bicking v. Minneapolis*, 891 N.W.2d 304 (Minn. 2017)).

150. *Id.* (quoting *Bicking*, 891 N.W.2d at 307) (“Each appointed police officer must provide proof of professional liability insurance coverage in the amount consistent with current limits under the statutory immunity provision of state law and must maintain continuous coverage throughout the course of employment as a police officer with the city. Such insurance must be the primary insurance for the officer and must include coverage for willful or malicious acts and acts outside the scope of the officer’s employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer’s insurance is exhausted. This amendment shall take effect one year after passage.”).

develop a pilot, attain data, and forecast administrative and overhead costs to better tune premium costs. Once a pilot insurance program is in place, adjustments can be made, and the model can be fine-tuned to the municipality's needs.

A disadvantage is that coverage is less than its Department Model counterpart and provides less police accountability. It does not mandate that 100 percent police officers carry professional liability insurance. Because insurance is elective rather than mandatory, risky police may not be policed out from high premiums. On the other hand, in Colorado, it has induced unions and police departments to request professional liability insurance.<sup>151</sup> Thus, it may well be that unions might begin to offer professional liability insurance to their members. This has two benefits: it can create union support for the idea and it may allow the insurance company to insure at the union level as opposed to issuing individual policies. However, one challenge may be that officers will decide to self-insure when attempts are made to price the officer out of policing. In contrast, requiring professional liability insurance through state legislation renders it easier to price officers out of policing. Under that model, police are required to carry professional liability insurance in order to police and are unable to self-insure.

The Officer Model also does not cap the settlement size. The advantage of this is that victims can be fully compensated. Thus, a municipality can still negotiate very large settlements such as the \$20 million Minneapolis settlement.<sup>152</sup> The disadvantage, however, is that the taxpayers will still need to foot a large part of the bill, especially for those larger suits. Ironically, they will be paying more than they currently do. For instance, in a \$5 million settlement, such as the one Chicago settled for Van Dyke,<sup>153</sup> the officer would be on the hook for \$25,000 but the taxpayer would be burdened with \$4,975,000, or 99.5 percent of the bill. Moreover, the taxpayer will be also be indirectly funding some of the premiums through the departments. Thus, the taxpayer may be negatively impacted by this model. To illustrate this point, Colorado Springs, Colorado has 700 police officers,<sup>154</sup> which would amount to \$336,000 in earned premiums, assuming a \$40 base premium, by way of illustration.<sup>155</sup> However, Colorado Springs in the past five years

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151. E-mail from Jeff Harrison, Chief Exec. Officer, Prymus Insurance, to Deborah Ramirez, Professor of L., Ne. Univ. Sch. Of L. (Aug. 28, 2020) (on file with author).

152. See, e.g., Li, *supra* note 119.

153. Husain, *supra* note 7.

154. *Police Employment*, COLO. SPRINGS, <https://coloradosprings.gov/police-department/page/police-employment-0> (last visited Mar. 11, 2021).

155. These are sample numbers given by Prymus Insurance.



had an average of 1.8 average settlements for a total average of \$151,710.<sup>156</sup>

## 2. How Premiums Change—Early Warning Indicators

Just as a driver's premium goes up following an accident, and just as young drivers pay higher premiums than their more experienced counterparts, premiums for police officers will be set according to considerations which will include an officer's early warning indicators ("EWIs"), practice patterns, past claims history, and geographical location.

EWIs are performance indicators that can be collected for every police officer. EWIs can include objective indicators or subjective indicators. Objective indicator measurements include prior lawsuits, number of settlements or judgments, civil complaints,<sup>157</sup> especially the number of sustained civil complaints, criminal convictions, disciplinary actions taken, and the number of times a service revolver is discharged. Historically, most officers never discharge their service weapon. In fact, "only about . . . (27%) of all officers say they have *ever* fired their service weapon while on the job, according to a . . . Pew Research Center survey conducted by the National Police Research Platform."<sup>158</sup>

Subjective indicators can include the unjustified use of force and unjustified use of a service revolver. For example, "[i]n 1993 and 1994, the Virginia Association of Chiefs of Police (VACOP) sent Use of Force Survey forms to 360 law enforcement agencies in Virginia."<sup>159</sup> The survey found that the "agencies made a total of 1,101,877 arrests and used force in 1,697 arrests, or about 0.15 percent of the total."<sup>160</sup> The survey also

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156. This is part of the database we are collecting. It was given to us directly by the municipality.

157. In a study conducted by Philip Matthew Stinson, Sr., J.D., Ph.D. from Bowling Green State University, the most common complaints were "simple assault (13%), driving under the influence (12.5%), aggravated assault (8.5%), forcible fondling (5.2%), and forcible rape (4.8%)." See PHILIP MATTHEW STINSON ET AL., POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 22 (2016), <https://www.ncjrs.gov/Pdffiles1/Nij/Grants/249850.Pdf>.

158. Rich Morin & Andrew Mercer, *A Closer Look at Police Officers Who Have Fired Their Weapon on Duty*, PEW RSCH. CTR.: FACT TANK (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/a-closer-look-at-police-officers-who-have-fired-their-weapon-on-duty/>.

159. TOM MCEWAN, U.S. DEP'T OF JUST., NCJ-160113, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 36 (1996), <https://www.bjs.gov/content/pub/pdf/ndcopuof.pdf>.

160. *Id.*

found that “[t]he median age of officers receiving complaints was 31 years, and the median length of experience was 7 years.”<sup>161</sup>

Such metrics can help determine premium risk levels. In order for a police officer to hold liability insurance, the police officer provides the insurance company their EWIs for a rolling window period. Offenses can age so that older offenses committed have less weight than more recent offenses. This provides the officer an incentive to treat trauma and alter bad behavior. As police behavior improves, the EWIs improve and the officer’s premium can decrease as a result.

EWIs are valuable to a gamut of public and private stakeholders. Public officials want the data on police EWIs as it relates to their responsibilities. Police executives desire the data because of their unique role in controlling its application. Police supervisors want information on their members’ use of force to illustrate restraint, identify professionalism, and help protect officers’ rights in after-action review procedures. Other local groups, such as oversight agencies, need the statistics as part of their mandate to keep watch over police. Many of the EWIs can be obtained via scraping public records, including records of officers driving under the influence, officer domestic violence restraining orders, officer arrest records for assaults, settlements, and verdicts. Some prosecutors are even known to maintain lists of officers’ misconduct or alleged misconduct, known as “Brady lists” that they may need to legally disclose to the “defense as the information could speak to officers’ credibility.”<sup>162</sup>

### 3. Risky Policing is Prevented by High Premiums

Strong evidence suggests “that the most dangerous officers are identifiable and relatively rare.”<sup>163</sup> Dangerous officers threaten the legitimacy of policing, making it harder for good officers to perform. For example, Derek Chauvin who allegedly murdered George Floyd, had seventeen prior complaints, only one being closed with disciplinary action.<sup>164</sup> Chauvin had previously been involved in multiple shootings and was on the scene when the Minneapolis police shot and killed a

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161. *Id.* at 37.

162. Walter Wuthmann, *Few Mass. DAs Keep Police Watch Lists. Constitutional Questions Exist for Those Who Don't*, WBUR (Aug. 18, 2020), <https://www.wbur.org/news/2020/08/18/police-brady-lists-middlesex-district-attorney>. These lists may sometimes be public records. *See id.*

163. Ramirez et al., *supra* note 1, at 408.

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

suspect in 2006.<sup>165</sup> In 2007, he was accused of pulling a woman out of her car after stopping her for driving 10 mph over the speed limit and frisking her.<sup>166</sup> Video and audio were turned off.<sup>167</sup> Investigation determined that questioning could have taken place outside.<sup>168</sup> In 2008, he opened fire at a suspect in response to a domestic disturbance call.<sup>169</sup> In 2011, he was present when the police fired and shot a man running from another shooting.<sup>170</sup> According to Dave Bicking, a board member of Communities United Against Police Brutality, based in Twin Cities, Chauvin had a “high number [of complaints] compared with other officers . . . . ‘His numbers should have definitely raised alarm with the department and triggered a review[.]’ . . . [M]ost officers might get one or two complaints in seven years.”<sup>171</sup> This history of misconduct would have impacted his EWIs in such a way that he theoretically would have been priced out of policing by high insurance premiums before he ever met George Floyd. Similarly, Chauvin’s colleague Tou Thao had six prior complaints.<sup>172</sup> Minneapolis had further settled a \$25,000 excessive force lawsuit against Thao.<sup>173</sup>

Daniel Pantaleo, the officer who put Eric Garner in a chokehold, had more sustained civilian complaints than 98 percent of the NYPD.<sup>174</sup> He was named in four civil suits alleging civil rights violations in the years before Garner’s murder—two of them prior lawsuits for illegal searches—

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165. Derek Hawkins, *Officer Charged in George Floyd’s Death Used Fatal Force Before and Had History of Complaints*, WASH. POST (May 29, 2020, 6:47 PM), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/>.

166. *Minneapolis Internal Affairs investigations into Derek Chauvin*, MUCKROCK, <https://www.muckrock.com/foi/minneapolis-1607/minneapolis-internal-affairs-investigations-into-derek-chauvin-93902/#file-912739> (last visited Apr. 17, 2021).

167. *Id.*

168. *Id.*

169. Hawkins, *supra* note 165.

170. See Yaron Steinbuch, *Minneapolis Cop Derek Chauvin Subject of Complaints Before George Floyd’s Death*, N.Y. POST (May 28, 2020), <https://nypost.com/2020/05/28/cop-in-george-floyds-death-was-the-subject-of-10-complaints/>.

171. Kim Barker & Serge Kovalski, *Officer Who Pressed His Knee on George Floyd’s Neck Drew Scrutiny Long Before*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/derek-chauvin-george-floyd.html>.

172. Melissa Alonso, *Fired Minneapolis Officer Had 18 Complaints Against Him*, CNN (May 28, 2020 3:36 PM ET), [https://www.cnn.com/us/live-news/george-floyd-protest-updates-05-28-20/h\\_52b202b652b86490416cc043f7a79d33](https://www.cnn.com/us/live-news/george-floyd-protest-updates-05-28-20/h_52b202b652b86490416cc043f7a79d33).

173. See Bernard Condon et al., *Cop in Floyd Case Got Medals for Valor and Drew Complaints*, AP NEWS (June 3, 2020), <https://apnews.com/8b486c2622de5504f1e65a606b0eac7f>.

174. See *supra* text accompanying note 5.

sustained by the civilian review board, one settled suit for an illegal strip search, and one civil suit for crashing a police car into another car.<sup>175</sup> “The Civilian Complaint Review Board found enough evidence to substantiate four claims that Pantaleo had abused his authority, according to the records published by ThinkProgress.”<sup>176</sup> The only disciplinary action Pantaleo ever faced from the NYPD was “additional training and the loss of two vacation days.”<sup>177</sup> Jason Van Dyke, the Chicago officer convicted of second-degree murder for the on-duty shooting of Laquan McDonald in 2014, had over twenty civilian complaints, placing him in the highest 3 percent of dangerous Chicago officers.<sup>178</sup> Van Dyke also had used excessive force on Ed Nance, for which a jury awarded \$350,000 in damages.<sup>179</sup>

A rigorous study by Kyle Rozema and Professor Max Schanzenbach analyzed more than 50,000 civilian complaints against officers in Chicago and found a significant correlation between the officers with the highest number of complaints and the prospect of civil litigation payouts by the city.<sup>180</sup> Specifically, they found that “[t]he worst [one] percent of officers, as measured by civilian allegations, generate almost [five] times the number of payouts and over [four] times the total damage payouts in civil rights litigation.”<sup>181</sup> Yet, officers below the eightieth or ninetieth percentile by number of complaints were little different from officers receiving no complaints in probable liability.<sup>182</sup>

If a neutral insurance company had flagged the officer via a risk score and set professional liability premiums for any one of these officers according to their previous histories of risky behavior, each would probably have been priced out of policing before ever encountering his

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175. Baker & Mueller, *supra* note 5; Eddie D’Anna, *A Look at Lawsuits Filed Against Police Officer Daniel Pantaleo, Officer in Eric Garner Incident*, SILIVE (Mar. 30, 2015), [https://www.silive.com/news/2015/03/a\\_look\\_at\\_lawsuits\\_filed\\_again.html](https://www.silive.com/news/2015/03/a_look_at_lawsuits_filed_again.html); John Marzulli, *Eric Garner Chokehold Cop Once Accused of Strip-Searching Two Men in Broad Daylight*, DAILY NEWS (July 24, 2014, 11:38 AM), <https://www.nydailynews.com/new-york/chokehold-accused-improper-strip-search-article-1.1878104>.

176. Baker & Mueller, *supra* note 5.

177. *Id.*

178. Lansu, *supra* note 10; Ramirez et al., *supra* note 1, at 437.

179. Jason Meisner & Jeremy Gorner, *Cop Who Shot Teen 16 Times Has History of Citizen Complaints*, CHI. TRIB. (Apr. 25, 2015, 2:00 AM), <https://www.chicagotribune.com/news/ct-police-shooting-16-shots-04—met-20150425-story.html>.

180. Kyle Rozema & Max Matthew Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J.: ECON. POL’Y 225, 235, 253–54 (2019); Ramirez et al., *supra* note 1, at 432 (stating that “[a] 2008 study found only 5% of officers in Chicago account for half of the complaints received”).

181. *Id.* at 225.

182. *Id.* at 257.

victim, and both lives and taxpayer dollars would have been saved as well as the integrity of good policing.

#### 4. Insurance Costs are Significantly Less than Municipality Payouts

“The cost of resolving police-misconduct cases has surged for big U.S. cities in recent years, even before the current wave of scrutiny faced by law-enforcement.”<sup>183</sup> In theory, the cost of these lawsuits, ultimately borne by taxpayers, were supposed to inspire better oversight, better government, and better policing. The results are unconvincing:

The [ten] cities with the largest police departments paid out \$248.7 million last year in settlements and court judgments in police-misconduct cases, up 48% from \$168.3 million in 2010, according to data gathered by The Wall Street Journal through public-records requests. Those cities collectively paid out \$1.02 billion over those five years in such cases, which include alleged beatings, shootings and wrongful imprisonment. . . . “The numbers are staggering, and they have huge consequences for taxpayers,” says Kami Chavis Simmons, a former assistant U.S. attorney who now directs the criminal-justice program at Wake Forest University School of Law. “Municipalities should take a hard look at the culture of police organizations and any structural reforms that might help alleviate the possibility of some of these huge civil suits.”<sup>184</sup>

“The New York Police Department is the largest police force in the country with over 36,000 members [serving] a city of 8.3 million people.”<sup>185</sup> During the 2019 fiscal year, “the city paid out \$175.9 million in civil judgments and claims for police-related lawsuits” and \$95.2 million in personal injury police action claims.<sup>186</sup> That equals, on average, around \$2,600 per officer per year for personal injury alone. In Chicago,

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183. Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL ST. J. (July 15, 2015, 10:30 PM), <https://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834>.

184. *Id.*

185. Christina Carrega, *Millions in Lawsuit Settlements are Another Hidden Cost of Police Misconduct, Legal Experts Say*, ABC NEWS (June 14, 2020, 10:12 AM), <https://abcnews.go.com/US/millions-lawsuit-settlements-hidden-cost-police-misconduct-legal/story?id=70999540>.

186. *Id.*; OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 123, at 14 tbl.1.

in 2018, the city spent approximately \$113 million—\$85 million to settle police misconduct lawsuits and an additional \$28 million to outside lawyers—to settle police misconduct cases.<sup>187</sup> That is on average almost \$6,800 per officer per year of taxpayer money, considering just the settlements without legal fees.<sup>188</sup> Philadelphia paid on average almost \$1,800 per officer per year.<sup>189</sup> Dallas paid just under \$1,000 per officer, supporting a smaller population of around 1.34 million.<sup>190</sup>

These numbers are troubling and astonishing. To ensure the viability of our model, we compared this payout to a municipality implementing the Department Model. Under our model, we assumed an average payout of \$10,000, with six of the settlements at \$500,000 million according to NYC's 2019 statistics.<sup>191</sup> With a \$5,000 officer deductible, the New York City municipality would be on the hook for \$26 million, as compared to the \$95.2 million in 2019.<sup>192</sup>

#### *E. The Lesson of Camden, New Jersey*

When considering police accountability, it is critical to carefully view municipalities that have implemented reform or have taken steps to abolish, defund, or reimagine the police. Camden, New Jersey is one such example. By dismantling the police force and obliterating the police union, Camden was able to pass a plethora of reforms otherwise unavailable due to collective bargaining practices and union intransigence.<sup>193</sup> The department mandated new police training and increased police presence and surveillance in Camden's streets.<sup>194</sup> Former Police Chief J. Scott Thomson recounted that in the new

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187. Newman, *supra* note 91.

188. Averages are taken from the total payout for settlements divided by the number of officers from Table 1.

189. Elinson & Frosch, *supra* note 183.

190. *Id.*; Dallas City, Texas, U.S. CENSUS BUREAU: QUICKFACTS, <https://www.census.gov/quickfacts/fact/table/dallascitytexas/PST045219> (last visited Mar. 11, 2021).

191. See *supra* note 131; see also *supra* Table 1.

192. OFF. OF THE N.Y.C. COMPTROLLER, *supra* note 123, at 14 tbl.1; see also *supra* Table 1. Chicago has by far fewer police officers with high settlements, which means less cost in premiums. The city, with less police, is actually paying more than New York City in settlement costs. See Carrega, *supra* note 185; see also Newman, *supra* note 91. We can either increase the deductible or increase the premium. Our recommendation is to increase the deductible so that good officers are not punished.

193. See J. Scott Thomson, *As Camden's Police Chief, I Scrapped the Force and Started Over. It Worked.*, WASH. POST (June 18, 2020, 10:30 AM), [https://www.washingtonpost.com/outlook/camden-police-chief-old-new-department/2020/06/18/37407536-b0b8-11ea-856d-5054296735e5\\_story.html](https://www.washingtonpost.com/outlook/camden-police-chief-old-new-department/2020/06/18/37407536-b0b8-11ea-856d-5054296735e5_story.html).

194. *Id.*

department he had an unprecedented level of cooperation: “I could now accomplish in a few days policy and operational changes—things like codifying the requirement that officers de-escalate encounters before using force—that would have taken years in the old department.”<sup>195</sup>

The reform began in 2010, when several police officers were charged by a federal grand jury for conducting warrantless searches, planting evidence, falsifying reports, and making bribes.<sup>196</sup> One year later, a budget crisis necessitated a mass layoff of almost half of the police force.<sup>197</sup> By 2012, the Camden police force had diminished to about 250 officers, 30 percent of whom were absent on any given day.<sup>198</sup> In 2012, there were 67 homicides, 172 victims of gun violence, and 175 open-air drug markets.<sup>199</sup> The murder rate was the fifth highest in the nation.<sup>200</sup> In 2013, every city police officer still working in Camden was let go.<sup>201</sup> After the city police department was disbanded, a new county police force was created.<sup>202</sup> Many officers from the city force reapplied to the county force, but not all were accepted.<sup>203</sup> Each of the 155 officers who were rehired<sup>204</sup> completed a fifty-page application as well as psychological and physical tests.<sup>205</sup>

Through focus-group surveys, Camden residents provided suggestions for the interview process.<sup>206</sup> The process was framed as building a new department with a new culture, as opposed to changing an existing one.<sup>207</sup> It seemed to work: after about six years with the

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195. *Id.*

196. See Teresa Masterson, *Dirty Camden Cop Admits Framing the Innocent*, NBC PHILA. (Mar. 19, 2010), <https://www.nbcphiladelphia.com/news/local/dirty-camden-cop-admits-framing-the-innocent/2138759/>.

197. Thomson, *supra* note 193.

198. Heather Haddon & Ricardo Kaulesar, *Crime Dips in Camden as New County Police Force Replaces City Officers*, WALL ST. J. (Aug. 5, 2013, 9:23 PM), <https://www.wsj.com/articles/SB10001424127887323968704578650171849946106>.

199. Thomson, *supra* note 193.

200. Sarah Holder, *What Happened to Crime in Camden?*, BLOOMBERG (Jan. 10, 2018, 7:18 AM), <https://www.bloomberg.com/news/articles/2018-01-10/after-police-reform-crime-falls-in-camden-new-jersey>.

201. Thomson, *supra* note 193.

202. *Id.*

203. *Id.*

204. Haddon & Kaulesar, *supra* note 198.

205. Thomson, *supra* note 193.

206. *Id.*

207. *Id.*

county force, the homicide rate dropped by 63 percent,<sup>208</sup> and total violent crimes dropped by 38 percent after about five.<sup>209</sup>

The new department implemented implicit bias and de-escalation training and changed its use-of-force policy.<sup>210</sup> New surveillance systems were introduced.<sup>211</sup> Uniformed police officers were stationed on street corners to deter crime.<sup>212</sup> After years of a vastly understaffed and underfunded department, the idea was to push for more: more police, more training, more interactions with community members.

Camden's method of reform may have been groundbreaking; however, its success is controversial. "[S]ome say that's simply a reflection of a national trend—US crime has dropped more than 50% since the early 1990s—and not specific to police reform."<sup>213</sup> Nyeema Watson, a lifelong Camden resident who is the associate chancellor for civic engagement at Rutgers University, said "[w]e can't police our way out of social issues, unemployment, disproportionate health issues, economic challenges—these are things that drive crime."<sup>214</sup>

Camden Police Chief Scott Thomson wrote that the new force was created under the assumption that the old way of policing was wrong.<sup>215</sup> However, in the seven years since Camden's county police force took to the streets, it has only implemented reforms pointing toward a department that has adopted a softer angle on policing.

The landscape from Camden suggests that, even if future cities choose to use Camden's mechanism for reform by narrowing the scope of the police and defunding large portions of the police budget, a system for police accountability still remains a critical and necessary component of policing, and a requirement which professional liability insurance can address.

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208. *Id.*

209. Brendan McQuade, *The "Camden Model" Is Not a Model. It's an Obstacle to Real Change.*, JACOBIN (July 4, 2020), <https://jacobinmag.com/2020/07/camden-new-jersey-police-reform-surveillance>.

210. See Lynn Englum, *Redefining Public Safety: The Example of Camden, N.J.*, STAR TRIB. (June 10, 2020, 5:34 PM), <https://www.startribune.com/redefining-public-safety-the-example-of-camden-n-j/571171052/>.

211. McQuade, *supra* note 209.

212. See Thomson, *supra* note 193.

213. Ankita Rao, *These New Jersey Cities Reformed Their Police—What Happened Next?*, GUARDIAN (June 25, 2020, 4:00 PM), <https://www.theguardian.com/us-news/2020/jun/25/camden-newark-new-jersey-police-reform>.

214. Scottie Andrew, *This City Disbanded Its Police Department 7 Years Ago. Here's What Happened Next*, CNN (June 9, 2020), <https://www.cnn.com/2020/06/09/us/disband-police-camden-new-jersey-trnd/index.html>.

215. Thomson, *supra* note 193.



*F. Narrowing the Scope of Policing: An Oregon Example*

Unlike in Camden, other municipalities have chosen to allocate a large proportion of police funding and responsibilities to programs and professionals who are more equipped to handle non-criminal matters and crises. For instance, some municipalities have attempted to address policing concerns by utilizing medical and behavioral health professionals instead of or in addition to police officers to respond to 911 calls.<sup>216</sup> In Eugene, Oregon, the White Bird Clinic, a community-based healthcare provider, started a program called Crisis Assistance Helping Out On The Streets (“CAHOOTS”) in 1989.<sup>217</sup> The founders of CAHOOTS—“a fairly anarchist bunch of hippies,” according to one founder—knew that people in peril were not calling the police and wanted to create a community-based service that people could trust.<sup>218</sup>

Each CAHOOTS team is made up of one medic and one crisis worker, the medic being a nurse or an emergency medical technician, and the crisis worker being an individual who has years of experience working in the mental health field.<sup>219</sup> Ben Brubaker, the White Bird Clinic coordinator, looks for three qualities in CAHOOTS applicants: “technical knowledge in . . . medical and behavioral health, a belief in client-centered care and personal experience in crisis situations.”<sup>220</sup> All team members are also required to complete more than 500 hours of de-escalation and crisis intervention training.<sup>221</sup> CAHOOTS employees provide assistance to folks with urgent medical or psychological needs, offering services in the following areas: crisis counseling, grief and loss, conflict resolution and mediation, suicide prevention, housing crises, first

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216. Tatiana Parafiniuk-Talesnick, *Nation Looks for a CAHOOTS Blueprint While Locals Want More of Its Services*, REG.-GUARD (July 5, 2020, 5:00 AM), <https://www.registerguard.com/story/news/2020/07/05/nation-looks-for-cahoots-blueprint-while-locals-want-more-of-its-services/42054913/>.

217. *Id.*

218. *Id.*

219. CAHOOTS, WHITE BIRD CLINIC, <https://whitebirdclinic.org/services/cahoots/> (last visited Mar. 12, 2021).

220. Tatiana Parafiniuk-Talesnick, *In Cahoots: How the unlikely pairing of cops and hippies became a national model*, REG.-GUARD (Oct. 20, 2019), <https://www.registerguard.com/news/20191020/in-cahoots-how-unlikely-pairing-of-cops-and-hippies-became-national-model>.

221. WHITE BIRD CLINIC, CRISIS ASSISTANCE HELPING OUT ON THE STREETS: MEDIA GUIDE 2020, at 2 (2020), <https://whitebirdclinic.org/wp-content/uploads/2020/07/CAHOOTS-Media.pdf>.

aid and other non-emergency medical care, transportation, substance use, and referrals and resource connection.<sup>222</sup>

While CAHOOTS started with a run-down van and a few employees, it has become a heavily relied-upon service in the Eugene and Springfield areas.<sup>223</sup> Currently, CAHOOTS responds to about 20 percent of calls that come in through 911 and the police non-emergency number, receiving between five and ten requests for services per day.<sup>224</sup> According to Brubaker, calls to 911 and the police are routed to CAHOOTS when there is a prominent behavioral health element and no apparent legal issue or serious threat of violence or danger to the individual or the public.<sup>225</sup> Of over 24,000 calls to which CAHOOTS responded in 2019, there were only 250 instances requiring backup from law enforcement.<sup>226</sup> Ebony Morgan, a CAHOOTS crisis worker, stated that CAHOOTS employees only contact the police when there is an immediate threat to the individual or others.<sup>227</sup> During an interview with National Public Radio, Ebony stated, “in 30 years, we’ve never had a serious injury or a death that our team was responsible for. And I think that’s important to note,” explaining that CAHOOTS’s unarmed crisis teams do not come with the same risks as armed police.<sup>228</sup>

Like Camden, Eugene is an example of a city where the role and scope of the police has been reimagined. Yet here, too, a re-imagined police architecture still includes a uniformed police force responding to violent crimes, crimes in progress, and other dangerous situations. These re-imagined police forces will still need the accountability that professional liability insurance provides. Thus, our recommendation would be to defund, dismantle, and reimagine a narrowed police force with officers carrying professional liability insurance.

#### IV. CONCLUSION

Law enforcement officials play a critical role in our communities. They conduct over ten million arrests each year in an effort to ensure public safety and hold individuals accountable for violating the law and

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222. *CAHOOTS*, *supra* note 219.

223. Parafiniuk-Talesnick, *supra* note 216.

224. Interview by Ari Shapiro with Ben Brubaker, Clinic Coordinator, and Ebony Morgan, Crisis Worker, White Bird Clinic (June 10, 2020), <https://www.npr.org/2020/06/10/874339977/cahoots-how-social-workers-and-police-share-responsibilities-in-eugene-oregon>.

225. *Id.*

226. *WHITE BIRD CLINIC*, *supra* note 221, at 2.

227. *See* Interview, *supra* note 224.

228. *Id.*

undertake efforts to ensure justice for over 8.25 million criminal offenses each year.<sup>229</sup> However, with this authority comes enormous power to use coercive force and discretion and to place individuals into the criminal justice system. This power raises the need for police accountability. However, today, as a result of powerful unions and qualified immunity, there is no meaningful way to weed out the bad officers and guide them toward good policing. Police chiefs cannot fire, promote, discipline, or terminate offending officers. Moreover, municipalities are left to pay for misconduct with taxpayer money.

In order to hold police officers accountable; prevent, detect, and deter police misconduct; compensate victims; and reduce taxpayer liability, we have identified four policies that would create a system of police accountability. These directives would limit police unions' collective bargaining power; increase transparency of officer discipline for the public; mandate professional liability insurance; and dismantle the doctrine of qualified immunity. This system seeks to reward productive officers and keep officers who engage in risky behavior from policing. It further seeks to compensate victims with just and fair economic and non-economic compensation. Lastly, it seeks to reduce the costs that we as taxpayers need to absorb for police misconduct. Our model aims to reduce dangerous and risky policing that leads to tragic police encounters, lives lost unnecessarily, all with taxpayer funding.

We believe that this roadmap to accountability can and should be part of broader police reform efforts. We advocate that municipalities should consider defunding, dismantling, and reimagining policing, including both narrowing the scope of policing and ensuring officers carry professional liability insurance.

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229. Jeremiah Mosteller, *The Role of Police in America*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/role-of-police-in-america/>.