

ARTICLES

AN IMPEDIMENT TO POLICE ACCOUNTABILITY? AN ANALYSIS OF STATUTORY LAW ENFORCEMENT OFFICERS' BILLS OF RIGHTS

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I. INTRODUCTION

A. *LEOBORs and Police Accountability*

American police officers, acting through their collective bargaining representatives, have succeeded in gaining a special layer of employee due process protections when faced with investigations for official misconduct. Commonly called Law Enforcement Officers Bills of Rights (“LEOBORs”),¹ these protections are codified in the laws of fourteen states.² Similar protections also exist in a much larger, but unknown, number of collective bargaining agreements throughout the

¹ This article defines LEOBORs as those state laws that apply specifically to law enforcement officers’ due process rights during discipline proceedings for misconduct, including at the investigation stage. There are fourteen such LEOBORs: California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. Nine of these fourteen also address due process rights during hearings; they are Delaware, Illinois, Kentucky, Maryland, Minnesota, Nevada, Rhode Island, Virginia, and West Virginia. There is also a proposed LEOBOR pending in Congress, which addresses both investigations and hearings. These is a much larger group of state laws, not considered by this Article, that apply specifically to police but address only hearing rights and procedures. For a comprehensive list of state statutes addressing police discipline hearings, see JEANNE BILANIN, REVIEW OF POLICE DISCIPLINARY PROCEDURES IN MARYLAND AND OTHER STATES, app. A-3 (1999) (prepared at the request of the Maryland Association of Counties and the Maryland Municipal League, available at <http://www.vprgs.umd.edu/igs/publications/PoliceDisc.pdf>).

² These laws go by different names. Only those provisions enacted in Delaware, Maryland, Rhode Island, and Wisconsin have the precise title “Law Enforcement Officers Bill of Rights;” Florida adds “and Correctional Officers’” Illinois’ law is called the “Uniform Peace Officers Disciplinary Act.” New Mexico’s is the “Peace Officer’s Employer-Employee Relations Act.” West Virginia’s law is entitled “Rights and Duties of Police and Fire Fighters.” Despite these variations in nomenclature, all the LEOBORs referred to as such in this Article have features in common, and some have provisions that are worded identically.

U.S.³ LEOBORs represent a form of special legislation for police officers. No other group of public employees enjoys equivalent legislation related to disciplinary matters, and the provisions of some LEOBORs grant police officers more specific protections than are provided other public employees in federal, state or local civil service laws.⁴

The special due process protections that LEOBORs grant to police officers raise important public policy questions. The most important question, examined in this article, is whether any LEOBOR provisions impede the effective investigation of alleged officer misconduct and consequently militate against the principle of police accountability: the principle that police officers are expected to maintain the highest standards of professional conduct, and to that end law enforcement agencies must maintain polices and procedures capable of effectively investigating allegations of officer misconduct.⁵

Underpinning these issues is a larger question of whether police officers are entitled to special consideration in disciplinary matters because of the unique role of the police in American society, a role that includes their authority to use coercive force, both lethal and non-lethal, and their capacity to deprive citizens of their liberty.⁶ If police officers, as they themselves argue, must be granted the widest latitude to exercise their discretion in handling difficult and often dangerous situations, and should not be second-guessed if a decision appears in retrospect to have been incorrect, then it arguably follow that they are entitled to special consideration in the investigation of alleged misconduct. Police officers have further argued that officers will be reluctant to take aggressive action to fight crime – and the community will suffer as a consequence – if the officers’ decisions in the field are subject to scrutiny.⁷ However, if police officers have a greater

³ The related due process protections in police collective bargaining agreements are the subject of a separate study. COLLEEN KADLECK AND SAMUEL WALKER, *POLICE COLLECTIVE BARGAINING AGREEMENTS AND POLICE ACCOUNTABILITY*, (research in progress).

⁴ G. BRANCATO AND E. POLEBAUM, *THE RIGHTS OF POLICE OFFICERS* (1981).

⁵ See Sec. II., below.

⁶ The classic statement on this issue is EGON BITTNER, *THE FUNCTIONS OF POLICE IN MODERN SOCIETY* (1970), available at BITTNER, *ASPECTS OF POLICE WORK* (1990), at 120-132.

⁷ The police and their political allies have traditionally made these arguments in opposition to civilian review boards. See AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, *POLICE CIVILIAN REVIEW BOARDS*, AELE DEFENSE MANUAL, Brief #82-3 (1982). The police made this their principal argument in the bitter 1966 referendum over the New York City Civilian Complaint Review Board (CCRB) in 1966. Critics of the police have labeled this approach “playing the law and order card.” JEWELL BELLUSH, *RACE AND POLITICS IN NEW YORK CITY* (1971). A more recent version of this position is the view that efforts to control racial profiling by the police inhibit the war on terrorism. HEATHER MACDONALD, *ARE COPS RACIST?* 163 (2003). The term “depolicing” is often used to characterize the phenomenon of police officers willfully doing less active police work in response to increased external oversight. An evaluation of the impact of a consent decree between the U.S. Department of Justice and the Pittsburgh (PA) Police Department found no evidence to support this idea. ROBERT C. DAVIS, NICOLE J. HENDERSON & CHRISTOPHER W. ORTIZ, *CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING?* THE PITTSBURGH CONSENT DECREE (2005), available at <http://www.vera.org>.

responsibility to conduct themselves in the most professional manner because of their special power to use force, then it arguably follows that they should be subject to the closest scrutiny regarding alleged misconduct.

Despite the fact that police accountability is a major controversy nationwide,⁸ with particularly important implications for police relations with racial and ethnic minority communities,⁹ and despite the fact that police unions have significant influence over some aspects of police management, including disciplinary procedures, LEOBORs have not been the subject of scholarly scrutiny. Moreover, there has been little study of the impact of unions on police management in general and no studies of their impact on discipline and accountability.¹⁰ A comprehensive report on police brutality and accountability by Human Rights Watch noted that “Police officers accused of human rights violations or other misconduct are often protected by special law enforcement officers’ ‘bill of rights,’ providing for specific protections for officers accused of misconduct.”¹¹ The report, however, does not include a detailed analysis of those bills of rights or their impact on accountability.

Virtually all of the recent initiatives related to police accountability have neglected the potential impact of LEOBORs on disciplinary proceedings. There is

⁸ SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005) [hereinafter WALKER, *POLICE ACCOUNTABILITY*]; Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department ‘Pattern or Practice’ Suits in Context*, XXII U. ST.L. PUB. L. R. 3 (2003); U.S. DEPARTMENT OF JUSTICE, *PRINCIPLES FOR PROMOTING POLICE INTEGRITY* (2001); SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* (2001); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999); JEROME SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993).

⁹ LEADERSHIP CONFERENCE ON CIVIL RIGHTS, *JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2000). On the specific issues of racial profiling in traffic enforcement, see DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

¹⁰ The exception, written from a police chiefs’ perspective, is WAYNE W. SCHMIDT, *PEACE OFFICERS BILL OF RIGHTS GUARANTEES: REASONING TO UNION DEMANDS WITH A MANAGEMENT SANCTIONED VERSION* (2004), available at <http://www.vera.org>. The only other previous study is an analysis of the Maryland LEOBOR, BILANIN, *supra* note 1, prepared at the request of the Maryland Association of counties and the Maryland Municipal League. A number of books and reports appeared in the 1970s in response to the initial spread of police unionism. MARGARET LEVI, *BUREAUCRATIC INSURGENCY* (1977); STEPHAN HALPERN, *POLICE ASSOCIATION AND DEPARTMENT LEADERS* (1974); INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *NATIONAL SYMPOSIUM ON POLICE LABOR RELATIONS* (1974); HERVERY JURIS & PETER FEULE, *POLICE UNIONISM* (1973). Note that these publications date from the 1970s; there has been an almost total neglect of the subject area since that time. In 1985, James B. Jacobs found the scholarship on police unions to be “skimpy” and outlined “four broad areas requiring analysis.” James B. Jacobs, *Police Unions: How They Look From the Academic Side*, in W.A. GELLER, ED. *POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY* at 288 (1985). Unfortunately, scholars have failed to heed his call in the intervening years. A national survey of police employee organization leaders found, not surprisingly, that 95 percent did not feel that their organizations had too much influence over department policy. Colleen Kadleck, *Police Employee Organization*, 26 *Policing* at 341-351.

¹¹ HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* 5 (1998).

little if any reference to formal officers' rights in the eleven consent decrees and memoranda of understanding secured by the U.S. Department of Justice under Section 14141 of the 1994 Violent Crime Control Act. The statute authorizes the Department to bring suit against police departments where there is a "pattern or practice" of violations of citizens' rights.¹² The various consent decrees and memoranda of understanding mandate changes designed to improve the reporting and investigation of possible officer misconduct, but they do not address possible impediments that either statutory LEOBORs or local collective bargaining agreements may create. A February 2005 conference assessing the impact of pattern or practice litigation, however, led to recommendation that future litigation address potential impediments to police reform posed by police collective bargaining agreements and/or other guarantees of police officers' rights.¹³ If certain provisions of LEOBORs or collective bargaining agreements do impede the investigation of alleged officer misconduct, then it is likely that the accountability-related reforms mandated in the settlements of Section 14141 litigation are seriously weakened. Along the same lines, there is no mention of LEOBOR related issues in the two most important investigations of police misconduct in the 1990s: 1991 Christopher Commission report on the Los Angeles Police Department¹⁴ or the 1994 Mollen Commission investigation of corruption and brutality in New York City.¹⁵

B. *The Problem Illustrated*

The issues examined by this Article are illustrated by recent controversies surrounding the Maryland LEOBOR statute. The Prince George's County Police

¹² The Los Angeles consent decree, in fact, expresses deference to existing collective bargaining agreements: "8. Nothing in this Agreement is intended to: (a) alter the existing collective bargaining agreements between the City (as defined in paragraph 15) and LAPD employee bargaining units; or (b) impair the collective bargaining rights of employees in those units under state and local law. The parties acknowledge that as a matter of state and local law the implementation by the City of certain provisions of this Agreement may require compliance with the meet and confer process or consulting process. The City shall comply with any such legal requirements and shall do so with a goal of concluding any such processes in a matter that will permit the City's timely implementation of this Agreement. The City shall give appropriate notice of this Agreement to affected employee bargaining units to allow such processes to begin as to this Agreement as filed with the Court. The City has received one demand to meet and confer in regard to the proposed Agreement and will use its best efforts to have expedited that process and any others that may be demanded. The City agrees to consult with the DOJ in regard to the positions it takes in any meeting and conferring or consulting processes connected with this Agreement." *United States v. City of Los Angeles* (2001). Similar language is found in the Memorandum of Agreement covering the Cincinnati Police Department. *United States v. City of Cincinnati* (2002).

¹³ CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION, REPORT: EXECUTIVE SUMMARY (2005), available at <http://www.policeaccountability.org>.

¹⁴ CHRISTOPHER COMMISSION, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991), available at <http://www.parc.info>.

¹⁵ COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT (1994)

Department has been embroiled in continued controversy in recent years because of a series of fatal shootings by department officers and other allegations of use of excessive force.¹⁶ In response, community activists have proposed a civilian review board to investigate citizen complaints against officers in the department. One provision of the Maryland LEOBOR, however, prohibits an officer suspected of misconduct from being interviewed by anyone other than a sworn police officer.¹⁷ This provision precludes the operation of a civilian review board (or other independent citizen oversight agency) where complaints are investigated by non-sworn investigators.¹⁸

The creation of independent citizen oversight agencies (including civilian review boards) has been one of the principal goals of civil rights activists over the past forty years.¹⁹ Activists believe that the investigation and review of citizen complaints by persons who are not police officers will be more independent than investigations by internal police units and will increase the likelihood that guilty officers will be disciplined, thus increasing police accountability.²⁰ The Maryland LEOBOR, however, precludes this approach to police accountability and as a consequence may not represent sound public policy. The Maryland and National Capital Area affiliates of the American Civil Liberties Union agree that the Maryland LEOBOR “is a major obstacle to those locales that wish to establish a system of civilian review.”²¹ A Community Task Force on Police Accountability, created in the wake of a number of controversial shootings and beatings by Prince George’s County Police, recommended amendments to the controlling LEOBOR in that state for the creation of a civilian review board.²²

¹⁶ Stephen Manning, *Cost of PG police misconduct suits near \$2 million*, WASH. TIMES, Dec. 31, 2003; Craig Whitlock & Jamie Stockwell, *U.S. to Probe Pr. George’s Police Force*, WASH. POST, Nov. 2, 2000, at 1; OFFICE OF POLICE REFORM, PRELIMINARY REPORT ON THE PRINCE GEORGE’S COUNTY POLICE DEPARTMENT (2003).

¹⁷ Craig Whitlock, *Power Urged for Police Panel*, WASH. POST, April 7, 2000, at B1.

¹⁸ The Berkeley (CA) Citizens Police Review Board is authorized by ordinance “(d) to receive complaints directed against the Police Department and any of its officers and employees, and fully and completely investigate said complaints and make such recommendations and give such advice relating to departmental policies and procedures to the City Council and the City Manager in connection therewith as the Commission in its discretion deems advisable; . . .” On civilian review boards generally see WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

¹⁹ WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

²⁰ AMERICAN CIVIL LIBERTIES UNION, FIGHTING POLICE ABUSE: A COMMUNITY ACTION MANUAL (1992).

²¹ American Civil Liberties Union of Maryland and the National Capital Area, Testimony on Senate Bill 655, Law Enforcement Officers’ Bill of Rights Act of 2002 (February 12, 2002).

²² [Prince George’s County] Community Task Force on Police Accountability: Report and Recommendations: An Executive Summary (February 2001), Recommendation #1 at 14.

C. *The Scope of this Article*

This Article examines due process protections in LEOBORs and the resulting ramifications concerning police accountability. It reviews LEOBORs from the perspective of three important interests at stake in the investigation of alleged officer misconduct – those of the rank-and-file police officer, those of police management, and those of the general public.

This Article focuses on statutory LEOBORs; it does not examine due process protections for police officers contained in Supreme Court decisions, in state or local civil service laws,²³ or in collective bargaining agreements. As mentioned above, none of these three mechanisms have been studied in detail with respect to either their general impact on police management or on disciplinary practices and accountability.

II. POLICE ACCOUNTABILITY DEFINED

Police accountability has several distinct dimensions. The term refers to, among other things, the conduct of individual officers in their interactions with citizens (e.g., courtesy respect, fairness, equal protection) and the nature and quality of the general services delivered to the public (e.g. crime control, order maintenance, and miscellaneous services).²⁴ A comprehensive review of research on American policing identifies these two dimensions in terms of the “dual mandate” of the police to be fair and effective.²⁵ This Article focuses exclusively on the former dimension.

Police accountability involves not only a general principle, but also that principle’s specific application. As a general principle, accountability means that in a democratic society the police should treat all people with respect, fairness and

²³ GEORGE W. GREISINGER, JEFFREY S. SLOVAK & JOSEPH J. MOLKUP, *CIVIL SERVICE SYSTEMS: THEIR IMPACT ON POLICE ADMINISTRATION* (1979). Since the 1990s, there have been efforts to weaken protections in civil service laws, and three states have essentially eliminated their civil service laws. JONATHAN WALTERS, *LIFE AFTER CIVIL SERVICE REFORM: THE TEXAS, GEORGIA, AND FLORIDA EXPERIENCES* (Oct. 2002), *available at* http://www.businessofgovernment.org/pdfs/Walters_Report.pdf. Public employees may still appeal discipline decisions. In Texas, for example, rather than a hearing before a state commission, public employees receive a hearing before peers and a hearing officer who make a recommendation to the agency director. The agency director’s decision is final unless the employee finds relief in the courts. This Article does not examine, and takes no position on, the adequacy of civil service laws or these sorts of reforms.

²⁴ WALKER, *POLICE ACCOUNTABILITY*, *supra* note 8. The best discussion of the role of the police remains HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* (1977). The community policing movement is designed to improve the quality of services delivered to the public. Jack R. Greene, *Community Policing in America: Changing the Nature, Structure, and Function of the Police*, in, *Policies, Processes and Decisions of the Criminal Justice System* (J. Horney ed. 2000). The literature on community policing has been disturbingly silent on accountability issues related to individual officer conduct. DAVID BAYLEY, *POLICE FOR THE FUTURE* (1994).

²⁵ NATIONAL ACADEMY OF SCIENCES, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* (2004).

equal treatment and at the same time should be required to answer for their conduct, particularly in cases of alleged misconduct.²⁶ Law enforcement agencies are accountable to the citizenry through all three branches of government. Mayors, city councils, county boards, governors and presidents are involved in directing law enforcement agencies as part of the executive responsibilities derived from their democratic mandates. Legislatures, meanwhile, control those same agencies through the budgetary process. Courts at all levels have the authority to pass judgment on aspects of police operations. All three branches of government have some voice in police misconduct and misconduct investigations.²⁷

Applying the general principle, police accountability requires that public officials have the capacity to maintain professional standards of conduct on the part of police officers. There must be policies and procedures in place that are designed to allow for effective investigation of alleged officer misconduct and the imposition of discipline where appropriate. It is an axiom in the police management literature that police managers should promulgate formal standards of conduct and maintain internal affairs units to investigate alleged misconduct. It is also assumed that the most effective process for maintaining standards of conduct is the supervision of front-line police officers by their immediate supervisors.²⁸

For over forty years, civil rights activists have argued that internal police accountability mechanisms have failed and that police departments have not effectively investigated misconduct and disciplined officers where appropriate.²⁹ As a consequence, there has been a growth of external accountability mechanisms. The most important of these are external citizen oversight agencies, which now monitor police departments in almost all large cities as well as an increasing number of smaller cities.³⁰ Meanwhile, Section 14141 of the 1994 Violent Crime Control Act allows the United States Department of Justice to bring civil suits against police departments where there is a “pattern or practice” of abuse of citizens’ rights. All of the consent decrees and memoranda of understanding secured by the Justice Department under Section 14141 mandate changes to strengthen internal accountability mechanisms in the departments covered.³¹ As mentioned earlier, some civil rights activists have argued that LEOBORs and certain provisions of collective bargaining agreements impede the effective operation of these internal and external accountability mechanisms.

²⁶ WALKER, POLICE ACCOUNTABILITY, *supra* note 8. GOLDSTEIN *supra* note 24.

²⁷ NATIONAL ACADEMY OF SCIENCES, *supra* note 25.

²⁸ JAMES J. FYFE, JACK R. GREENE, WILLIAM F. WALSH, O. W. WILSON & ROY C. McLAREN, POLICE ADMINISTRATION, (5th ed. 1997) at 408-427, 449-481; LOU REITER, LAW ENFORCEMENT ADMINISTRATIVE INVESTIGATIONS: A MANUAL GUIDE (2nd ed. 1993).

²⁹ NAACP, BEYOND THE RODNEY KING STORY (1998); PAUL CHEVIGNY, POLICE POWER (1969).

³⁰ WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

³¹ The activities of the Special Litigation Section of the U.S. Department of Justice under Section 14141 are found at <http://www.usdoj.gov/crt/split>. WALKER, POLICE ACCOUNTABILITY, *supra* note 8; Livingston, *supra* note 8.

III. THE SPECIAL ROLE OF THE POLICE

The question of whether the police should be entitled to special due process protections in misconduct investigations poses the issue of the role of the police in American society. Both the social science literature and the courts have acknowledged that the police role is unique in American society.³² The police necessarily perform a variety of difficult and dangerous jobs that often put them in conflict with people.³³ A small but important number of these situations call for the police to exercise force that is nearly always coercive and sometime deadly. The police are the only agents in society legally granted “the unique capacity to use force” as an inherent part of their job.³⁴ Accordingly, the police bear special obligations in the use of force. At the same time, they enjoy special status both at law and in American civic culture because of the dangers they face. It has been generally recognized that judges and juries are reluctant to convict police officers charged with criminal offenses because of deeply-ingrained deference to the authority of the police.³⁵

The courts have issued divergent – and at times contradictory – rulings on whether this special role entitles the police to special consideration with respect to due process in internal investigations. The Supreme Court has held that police officers, like other public employees are entitled to basic due process protections. In *Garrity v. New Jersey*, the Court held that “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.”³⁶ *Garrity* is particularly relevant to the issues examined in this Article because it involved the investigation of alleged officer misconduct. In that case, the Court decided that compelled statements from an internal disciplinary process could not support the prosecution of a public employee.

Similarly, in *Cleveland Board of Education v. Loudermill*,³⁷ the Court took notice of “the competing interests at stake” in public employee disciplinary issues. On the one hand, the employee has a “private interest in retaining employment.”³⁸ Prior to dismissal, a tenured public employee has a right to be given notice of charges, a description of the evidence, and an opportunity to tell his side of the story.³⁹ At the same time, however, “the governmental [has an] interest in the

³² The classic statement is BITTNER, *supra* note 5, at 36-47.

³³ GOLDSTEIN, *supra* note 24. Also see WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE (1970); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY, at 44-53 (3RD ED. 1994).

³⁴ BITTNER, *supra* note 6.

³⁵ VERA INSTITUTE, PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION (1998), available at <http://www.vera.org>.

³⁶ 385 U.S. at 500.

³⁷ 470 U.S. at 562-63.

³⁸ 470 U.S. at 542-43.

³⁹ 470 U.S. at 546. Loudermill was a school security guard in New York who was fired for lying on his job application. He stated that he had not been convicted of a felony when, in truth, he had been convicted of grand larceny ten years earlier. The school board discharged him without giving him a chance to tell his side of the story.

expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.”⁴⁰ The employer has an interest in protecting people from a potentially dangerous or untruthful employee.⁴¹ The Court held that these government interests go only so far, however, and remedies other than summary termination may be suitable (e.g., in this case, suspending Loudermill without pay, giving Loudermill a chance to explain his record).⁴²

In *Terry v. Ohio*, the Court provided a more nuanced analysis specifically concerning police officers and their relationship to society.⁴³ Besides laying out a new standard – reasonable suspicion – by which “stop and frisk” searches would be judged, the Court forged a sympathetic view of the police in a dangerous modern world. Nonetheless, the Court was sensitive to the need for police accountability, citing the courts’ continued responsibility to reign in “substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in ‘the often competitive enterprise of ferreting out crime,’” and noting the potential to “exacerbate police-community tensions in the crowded centers of our Nation’s cities.”⁴⁴ Indeed, the Court even acknowledged the impotence of the judiciary “where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”⁴⁵

In *National Treasury Union Employees v. Von Raab*,⁴⁶ the Court held that the rights of law enforcement officers can be limited in favor of “public interest demands.”⁴⁷ The Court employed a balancing test⁴⁸ to weigh the interests of the United States Customs Service to conduct drug tests of its employees against the privacy rights of its agents. Significantly, the Court gave extensive consideration to the interests of the public, stating that “the public interest demands” both

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² As it turns out, Loudermill plausibly believed he had not been convicted of a felony, because of the shortness and nature of his sentence. 470 U.S. at 544, n.9.

⁴³ “We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity – issues which have never before been squarely presented to this Court.” 392 U.S. 1, 9-10 (1968).

⁴⁴ 392 U.S. at 11.

⁴⁵ *Id.* at 13.

⁴⁶ 489 U.S. 656, 669 (1989). The Court found that the test constituted a Fourth Amendment search, but that it was not intended for law enforcement purposes and the government’s interest outweighed the individual interest in privacy. The Court held that Customs does not need warrants to require drug urinalysis of agents seeking promotions to sensitive positions involving narcotics interdiction or carrying a firearm. Arguably, the Court suggested a much broader application of its holding by stating, “Much the same is true of employees who are required to carry firearms.” Therefore, the Court may have had in mind all law enforcement officers. *Id.* at 670-72.

⁴⁷ *Id.*

⁴⁸ “Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, *we have balanced the public interest* in the Service’s testing program against the privacy concerns implicated by the tests. . . .” *Id.* at 679 (emphasis added).

keeping drug users out of the business of drug interdiction and keeping impaired, gun-wielding Customs agents from using deadly force against members of the public.⁴⁹ The Court stated, “Because successful performance of their duties depends uniquely on their judgment and dexterity, [employees who are required to carry firearms] cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.”⁵⁰ Some of the Court’s rationale in *Von Raab* has implications for the issues examined in this Article. For example, the Court repeated the theme that “the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment.”⁵¹ The Court clearly suggests that law enforcement officers have special powers and responsibilities, and that as a consequence they can legitimately be held to very high standards of fitness and performance.⁵² While this case involved an intrusive drug test, the logic of the Court’s rationale implies that other inquiries related to fitness for duty would also be legitimate. Most important, it inverts the logic behind the traditional police union argument and suggests that, far from justifying greater deference from external scrutiny, the special role of the police justifies heightened scrutiny. Civil libertarians, who strongly oppose many forms of employee drug testing, may be troubled by the use of the reasoning in *Von Raab* to justify measures designed to investigate alleged officer misconduct toward citizens. It is useful, therefore, to distinguish between employee drug tests based on individualized suspicion, on the one hand, and testing procedures that are either mandatory or random, on the other hand. The investigation of an allegation of officer misconduct is, by definition, based on individualized suspicion that the officer committed the act(s) in question. Such investigations, which are the subject of this Article, do not therefore raise the privacy issues that concern civil libertarians about the kind of employee drug tests sanctioned in *Von Raab*.

IV. THE DEVELOPMENT OF LEOBORS

The conflict between the rights of police officers as embodied in LEOBORS and the demand for accountability arises out of two closely related developments in policing over the past four decades. The rising demand for greater police accountability in the 1960s, as a part of the civil rights movement, included demands for more effective means of investigating alleged officer misconduct. The police rank-and-file responded to this movement by seeking greater protections for themselves in misconduct investigations.

A. *The Rising Public Demand for Police Accountability*

Allegations of police misconduct, such as brutality, unjustified shootings, and

⁴⁹ *Id.* at 670-72.

⁵⁰ *Id.* at 672.

⁵¹ 489 U.S. at 671.

⁵² *Id.* at 672.

discrimination in enforcement, emerged as a major national controversy in the 1960s.⁵³ Virtually all of the riots of the 1964-1968 period were sparked by an incident involving a police officer.⁵⁴ As a remedy for police misconduct, civil rights advocates demanded, among other reforms, the creation of civilian review boards, which they believed would be independent of the police subculture and, consequently, more vigorous in investigating officer misconduct.⁵⁵ Despite much political effort, civil rights forces were not successful in achieving civilian review boards in the 1960s. Indeed, by the end of the decade the two most important such boards, in New York City and Philadelphia, had been abolished.⁵⁶ Public pressure for external review boards, however, did have the effect of forcing police departments to create or improve their internal complaint procedures.

In the 1970s the demand for civilian review of the police gained new momentum, and review boards were established in a growing number of cities and counties.⁵⁷ There were a sufficient number of oversight agencies by the mid-1980s to support the creation of a national professional association, the International Association for Civilian Oversight of Law Enforcement (IACOLE), and later the National Association for Citizen Oversight of Law Enforcement (NACOLE).⁵⁸ The videotaped beating of motorist Rodney King in Los Angeles in March 1991 spurred the growth of citizen oversight; by 2001 there were more than 100 agencies covering police departments in all but a few of the largest cities.⁵⁹

In 1994, Congress added a new accountability mechanism by enacting the Violent Crime Control and Law Enforcement Act. Section 14141 of the Act authorizes the Justice Department to bring suit against law enforcement agencies where there is a "pattern or practice" of violating citizens rights.⁶⁰ There are presently eleven consent decrees or memoranda of understanding in force against local law enforcement agencies. The provisions of these agreements embody a

⁵³ The development of the police accountability controversy in the United States has paralleled those in other countries, notably England. Increased conflict between the police and racial and ethnic minority communities have led to urban racial violence and the subsequent creation of or revision of procedures for investigating alleged police officer misconduct. ANDREW GOLDSMITH, *COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW* (1991).

⁵⁴ NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (1968).

⁵⁵ WALKER, *POLICE ACCOUNTABILITY*, *supra* note 8.

⁵⁶ On the racially polarized conflict over the New York City Civilian Complaint Review Board, *see* BELLUSH, *supra* note 7 and ALGERON D. BLACK, *THE PEOPLE AND THE POLICE* (1968).

⁵⁷ The Watergate and related scandals involving the FBI and the CIA heightened the consciousness of white Americans about the need to guard against abuse by law enforcement agencies.

⁵⁸ WALKER, *POLICE ACCOUNTABILITY*, *supra* note 8. The present status of IACOLE is not clear as of this writing. NACOLE has emerged as the principal professional association for citizen oversight. *See* <http://www.nacole.org>.

⁵⁹ LOU CANNON, *OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES* (1997). SKOLNICK & FYFE, *supra* note 8. A current list of oversight agencies can be found at <http://www.nacole.org>. Another list of oversight agency web sites is at <http://www.policeaccountability.org>.

⁶⁰ 42 U.S.C. § 14141 (2003).

short list of what are increasingly recognized as “best practices” in police accountability.⁶¹

B. *The Rising Public Demand for Public Accountability*

Police unionism, as a permanent feature of American policing, emerged in the 1960s as a direct consequence of the criticism of police conduct by civil rights forces and the demand for civilian review of the police.⁶² Police officers in the United States had made their first attempt to unionize in the early twentieth century. There were thirty-seven local police unions in 1919, but this movement was destroyed by the public backlash to the famous 1919 Boston Police Strike.⁶³ Police officers made a second major attempt to unionize in the early 1940s but lost to strong management opposition and a series of unfavorable court decisions.⁶⁴ Police unions finally became a permanent feature of American life in the late 1960s.⁶⁵

The police union movement of the 1960s was fueled by several factors, including anger among rank-and-file officers over Supreme Court decisions they perceived to be hostile to their crime-fighting interests, civil rights protests that accused the police of systematic brutality and race discrimination, and police management practices that denied them basic constitutional rights and participation in the governance of their department. Rank-and-file officers responded to these problems – ironically – by adopting many of the tactics of their civil rights critics: public protests, assertion of their group rights, and lobbying for legislative protections. Unionization became the most effective expression of this group self-interest in several ways. Unions not only secured collective bargaining agreements that contained many protections but also became a political force that helped to elect sympathetic public officials and to secure enactment of protective legislation, notably LEOBORS.⁶⁶ The leading study of the growth of contemporary police unions found that dissatisfaction with internal police management practices was one of four factors spurring the union movement. These practices included “the lack of internal civil and constitutional rights for officers being investigated for misfeasance and malfeasance”⁶⁷ Other problems included favoritism in disciplinary actions, arbitrary and punitive transfers of officers who challenged

⁶¹ WALKER, POLICE ACCOUNTABILITY, *supra* note 8, elaborates on the “best practices” mandated by the various consent decrees and argues that they form a coherent “package” of reforms. *Id.*

⁶² A good brief history of police unions is in Anthony M. Bouza, “Police Unions: Paper Tigers or Roaring Lions?,” in GELLER, *supra* note 10, at 241.

⁶³ The Fraternal Order of Police was created in 1915. FRANCIS RUSSELL, A CITY IN TERROR - 1919- THE BOSTON POLICE STRIKE (1975). *Also see* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 150-151, 199-200 (2nd ed. 1998).

⁶⁴ *Id.*

⁶⁵ WILL AITCHISON, THE RIGHTS OF LAW ENFORCEMENT OFFICERS (5th ed.), at 5-6.

⁶⁶ JURIS & FEUILLE, *supra* note 9. WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

⁶⁷ JURIS & FEUILLE, *supra* note 10, at 20-21.

management practices, and the lack of formal grievance procedures.⁶⁸

The first proposed statutory LEOBOR was a bill introduced in the U.S. House of Representatives in the early 1970s.⁶⁹ Variations of this bill have been introduced in nearly every subsequent session of Congress. A federal LEOBOR came closest to enactment in 1991 when the Senate passed S.1043 by a vote of fifty-five to forty-three.⁷⁰ However, the proponents of LEOBORs have achieved their greatest successes at the state level. Fourteen states have statutorily adopted LEOBORs.⁷¹ Florida and Maryland were first in 1974. California and Rhode Island followed suit in 1976, Virginia in 1978, and Wisconsin in 1979. In the 1980's, West Virginia, Nevada, Louisiana, and Illinois joined the group, followed by New Mexico and Minnesota in 1991 and Kentucky in 1994. Although not counted as an LEOBOR in this Article due to its lack of provisions relating to investigations, Alabama adopted in 2001 a detailed code on "Due Process for Municipal Law Enforcement Officers" relating to hearings.⁷²

The effort by rank-and-file police officers to secure LEOBOR laws continues to this day. A LEOBOR was introduced in the Pennsylvania legislature in March 2003.⁷³ Police unions are actively lobbying to pass bills in Arizona,⁷⁴ Hawaii,⁷⁵ Kansas,⁷⁶ Massachusetts,⁷⁷ Michigan,⁷⁸ Montana,⁷⁹ North Dakota,⁸⁰ South Carolina,⁸¹ Utah,⁸² and Washington.⁸³ These unions are also seeking to expand LEOBORs in states where they already exist. In Congress, the effort to pass a LEOBOR with nationwide effect enters its thirtieth year.

V. COMPETING INTERESTS AT STAKE IN LEOBORs

"Balancing" – i.e., weighing against one another the countervailing interests at stake in a dispute or situation – is the method used by courts to determine

⁶⁸ *Id.* at 138.

⁶⁹ WAYNE W. SCHMIDT, PROPOSED FEDERAL "RIGHTS OF LAW ENFORCEMENT OFFICERS" LEGISLATION, *available at* <http://www.aele.org/pobor.html>.

⁷⁰ S. 1043, 102d Cong. (1991).

⁷¹ LEOBORs exist in California, Delaware, Florida, Illinois, Louisiana, Kentucky, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin.

⁷² Ala. Stats. §§ 11-43-230-232 (2003).

⁷³ Law Enforcement Officers Bill of Rights, H.B. 376, S. Res. 1073, 185th Leg. (Pa. 2001).

⁷⁴ H.B. 2430, 45th Leg., 2d Reg. Sess. (Ariz. 2002).

⁷⁵ Law Enforcement Officers Bill of Rights, S.B. 2986, 21st Leg. (Haw. 2002).

⁷⁶ Law Enforcement Officers Bill of Rights, S.B. 214, 77th Leg. (Kan. 1997).

⁷⁷ Correctional Officers Bill of Rights, H.B. 368, 182 Leg. (Mass. 1998).

⁷⁸ Law Enforcement Officers Bill of Rights Act, S.B. 25 (Mich. 2001).

⁷⁹ Law Enforcement Officers Bill of Rights, S.B. 44 (Mont. 1993).

⁸⁰ Peace Officers Bill of Rights, S.B. 2368, 57th Leg. (N.D. 2001).

⁸¹ Law Enforcement Officers Bill of Rights, H.B. 4498, 112th Leg. 1997 Sess. (S.C. 1998).

⁸² H.R.J. 9, 54th Sess. § 143 (Utah 1999) (directing legislative management committee to study legislation to establish a LEOBOR).

⁸³ Law Enforcement Officers Bill of Rights, H.B. 1850, 54th Sess. (Wash. 1995).

constitutional due process rights. It could be said that legislators and contract negotiators who consider police officers' due process rights also engage in a version of balancing.⁸⁴ In any situation, the considerations weighed and the relative importance afforded to each depend on the decisionmaker's view of the police, their societal role, and what other interests are at stake.

A. *The Interests of Rank-and-File Police Officers*

Rank-and-file police officers, like all employees – public or private – have a basic interest in job security, fair pay, safe working conditions, and fair and appropriate treatment by their employers.⁸¹ In the racially polarized controversy over police misconduct over the past forty years, police officers have developed a special interest in shielding themselves against what they view as excessively intrusive inquiries into their conduct. This interest has fueled their pursuit of LEOBORs.

Local and national police unions are the principal advocates for the interests of police officers. Unlike unionized private and public sector employees, police officers are not represented by a single national union organization. Rather, local police unions are affiliated with a number of different national associations. The Fraternal Order of Police (FOP), a national federation of police unions, offers the basic rationale for LEOBORs. It argues that “rank-and-file police officers are sometimes subjected to abusive and improper procedures and conduct on the part of the very departments or agencies they serve” and that, in some jurisdictions, “officers have no procedural or administrative protections whatsoever.”⁸⁵ The LEOBOR is needed “to create a uniform minimal level of procedural due process for police officers and codify the core holdings of the U.S. Supreme Court in two landmark decisions: *Garrity v. New Jersey* (1967) and *Gardner v. Broderick* (1968).”⁸⁶

⁸⁴ At the local bargaining table, unions and management determine their respective needs, desires, and resources and negotiate according to their respective priorities, in effect, balancing the interests in a somewhat adversarial way. In the state house or Congress, legislators consider data and facts, political support, and the public interests involved and weigh these factors.

⁸¹ See *Loudermill*, 470 U.S. at 562-63.

⁸⁵ Press Release, Police Benevolent Association, Due Process for Police Officers Introduced in Senate (May 9, 1999) available at <http://www.grandlodgefop.org/press/pr010509.html>. This statement represents considerable hyperbole. Department of Justice data indicate that in 2000 72 percent of municipal police departments had a collective bargaining agreement with their rank and file officers. These contracts generally include protections for officers subject to disciplinary investigations. Additionally, except for the southeastern U.S., most medium sized to large agencies are unionized. Thus, only small departments tend to be without collective bargaining. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 2000 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lemas00.pdf>

⁸⁶ Police Benevolent Association, Due Process for Law Enforcement Officers (Position Paper) available at <http://www.grandlodgefop.org/legislation/issues/LEOBOR.html>. See also AFSCME Res. No. 40, *infra* note 164 (“Law enforcement officers throughout the

Other typical arguments for LEOBORs advanced by police unions include: (1) Officers need special protections, because policing is perhaps the only job in which people are forced to answer questions or be fired;⁸⁷ (2) The lack of due process rights has led to a loss of officer confidence in the disciplinary process and a loss of morale;⁸⁸ (3) Unfair treatment of officers may deter or prevent officers from carrying out their duties effectively and fairly;⁸⁹ (4) The perception or reality of unfair treatment may negatively impact recruitment and retention efforts;⁹⁰ (5) Effective policing depends on stable employer-employee relations, which the LEOBOR promotes;⁹¹ and (6) LEOBORs are needed to provide more uniform fairness among and between different departments that currently have widely different protections.⁹²

Contrary to the views of civil rights activists, police union leaders do not feel that they exert undue influence over police departments. A national survey of 648 police employee organization leaders found that 95.4 percent disagreed with the statement that “PEOs have too much influence over policy related issues.” Similarly, 88 percent disagreed with the statement that “PEOs and unions are not accountable to the public.”⁹³

B. *The Interests of Police Managers*

On matters of discipline, the interests of police managers diverge from those of rank-and-file police officers. Police managers have a formal responsibility to direct their organizations and to maintain high standards of professionalism and integrity.⁹⁴ This includes the responsibility to investigate alleged misconduct and appropriately discipline any employee found guilty of misconduct. To that end, police managers prefer to have the broadest possible latitude with regard to investigating misconduct, including having the power to vigorously question

United States do not uniformly enjoy fundamental rights of citizenship and of public employment, such as the right to fully engage in political activity while off duty, the right to remain silent in connection with an internal investigation, the right to be advised of the nature of an internal investigation involving the officer, and the right to full and fair representation. . .”).

⁸⁷ William K. Rashbaum, *Police Officials Hope Ruling Will Help End 48-Hour Rule*, N.Y. TIMES, May 10, 2002, at B3 (citing the remark of “a senior union official”). This allegation, along with others commonly made by police unions, has not been supported by empirical evidence, however.

⁸⁸ H.R. 1626, 107th Cong. § 2(a)(2) (2001).

⁸⁹ H.R. 1626, 107th Cong. § 2(a)(3) (2001).

⁹⁰ H.R. 1626, 107th Cong. § 2(a)(4) (2001).

⁹¹ CAL. GOV'T CODE § 3301 (2001); N.M. STAT. ANN. § 29-14-2 (Michie 2001).

⁹² This argument is frequently made to support the federal bill. By way of comparison, however, H.R. 1626 would hardly be what the 1978 Civil Service Reform Act (CSRA) was in its day: “the unification of decades of piecemeal efforts to afford protection to federal employees from wrongful or arbitrary action by their employer.” Robert M. O’Neil, *The Rights of Public Employees* 121 (1993).

⁹³ Kadleck, *supra* note 10.

⁹⁴ FYFE, et al., *supra* note 28. The managerial perspective is set forth in SCHMIDT, *supra* note 10.

suspect officers. Police unions and LEOBORs, in fact, arose in response to what rank-and-file officers perceived to be abuses of authority by police managers and the violations of the rights of rank-and-file officers in overly zealous internal investigations.

The special history of police professionalization in the United States heightened the divergence between the interests of police managers and the rank-and-file. The movement for police professionalism in the twentieth century developed a tradition of strong police chiefs. Those chiefs celebrated for their achievements in reforming their departments were strong-willed if not authoritarian. This practice was celebrated by reformers outside of police departments, who believed that only strong leadership could overcome the twin evils of political influence from without and a hopelessly incompetent and unprofessional rank-and-file from within.⁹⁵ The result was a deep tradition of conflict between top management and the rank-and-file. Indeed, studies of the growth of police unions in the 1960s noted that rank-and-file officers were often as alienated from their own leaders as they were from their critics in the community. These studies noted, among other things, the often arbitrary use of disciplinary procedures against dissident rank-and-file officers.

The interests of police managers with regard to LEOBORs are expressed by the leading professional associations, particularly the International Association of Chiefs of Police (IACP)⁹⁶ and the Police Executive Research Forum (PERF),⁹⁷ which represent chiefs and other managers, as well as Americans for Effective Law Enforcement (AELE). All three organizations have at various times taken public stands against proposed federal LEOBORs.

The IACP argues that a federal LEOBOR will make it harder for a department to “fulfill its mission of protecting the public.”⁹⁸ The specific criticisms of LEOBORs are that some provisions would micro-manage local governments and interfere with good management practices,⁹⁹ that there is no evidence of officers being mistreated in investigations and that police officers already enjoy considerable protection of their due process rights in the U.S. Constitution, state and local civil service laws, and collective bargaining agreements.¹⁰⁰ The IACP “opposes any special and/or

⁹⁵ This tradition was established by August Vollmer, the founder of the police professionalism movement, and carried on by his protégé, O. W. Wilson. SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM* (1977). It was continued, most famously or infamously, by William H. Parker, chief of the Los Angeles Police Department from 1950 to 1966. CANNON, *supra* note 59, at 51-75.

⁹⁶ The International Association is a professional association of law enforcement chief executives. See <http://www.theiacp.org>.

⁹⁷ The Police Executive Research Forum is a professional association of law enforcement chief executives in agencies of 100 or more sworn officers or jurisdictions of at least 50,000 residents. See <http://www.policeforum.org>.

⁹⁸ See <http://www.theiacp.org>.

⁹⁹ See Sec. VI. B. *infra*.

¹⁰⁰ International Association of Chiefs of Police, “Wrap-Up of the 106th Congress and Overview of the 107th Congress” (Aug. 6, 2001), available at <http://www.theiacp.org/documents/pdfs/ACF2855.pdf>. The statement that officers have not been mistreated in misconduct investigations, as is the case with many statements made by police unions on the other side, has not been researched.

additional protection for law enforcement officers,” and argues that “officers’ rights should be no greater than those of other private and public sector employees.”¹⁰¹ PERF’s objections to LEOBORs are more squarely concerned with the potential impact on police accountability. It argues that the recent federal bill “would virtually inoculate [the relatively few officers guilty of egregious conduct] by providing a wide array of prophylactic measures that impede a search for the truth and create technical loopholes to escape any accountability for their actions.”¹⁰² Particularly threatening to good management is one provision of the federal bill that, while ambiguous, potentially limits routine supervisory practices.

C. *Interests of the Public*

The public may be defined as those people who receive police services, either directly or indirectly.¹⁰³ For all practical purposes, this includes all the residents within the jurisdiction of a law enforcement agency and all persons passing through said jurisdiction. The general public has a vital interest in police accountability. Law enforcement agencies are one of the principal agencies of social control in modern society with a general mandate to control crime, maintain order, and provide miscellaneous services to the public.¹⁰⁴ In addition to controlling crime and maintaining order, the police also have a legal mandate to treat all citizens in a fair and equal manner. A recent review of the social science literature on policing by the National Academy of Sciences defined the role of the police in terms of a “dual mandate” of “fairness and effectiveness.”¹⁰⁵

The public has a clear stake in police disciplinary practices. Officers who use excessive force but are not disciplined may subsequently abuse other citizens. The failure to discipline one officer may embolden other officers to violate departmental standards and abuse citizens. Further, as discussed above, the perceived failure of police disciplinary practices has had a serious impact on urban race relations over the last forty years. The demand for citizen oversight of the police, in fact, can be seen as a political effort to establish a mechanism for expressing the public interest in police disciplinary practices. Nonetheless, the stake of the public in how police officers are disciplined is the least developed and considered category in the determination of what due process rights police officers should have. There are several possible reasons for this neglect.¹⁰⁶ The public does

¹⁰¹ International Association of Chiefs of Police, Legislative Agenda For The 107th Congress, p. 14.

¹⁰² Police Executive Research Forum, PERF’s Letter to Senators on the Police Officers’ Bill of Rights, available at <http://www.policeforum.org/pobr.html>.

¹⁰³ From this perspective, all residents benefit from the capacity of the police to control crime, and by the same token, suffer from any failure to do so.

¹⁰⁴ The development of community policing over the past twenty-five years has involved a debate over the most effective *means* of fulfilling the broad social control responsibilities of the police. Bayley, *supra* note 24.

¹⁰⁵ NATIONAL ACADEMY OF SCIENCES, *supra* note 25.

¹⁰⁶ There are a number of valid criticisms of the balancing method. In *Loudermill*, Justice Rehnquist articulates a common criticism in his dissent from the majority’s use of the

not have a seat at the table in labor negotiations. Public outrage over particular incidents of police misconduct is a blunt instrument that is rarely able to focus on the minutia of the disciplinary process. Public outrage is also fleeting, replaced by other concerns, and outlasted by the political power of police unions.¹⁰⁷ As such, the decision-making process usually does not include a full, fair airing and balancing of all the interests of all the parties. Rather, the debate has been tilted toward the interests of unions and management.

As noted above, the courts have given some recognition to the interests of the public in ensuring that law enforcement officers are held to high standards of integrity and good judgment. In *Von Raab*, the Court held that “the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.”¹⁰⁸ Earlier, in *Garrity* the Court held that a police officer “is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer.”¹⁰⁹ In *Foley v. Connellie*,¹¹⁰ the Court also nodded to the public interest in police accountability, acknowledging that a police officer is entrusted “to exercise an almost infinite variety of discretionary powers” that “affect[] members of the public significantly and often in the most sensitive areas of daily life. . . .”¹¹¹

The bitter and racially-charged controversies that have engulfed the police over the past half-century have arisen from strong public feelings that the police have failed to fulfill the fairness part of their dual mandate.¹¹² Racial and ethnic minority communities have consistently alleged that the police engage in systematic discrimination on the basis of race and ethnicity and have failed to investigate effectively alleged office misconduct. For this reason they have consistently demanded more stringent forms of accountability. The advocates of more effective crime control, on the other hand, have argued that to fight crime effectively officers must be given the broadest latitude and that the public and the courts should defer to the exercise of officer discretion in handling particularly difficult situations.¹¹³

method: “The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake. . . . [The result is] unobjectionable, but . . . devoid of any principles which will either instruct or endure. . . . At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired.” 470 U.S. at 562-63.

¹⁰⁷ Attitudes toward the Los Angeles Police Department, for example were heavily influenced by the 1991 Rodney King beating but eventually returned to their pre-incident levels. Ronald Weitzer, “Incidents of Police Misconduct and Public Opinion,” 30 J. CRIM.JUST. 397 (2002).

¹⁰⁸ 489 U.S. at 671.

¹⁰⁹ 392 U.S. at 278 (1968).

¹¹⁰ 392 U.S. at 278 (1968).

¹¹¹ *Id.* at 297.

¹¹² NATIONAL ACADEMY OF SCIENCES, *supra* note 25.

¹¹³ This conflict is best summarized in the classic essay by Herbert Packer, “Two Models of the Criminal Process,” in HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) at 149-173. Bryley argues vigorously that the traditional formulation is a false

One segment of the public, the civil liberties community, has made police accountability one of its major issues for nearly forty years. It has been the leading advocate of civilian review boards and a critic of LEOBORs and other measures that might excessively shield police officers from investigation and discipline.¹¹⁴

The growth of citizen oversight agencies in the last two decades suggest a significant shift in public attitudes on the issues examined in the Article. In the 1960s, the rank-and-file was able to defeat all proposals for civilian review boards. The most notable example was the 1966 referendum in New York City over the Civilian Complaint Review Board, where the police successfully argued that an independent review board would limit their crime-fighting abilities.¹¹⁵ Beginning in the 1970s, however, a steadily increasing number of cities and counties have established some form of external citizen oversight. Public opinion polls, moreover, indicate majority support for citizen oversight.¹¹⁶

VI. ANALYSIS OF LEOBOR PROVISIONS

This section examines the provisions of state LEOBORs related to the investigation of misconduct allegations against police officers. It involves a content analysis of fourteen state LEOBORs, along with the pending federal legislation. Because of ambiguities in the language of various state statutes, the selection of the fourteen statutes for analysis involved some difficult decisions. Virtually all states have statutes establishing personnel procedures for public employees. Some have statutes related to law enforcement employees that do not clearly relate to disciplinary procedures. The fourteen statutes selected for analysis include only those that *clearly specify some right or rights for law enforcement officers in the investigation of misconduct*, no matter how minimal the protection. Some existing statutes, in fact, provide very minimal protections; nonetheless, they are included in the analysis.

The analysis consists of two parts: first, a description of each provision, including a report on its prevalence in LEOBORs; and second, a commentary on the potential impact of each provision on police accountability.¹¹⁷

A. LEOBORs' Scope of Coverage

The initial issue related to LEOBORs involves the officers covered by the enumerated rights in the law and the nature of the conduct that triggers the laws

dichotomy. David H. Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIM. & PUBLIC POLICY 133-153 (2002).

¹¹⁴ HUMAN RIGHTS WATCH, *supra* note 11. NAACP, BEYOND THE RODNEY KING STORY (1998). ACLU, *supra* note 20.

¹¹⁵ BELLUSH, *supra* note 7.

¹¹⁶ "Public Solidly Favors Mixed Police/Civilian Review Boards," Law Enforcement News (October 31, 1992). WALKER, POLICE ACCOUNTABILITY, *supra* note 8, at 19-49.

¹¹⁷ As stated earlier, this Article addresses only those provisions related to investigation and hearing procedures. Many LEOBORs treat other important issues, such as officers' right to engage in political activity. See *supra* note 33.

application.¹¹⁸ Table 1 provides a summary of key aspects of the scope of coverage of the fourteen state statutes.¹¹⁹

1. Officers Covered

a. Typical Provisions

With respect to which officers are covered, some LEOBORs cover only rank-and-file officers while others also cover police chiefs and supervisors. The California law, for example, covers chiefs and supervisors¹²⁰ and most state agencies, but specifically excludes parole officers, court officers, and state hospital officers.¹²¹ The Delaware LEOBOR, on the other hand, does not cover the highest ranking officer in any agency, but does cover most state agencies, including probation officers.¹²² Delaware separately provides police chiefs with much more limited rights.¹²³

¹¹⁸ A note on definitions: (1) nearly all LEOBORs apply both to investigations and interrogations (or interviews) and (2) by “discipline” or “punitive action,” they almost always mean dismissal, demotion, suspension, reduction in salary, written reprimand, or punitive transfer. Illinois is an exception; it excludes questioning “relating to minor infractions of agency rules which may be noted on the officer’s record but which may not in themselves result in removal, discharge or suspension in excess of 3 days.” Uniform Peace Officers’ Disciplinary Act, 50 ILL. COMP. STAT. 725.3(d) (2001).

¹¹⁹ See Tbl. 1, App. A.

¹²⁰ CAL. GOV’T CODE § 3301 (2003) (including “peace officers” defined in CAL. PENAL CODE § 830.1 (2003)).

¹²¹ CAL. GOV’T CODE § 3301 (2003) (excluding “peace officers” defined in CAL. PENAL CODE §§ 830.5, 830.36, 830.38 (2003)).

¹²² The statute appears to cover only the sheriffs of New Castle County and not those of Kent or Sussex Counties. Law-Enforcement Officers’ Bill of Rights 11 Del. C. § 9200(b) (2003).

¹²³ Delaware provides:

(a) No chief of police or police superintendent of a legislatively authorized police department within this State, excluding municipalities with a population greater than 60,000, shall be dismissed, demoted or otherwise removed from office unless there is a showing of just cause and such person has been given notice in writing of the specific grounds for such action and an opportunity to be heard in the chief’s or the superintendent’s own defense, personally and/or by counsel, at a public hearing before the elected governing body of the jurisdiction. Such public hearing, unless otherwise specified by charter, shall be held not less than 5 nor more than 30 days after such notice.

(b) Any appeals from the process described in subsection (a) of this section shall be to the Superior Court for the county in which the public hearing was held. All such appeals shall be undertaken by filing a notice of appeal with the Court within 90 days of receipt of the written decision of the governing body.

11 Del. C. § 9301 (2003).

b. Commentary

From the standpoint of accountability, the scope of LEOBORs with respect to which agencies are covered is not a critical issue. Rights accorded any officer facing a misconduct investigation should, presumably, apply to all agencies in the state. The question of whether LEOBORs should cover chiefs and supervisors, however, does raise some important issues. It is expected that police chiefs can be “called to the carpet” by public officials regarding issues of basic law enforcement policy (e.g., the adoption of community policing, failure to reduce crime) and replaced as political pressures demand. Similarly, LEOBORs’ coverage of senior commanders follows a similar logic. A chief executive should have great flexibility in choosing and replacing commanders based on conformity with policy goals and basic job performance. No LEOBOR rights should attach in such decisions. The investigation of specific acts of misconduct, however, is a very different matter, and there is no reason why LEOBOR rights available to rank-and-file officers should not be available to the chiefs and commanders as well.

2. Criminal Conduct

a. Typical Provisions

Only the Wisconsin LEOBOR, with its relatively limited protections, explicitly applies to the investigation of alleged criminal conduct by officers.¹²⁴ Three LEOBORs specifically do not apply when an officer is being investigated for alleged criminal conduct.¹²⁵ The remaining ten LEOBORs are silent as to whether

Alabama’s law is directed at municipalities and covers chiefs and supervisors but excludes persons popularly elected (e.g., sheriffs) and officers serving a probationary period of employment. Ala. Stats. § 11-43-231 (2003). Strikingly, Maryland’s LEOBOR also excludes officers during their probationary period *except* when they are the subject of allegations of brutality. Law Enforcement Officers’ Bill of Rights, MD. CODE ANN., Art. 27, § 727(c) (2003). Nevada’s LEOBOR is the most sweeping, and covers practically all types of law enforcement officers. Rights of Peace Officers, NEV. REV. STAT. § 289.010(2) (2003) (including “peace officers” defined in NEV. REV. STAT. §§ 289.150-289.360 (2003))

¹²⁴ “If a law enforcement officer is under investigation and is subjected to interrogation for any reason which could lead to disciplinary action, demotion, dismissal *or criminal charges*. . . .” WIS. STAT. § 164.02 (2001) (emphasis added). Nevada’s statute partially applies to criminal matters: “[A]ny investigation which concerns alleged criminal activities” lifts the requirement of notice, the provisions governing polygraph examinations, and the right to have a representative present. *See* NEV. REV. STAT. 289.090 (2004).

¹²⁵ Illinois’s LEOBOR “does not apply to any officer charged with violating any provisions of the Criminal Code . . . or any other federal, State, or local criminal law.” 50 ILL. COMP. STAT. ANN. 725/5 (2004). The Rhode Island statute applies only to interrogations for “non-criminal matter[s] which could lead to disciplinary action.” R.I. GEN. LAWS § 42-28.6-2 (2001). The California LEOBOR does the same, but only if they are not in the gray area: “[N]or shall this section apply to an investigation concerned *solely and directly* with alleged criminal activities.” Safety Officers Procedural Bill of Rights Act, CAL. GOV’T CODE § 3303(i) (2001) (emphasis added). The federal bill does not apply to “an investigation of specifically alleged conduct by a law enforcement officer that, if proven, would constitute a

they apply to suspected criminal behavior.

b. Commentary

LEOBOR protections are redundant of constitutional protections in the event of a criminal investigation. Under the Fifth Amendment, once a misconduct allegation becomes subject to a criminal investigation, an officer has a right to refuse to incriminate himself or herself.¹²⁶ If a police department forces an officer to answer questions, the officer's answers cannot be used in a criminal prosecution.¹²⁷ In general, if an allegation becomes a matter for criminal investigation, those charges are typically prosecuted prior to any internal discipline. When an officer is convicted of a crime, automatic dismissal is the normal course of action. Under such circumstances, there would be no subsequent internal investigation of the officer's misconduct. Actual practice, however, may not conform to this scenario. For example, it is not certain that officers who are allowed to plead guilty to a misdemeanor are automatically dismissed. LEOBOR protections then become relevant in a subsequent internal investigation.¹²⁸

In many incidents, the line between criminal and non-criminal conduct is not immediately clear. Immediately following a use-of-force incident, for example, it is unclear whether the officer's action was (1) fully justified, (2) lawful, but in violation of department procedure, or (3) a possible crime. Under such circumstances, supervisors should respond to the scene immediately and seek to determine the facts of the matter.¹²⁹

Whether any questions a supervisor asked an officer at this initial stage would constitute an "investigation" or an "interrogation" within the meaning of a particular LEOBOR is a critical issue. An officer who a supervisor questions can always invoke his Fifth Amendment rights and refuse to answer.

violation of a statute providing for criminal penalties...." H.R. 354, 109th Cong. § 820(b)(2)(A).

¹²⁶ See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968).

¹²⁷ For this reason, this Article recommends that officers be read their full rights at the outset of an interview. See discussion in *Advice of Rights*, *infra* Section B.5.

¹²⁸ The authors would like to thank Mike Gennaco, Director, Office of Internal Review (OIR) of the Los Angeles County Sheriff's Department for alerting us to this point. Mike Gennaco, Personal Communication (Jan. 19, 2004).

¹²⁹ "The supervisor assigned [to a use-of-force investigation] will immediately respond to the location of the person upon whom force was used." REITER, *supra* note 28, at 17.3. Schmidt does not distinguish between suspected criminal and non-criminal conduct on the part of an officer under investigation. He uses the term "serious misconduct" (and by implication its opposite, non-serious misconduct) which includes any action that might lead to punishment ranging from a one day suspension to termination. Schmidt, *supra* note 10, at 6, 16.

3. Formal Investigations versus Informal Inquiries and Routine Supervision

a. Typical Provisions

LEOBORs are designed to protect the due process rights of officers in official misconduct investigations. Such investigations are distinct from questioning and other fact-gathering associated with routine supervision. As noted in Section V.B, police managers have an interest in supervising their employees to ensure compliance with departmental objectives and maintenance of the highest standards of professional service. Managers' interests in this regard coincide with the public interest in maintaining high standards of police service.¹³⁰ Any LEOBOR provisions that could be construed to cover routine supervisory activities and thereby limit questioning and fact-gathering would have enormous potential implications for the accountability of the police force. Six LEOBORs explicitly exclude informal inquiries and questioning related to routine supervision, but five are ambiguous and appear to apply to such inquiries and questioning.¹³¹ Particularly ominous is a provision in the pending federal bill, H.R. 1626/S.B. 820, which attaches all the other protections in the bill to "questioning *incidental to* an investigation ... that may result in disciplinary action against the officer."¹³² Most importantly, "investigation" is defined in the bill as including actions:

by a public agency or a *person* employed by a public agency, *acting alone* or in cooperation with or at the direction of another agency. . . . regardless of a denial by such an agency that any such action is not an investigation. ["Actions" include:]

- (i) *asking questions* of any other law enforcement officer or non-law enforcement officer;
- (ii) *conducting observations*; [and]
- (iii) reviewing and evaluating reports, records, or other documents; and examining physical evidence.¹³³

¹³⁰ A note on definitions: (1) nearly all LEOBORs apply both to investigations and interrogations (or interviews) and (2) by "discipline" or "punitive action," they almost always mean dismissal, demotion, suspension, reduction in salary, written reprimand, or punitive transfer. Illinois is an exception; it excludes questioning "relating to minor infractions of agency rules which may be noted on the officer's record but which may not in themselves result in removal, discharge or suspension in excess of 3 days." Uniform Peace Officers' Disciplinary Act, 50 ILL. COMP. STAT. ANN. 725/2(d) (West 2001). See the valuable discussion of this issue in SCHMIDT, *supra* note 10, at 16.

¹³¹ The provisions in Illinois, Kentucky, Louisiana, Minnesota, Nevada, and New Mexico explicitly limit the bills' application to formal investigations or exclude routine supervision, see *infra*, nn. 142-46. California, Delaware, Florida, and West Virginia are ambiguous and likely problematic in application, see *infra* n. 147. Maryland, Rhode Island, and Virginia are ambiguous and problematic but less so, see, e.g., *infra*, n. 149, and Wisconsin's provision defies categorization, see *infra* n. 150.

¹³² H.R. 1626, § 820(f) (2001) (emphasis added).

¹³³ H.R. 1626 § 820(a)(4) (2001) (emphasis added).

This language potentially applies to almost all activities associated with routine supervision.¹³⁴ Observation of and communication with officers under his command is a basic aspect of routine supervision by a sergeant in a patrol or traffic unit.¹³⁵ Similarly, supervisors routinely review documents, such as reports completed by officers under their command. These reports include arrest reports, field interrogation reports, use-of-force reports, vehicle pursuit reports, and so on. The bill's language appears to apply to any questions asked by *anyone* in the police department. For example, it would apply to a fellow rank-and-file officer—a non-supervisor—who asks his partner, “What happened out there?”

In practice, such a provision is not likely to paralyze all routine supervisory activities. However, it likely will be invoked by an officer who has violated departmental policy (e.g., used excessive force) and wants to shield himself from questioning. The vagueness of the federal bill's wording about questioning could easily create a climate of uncertainty within police departments. Rather than encouraging a culture of professionalism and accountability among police, this formulation would create a legal barrier to the self-policing of police misconduct.¹³⁶ It would enshrine in law the previously illegal blue wall of silence, providing a defense to both officers guilty of misconduct and those who refuse to report the misconduct of such officers.¹³⁷

The Illinois LEOBOR resolves the problem by specifically exempting informal inquiries and routine supervision from the provisions of the law. Thus, an officer cannot invoke the LEOBOR when faced with “questioning (1) as part of an informal inquiry or (2) relating to minor infractions of agency rules which may be noted on the officer's record but which may not in themselves result in removal, discharge[,] or suspension in excess of 3 days.”¹³⁸ The protections of the LEOBOR apply only to “questioning of an officer pursuant to the formal investigation procedures of the respective State agency or local governmental unit in connection

¹³⁴ House Bill 1626 does not apply to “a nondisciplinary action taken in good faith on the basis of the employment related performance of a law enforcement officer.” H.R. 1626 § 820(b)(2)(B) (2001). The bill also exempts “summary punishment,” which is defined as “punishment imposed for a violation of law that does not result in any disciplinary action” or violations of law negotiated and agreed to by the officer and agency. H.R. 1626 § 820(a)(8) (2001). Given the extremely broad definition of disciplinary action as any adverse personnel action, the first prong seems to be meaningless. The second prong may allow departments to negotiate automatic punishments for violations that police unions do not want to defend, like vehicular manslaughter while under the influence of drugs or alcohol.

¹³⁵ The best empirical study of routine supervisory practices is ROBIN SHEPARD ENGEL, HOW POLICE SUPERVISORY STYLES INFLUENCE PATROL OFFICER BEHAVIOR (2003), available at <http://www.ncjrs.org/pdffiles1/nij/194078.pdf>

¹³⁶ Douglas Perez, who rejects most formal mechanisms of external accountability, argues that the best way to create a police culture that respects citizens' rights is to give ample room for “subcultural dynamics” to have their corrective effect, like the friendly advice of a peer or sergeant to an errant officer. DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 258-59 (1994). The federal bill would impede such informal dynamics if it retains its extremely broad application.

¹³⁷ See e.g., SKOLNICK & FYFE, *supra* note 8; Jerome H. Skolnick, *Code Blue*, 11.10 THE AMERICAN PROSPECT (Mar. 27–Apr. 10, 2000).

¹³⁸ 50 ILL. COMP. STAT. ANN. 725/2(d) (West 2001).

with an alleged violation of such agency's or unit's rules which may be the basis for filing charges seeking his or her suspension, removal, or discharge."¹³⁹ The operative term seems to be "formal investigation," but it is not clear what supervisor activities this covers.

The California LEOBOR also exempts routine interactions between officers and both their supervisors and colleagues in an ambiguous manner. The bill states: "This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. . . ."¹⁴⁰ It applies to any officer who is under investigation and subject to interrogation by supervisors or colleagues that "could lead to punitive action."¹⁴¹ As such, the formulation leaves open many questions. Would questions during a routine, unplanned interaction, which could lead to punitive action, trigger the LEOBOR? Presumably not, if the unplanned questioning relates to an incident other than the investigation. However, what if the topic of questioning is akin to a general inquiry about a recent incident in which the officer was involved? The supervisor may not know this point that the incident involved potentially questionable action by the officer whether such active supervision is a routine part of the sergeant's job in that instance may depend on whom one asks.

The provisions of five other LEOBORs – those of Kentucky,¹⁴² Louisiana,¹⁴³ Minnesota,¹⁴⁴ Nevada,¹⁴⁵ and New Mexico¹⁴⁶ – also explicitly limit the application of the law to formal investigations by the officer's department. In contrast, four state LEOBORs, however, are vaguely worded and potentially problematic in their application in a manner similar to the pending federal bill.¹⁴⁷ Florida's LEOBOR,

¹³⁹ *Id.*

¹⁴⁰ CAL. GOV'T CODE § 3303(i) (2001).

¹⁴¹ *Id.* (emphasis added).

¹⁴² Kentucky's LEOBOR applies "in a departmental matter involving alleged misconduct on [the officer's] part. . . ." KY. REV. STAT. ANN. § 15.520(1)(c) (Banks-Baldwin 2001).

¹⁴³ Louisiana's LEOBOR is the most similar to the federal bill, referring to "interrogations . . . in connection with the investigation." LA. REV. STAT. ANN. § 40:2531(B)(3) (West 2001).

¹⁴⁴ Minnesota's LEOBOR applies to the taking of "formal statements," defined as "the questioning of an officer in the course of obtaining a recorded, stenographic, or signed statement to be used as evidence in a disciplinary proceeding against the officer." MINN. STAT. ANN. § 626.89(1)(b) (West 2001).

¹⁴⁵ Nevada law provides a comparable qualification only for notice of hearing: "The agency shall, within a reasonable time before any *interrogation or hearing* is held *relating to an investigation of the activities of a peace officer which may result in punitive action*, provide written notice. . . ." NEV. REV. STAT. § 289.060 (2001) (emphasis added).

¹⁴⁶ Slightly broader, but still limited to official investigations by the employer, New Mexico's LEOBOR applies "[w]hen any peace officer is under investigation by his employer for alleged actions that could result in administrative sanctions being levied against the officer. . . ." N.M. STAT. ANN. § 29-14-4 (Michie 2001).

¹⁴⁷ These four states are California, Delaware, Florida, and West Virginia. Among them, Delaware's formulation may be the broadest of all, applying "[w]hensoever a law-enforcement officer is under investigation or is subjected to questioning for any reason which could lead to disciplinary action . . ." DEL. CODE ANN. tit. 11, § 9200(c) (2001). This wording does not

for example, applies “[w]henever a law enforcement officer or correctional officer is under investigation and subject to interrogation *by members of his or her agency for any reason which could lead to disciplinary action. . .*”¹⁴⁸

Several of the earliest LEOBORs – those of Maryland, Rhode Island, and Virginia – are limited to questions by the police department, but use broad language for the type of questions that are covered. Maryland’s LEOBOR, for instance, applies “[w]henever a law enforcement officer is under investigation or subjected to interrogation *by a law enforcement agency, for any reason which could lead to disciplinary action . . .*”¹⁴⁹ Phrases like “by the agency” might exclude questions asked by a fellow officer on his own initiative. However, questioning “for any reason” that “could” lead to discipline appears to cover – in the absence of a limiting exception that some state LEOBORs have – any routine supervision or inquiries.¹⁵⁰

b. Commentary

From the standpoint of accountability, the application of LEOBORs to routine supervision is a critical issue. Any provision that limits a police supervisor’s routine observation, questioning, or data gathering will seriously impede both accountability and basic management and supervision in law enforcement agencies. As argued in Section V.B., routine supervision is a necessary and critical part of normal police operations. As in other organizations, it is assumed that supervisors should closely direct the activities of their subordinates in order to ensure that organizational goals are being pursued and that high standards of integrity and professionalism are being met. In practice, this requires that supervisors observe, and in some cases direct, officers under their command. In many cases, supervisors will need to inform themselves about particular incidents or patterns of incidents by asking questions of officers. If an LEOBOR places any limits on the capacity to observe or question by defining those actions as part of a disciplinary investigation, the basic supervisory function will be impeded.

require that the investigation or questioning have anything to do with the officer’s police department. Thus, the statute could arguably protect officers from discipline resulting from questions asked by an insurance company, the F.B.I, or a grand jury.

¹⁴⁸ FLA. STAT. ANN. § 112.532(1) (West 2001) (emphasis added).

¹⁴⁹ MD. CODE ANN. art. 27, § 728(b) (2001) (emphasis added).

¹⁵⁰ Defying categorization, Wisconsin’s LEOBOR provides an ambiguous twist on the Maryland formula: “If a law enforcement officer is under investigation *and* is subjected to interrogation for any reason which could lead to disciplinary action. . .” WIS. STAT. § 164.02(1) (2001) (emphasis added). The statute does not say subject to interrogation *by whom*, although the requirement that the officer being questioned also be under investigation suggests that the two events are related and have the same source. However, this wording could cover the coincidence of a fellow officer asking questions on his own initiative while an investigation was taking place. It is not an unlikely scenario that an errant officer’s colleagues might become aware on their own of the same misconduct that internal affairs is investigating. Because colleagues interrogated the officer without following the LEOBOR, their testimony could arguably not be used, and any discipline based on their information could also violate the LEOBOR.

The language of the Illinois LEOBOR that specifically exempts routine supervision from the law's application is a sound approach that is likely to prevent a potentially serious barrier to accountability.

B. *Investigative Procedures*

Table 2 provides a summary of key provisions of the investigative procedures in the fourteen state statutes.¹⁵¹

1. Notice of Investigation

a. Typical Provisions

In addition to being informed of the names, commands, and ranks of the officer in charge of the investigation and all those who will be present during the questioning,¹⁵² twelve of the fourteen LEOBORs require that an officer also be informed prior to questioning of the nature of the investigation¹⁵³ Four LEOBORs also require disclosure of the names of complainants, including civilian complainants.¹⁵⁴

b. Commentary

The right to notice of a pending investigation that could ultimately have an adverse effect on one's employment is one of the most fundamental due process rights. Additionally, formal notice of an investigatory interview poses no barrier to accountability. Prior notice does not preclude undercover investigation of possible officer misconduct, including "sting" operations, which are increasingly used to detect officer misconduct.¹⁵⁵ The notice requirement applies only when an officer is to be formally questioned about the alleged misconduct.

¹⁵¹ Tbl. 2, App. A.

¹⁵² H.R. 1626, 107th Cong. § 3(e)(2) (2001) (only those conducting the investigation); California, Delaware (officer in charge only), Florida, Illinois, Maryland, New Mexico, Nevada, Rhode Island, Virginia, and West Virginia.

¹⁵³ H.R. 1626, 107th Cong. § 3(e)(2) (2001); California, Delaware, Florida, Illinois, Maryland, New Mexico, Nevada, Rhode Island, Virginia, West Virginia, and Wisconsin.

¹⁵⁴ Florida, Illinois (the provision is ambiguous as to whether it means prior to an interview or the hearing), New Mexico (unless chief says it will jeopardize integrity of investigation, etc.), and Rhode Island.

¹⁵⁵ The Public Integrity Division of the New Orleans Police Department has used both "directed" and "random" integrity tests. The former involve "scenarios ... mimicking situations common to everyday law enforcement duties ..." and where officers are presented with situations where they could engage in corrupt activity. New Orleans Police Department, Public Integrity Division, Integrity Tests (1997).

2. "Waiting Periods" Before Investigations/Interrogations

a. Typical Provisions

One of the most publicized and controversial issues related to the rights of police officers involves formal "waiting periods" before formal investigations or interrogations can begin.¹⁵⁶ The New York City Police Department had a rule, since eliminated, that gave an officer forty-eight hours to secure representation prior to being interrogated.¹⁵⁷ Maryland gives any "officer under interrogation" a ten-day waiting period: "The interrogation shall be suspended for a period of time not to exceed ten days until representation is obtained."¹⁵⁸ Kentucky provides forty-eight hours.¹⁵⁹ The Delaware statute states: "The questioning shall be suspended for a period of time if the officer requests representation until such time as the officer can obtain the representative requested if reasonably available."¹⁶⁰ Similarly, Illinois, Minnesota, and Rhode Island provide for a "reasonable" opportunity to obtain counsel.¹⁶¹ Schmidt proposes a waiting period of not more than three business days before a "formal interview" for the purpose of allowing an officer to secure an attorney or representative. His proposed policy does not, however, allow for representation at an "informal interview," and by implication would disallow any waiting period for such informal interviews.¹⁶²

b. Commentary

Delays in the investigation of possible officer misconduct are intolerable. There is a widespread impression that delays in investigations allow officers time to collude to create a consistent, exculpatory story. These delay provisions apply not only to officers suspected of misconduct, but also to officers who may have been mere witnesses. No law enforcement officer would countenance a time bar on proceeding with the investigation of a crime by civilians. Anyone who is arrested

¹⁵⁶ Delaware, Illinois, Maryland, Minnesota, and Rhode Island. The federal bill states: "If the counsel or representative of the . . . officer is not available within 24 hours of the time set for the commencement of any questioning of that officer, the . . . agency shall grant a reasonable extension of time for the . . . officer to obtain counsel or representation." H.R. 1626, 107th Cong. § 3(f)(1)(c) (2001).

¹⁵⁷ New York Police Department, NYPD Patrol Guide § PG118-09 (J. & B. Gould eds., Gould's DiskLaw NYPD Patrol Guide, Sept. 1999). See Eleanor Heard, *Are the New York Police Officers Safely Playing or Playing it Safe? Eliminating the Forty-Eight Hour Rule*, 57 N.Y.U. ANN. SURV. AM. LAW 133 (2000). For a police officer's view supporting the forty-eight hour rule, see Edward D. Reuss, *48-Hour Rule*, N.Y. COP ONLINE MAGAZINE, (Mar. 2001), at http://www.nycop.com/Stories/Mar_01/48_Hour_Rule/body_48_hour_rule.html.

¹⁵⁸ MD. ANN. CODE art. 27, § 728(b) (10) (2001). The ten days can be extended by the chief for good cause shown. *Id.*

¹⁵⁹ KY. REV. STAT. ANN. § 15.520(1)(c) (Banks-Baldwin 2001).

¹⁶⁰ DEL. CODE ANN. tit. 11, § 9200(c)(9) (2001).

¹⁶¹ 50 ILL. COMP. STAT. 725/3.9 (2001); MINN. STAT. ANN. § 626.89(9) (West 2001); R.I. GEN. LAWS § 42-28.6-2(j) (2001).

¹⁶² SCHMIDT, *supra* note 10, at 16.

for a crime may assert his Miranda right not to answer questions without an attorney present, but he or she is not permitted to leave, speak to witnesses or victims, visit the crime scene, or take other actions that could frustrate the investigation or prosecution of the offense.

Nonetheless, the question of how much time an accused officer has to secure representation crosses into a complicated gray area – when an investigation of possible police misconduct becomes a criminal investigation.¹⁶³ We have found no literature or scholarship adequately exploring or elaborating this issue; it certainly deserves greater review and attention. There may be no clear line or easy answer, but the problem and certain standards are clear: prompt investigation of alleged misconduct, particularly when civilians have been harmed, is essential in order to interview people while memories are still fresh and to preserve physical evidence. Several provisions of the consent decree settling a federal “pattern or practice” suit against the Los Angeles Police Department (LAPD) are designed to overcome the problem of delay and the associated collusion that can result. The LAPD is now required to “roll out” immediately, at any hour of the day or night, to investigate officer-involved shooting incidents and to separate officers at the scene in cases where more than one officer is involved.¹⁶⁴ In Northern Ireland, independent investigators from the Police Ombudsman’s office respond immediately and take over the crime scene where there has been a death or serious injury resulting from use of force by the police. They conduct the forensics investigation in order to secure evidence for the prosecution of any civilian(s) and to determine whether the officer’s use of force was appropriate.¹⁶⁵

Basic standards of due process require that an officer suspected of misconduct be permitted legal representation. An officer who is the principal suspect should have the right to have a representative present during an interrogation. Consequently, he should have a reasonable period of time to arrange for such representation, so long as it does not inhibit any investigation(s) and the “charge” is not a criminal one. Of course, the officer may invoke his Fifth Amendment right to remain silent. If the

¹⁶³ The issue also arises in provisions addressing whether and what kind of representation an accused officer is entitled to during interrogation, *see infra* Part VI.B.4, and in provisions addressing what advice of rights an officer should receive prior to interrogation, *see infra* Part VI.B.5.

¹⁶⁴ United States v. City of Los Angeles, Civil No. 00-11769-GAF Consent Decree, ¶ 56 (C.D. Cal. June 19, 2001), *available at* [http://www.cacd.uscourts.gov/cacd/recentpubop.nsf/0/1105cebf2219a6a288256b48007a04c1/\\$FILE/cv00-11769.pdf](http://www.cacd.uscourts.gov/cacd/recentpubop.nsf/0/1105cebf2219a6a288256b48007a04c1/$FILE/cv00-11769.pdf). In the Los Angeles Sheriff’s Department (LASD), the Office of Independent Review “rolls out” to all officer-involved shooting incidents. The State’s Attorney’s Office in Miami, Florida has a similar policy. The Boise (Idaho) Community Ombudsman is also required to be notified immediately of all officer-involved shootings.

¹⁶⁵ *See* Statutory Rule 2000 No. 318: Royal Ulster Constabulary (Complaints etc.) Regulations 2000 Explanatory Note (requiring the Ombudsman “to investigate cases where it is alleged the conduct of a police officer caused death or serious injury”); Police (Northern Ireland) Act 1998 § 55(6), *available at* <http://www.opsi.gov.uk/acts/acts1998/80032--i.htm#55> (giving the Ombudsman discretion to investigate any incident in which it appears that a police officer may have “(i) committed a criminal offence; or (ii) behaved in a manner which would justify disciplinary proceedings. . .”).

department states that the investigation is one involving criminal activity, the officer may refuse to answer questions without counsel present. An important related issue involves officers who are witnesses to an incident under investigation or who have some knowledge about it. If they are not at risk of incriminating themselves for criminal sanctions, they do not have a Fifth Amendment right to remain silent. Questioning of those officers can and should continue. Police internal investigations often fail at this point. In practice, some departments have taken an unjustifiably expansive interpretation of forty-eight-hour rules and ceased all investigation, including questioning of witness-officers, who are likely to provide the most relevant testimony about the incident.

An acceptable delay provision might read as follows: "An officer suspected of non-criminal misconduct, other than obstruction of an internal investigation, shall have a reasonable period prior to a formal interrogation to secure representation, not less than six hours or more than twenty-four hours unless the chief approves a longer period for good cause. This delay may be waived by the officer or, for good cause, such as the prejudicing of concurrent investigations, by the chief. In cases of serious misconduct, the department may sequester the suspected officers during the delay period while his representative is sought."¹⁶⁶

3. Compulsory Participation

a. Typical Provisions

Several LEOBORs state that an officer's refusal to answer questions or cooperate in other ways in a misconduct investigation may result in punitive action.¹⁶⁷ Thus, LEOBORs do not eliminate a department's ability to coerce cooperation in an investigation. Delaware's statute states: "[e]xcept upon refusal to answer questions pursued in a valid investigation, no officer shall be threatened with . . . disciplinary

¹⁶⁶ Naturally, our recommendation for this provision assumes that it would be part of a bill that followed this Article's recommendations about other provisions, for instance, making the LEOBOR inapplicable to criminal investigations and requiring departments to inform an officer when an investigation becomes criminal.

¹⁶⁷ See e.g., CAL. GOV'T CODE §3303(e) (2001); DEL. CODE ANN. tit. 11, § 9200 (c)(6) (2001); MD. ANN. CODE art. 27, §§ 728(7)(i), (ii) (2001); NEV. REV. STAT. § 289.020(3) (2001), N.M. STAT. ANN. § 29-14-5 (Michie 2001). Maryland, although broadly applying the requirement of cooperation to "blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations," also specifies that the interrogations must "specifically relate to the subject matter of the investigation." MD. ANN. CODE art. 27, § 728(7)(ii) (2001). Nevada's provision also employs a broad notion of cooperation, but it only applies in criminal matters: "If a peace officer refuses to comply with a request by a superior officer to cooperate with his own or any other law enforcement agency in a criminal investigation, the agency may charge the officer with insubordination." NEV. REV. STAT. § 289.020(3) (2001). New Mexico departments may force officers to submit to a polygraph examination if other investigative means have been exhausted and the officer has been advised of the reasons for the polygraph. N.M. STAT. ANN. § 29-14-5 (Michie 2001). California and Illinois give officers the right to refuse a polygraph. CAL. GOV'T CODE § 3307 (2001); 50 ILL. COMP. STAT. 725/3.11 (2001).

action.”¹⁶⁸ However, in reiterating this authority, some LEOBORs limit it. For example, California requires that the “questions [be] directly related to the investigation or interrogation,”¹⁶⁹ unless it is a criminal matter, in which case the chief may order the officer to cooperate with the investigation or else be charged with insubordination.¹⁷⁰

b. Commentary

Garrity governs LEOBOR provisions. This Article does not purport to examine the arguments surrounding the imperfect balance struck by *Garrity* and its progeny.¹⁷¹ It is sufficient to state that LEOBORs should conform with relevant case law and avoid any innovations, such as California’s, that may provide more protection than the Constitution requires for collateral use of compelled statements by police officers.

Schmidt’s proposed policy holds that “[e]very officer and employee has a duty to report promptly any and all information” related to officer misconduct and also “to cooperate fully with an internal investigation of misconduct.”¹⁷² This recommendation reflects the recent trend in law enforcement to make such requirements a matter of formal departmental policy. These requirements, in turn, address the historic problem of the “code of silence” which many experts believe to be one of the greatest impediments to police accountability.¹⁷³

4. Representation

a. Typical Provisions

Twelve of the fourteen LEOBORs provide officers with the right to have a representative present during questioning. This “representative” may be a lawyer, a union representative, or other person.¹⁷⁴ California and West Virginia allow a

¹⁶⁸ DEL. CODE ANN. tit. 11, § 9200(c)(6) (2001).

¹⁶⁹ CAL. GOV’T CODE § 3303(e) (2001).

¹⁷⁰ CAL. GOV’T CODE § 3304 (2001). H.R. 1626 limits this employer power substantially: a threat of disciplinary action may be made only if the officer has been guaranteed immunity (use and derivative use or transactional) from prosecution. H.R. 1626, 107th Cong. § 3(h)(7) (2001).

¹⁷¹ See instead Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 75 N.Y.U. L. REV. 1309 (2001) (arguing that the stringent use restrictions on compelled statements from police officers do not square with the weaker protections for coerced confessions and that courts should relax prohibitions on collateral uses of these statements).

¹⁷² SCHMIDT, *supra* note 10, at 7-8.

¹⁷³ See *supra* text accompanying note 8.

¹⁷⁴ The statutes use different formulations as follows: “Counsel of his or her choosing,” 50 ILL. COMP. STAT. 725/3.8 (2001), R.I. GEN. LAWS § 42-28.6-2(j) (2003); “Counsel,” KY. REV. STAT. ANN. §15.520(d) (Banks-Baldwin 2003), VA. CODE ANN. §9.1-502(A)(2) (Michie 2003) W. VA. CODE § 8-14A-2(5) (2003); “Representative,” CAL. GOV’T CODE §3303(i) (2001), WIS. STAT. §164.02(b) (2001); “either/or,” DEL. CODE ANN. tit. 11 § 9200

representative only when formal written charges have been filed or an interrogation “focuses on matters that are likely to result in punitive action.”¹⁷⁵ The Florida statute applies only when “the interrogation relates to the officer's continued fitness for law enforcement”¹⁷⁶ Nevada makes communications with the representative quasi-privileged and qualifies that the representative may not also be a subject of the investigation.¹⁷⁷

b. Commentary

Careful distinctions should be made as to exactly when the right to representation attaches.¹⁷⁸ It may be useful to think of a tripartite framework for misconduct investigations. (1) When a supervisor on the scene asks general questions about an incident, without focusing on any individual officer, no right to representation should attach. (2) When the inquiry begins to focus on a particular officer, that officer should have the right to representation. (3) During a formal inquiry or hearing some time after the incident, where the investigation clearly focuses on an officer, representation is a fundamental due process right. No existing statute embodies clear distinctions of the sort just described. Further discussion and comment on the merits of this idea are warranted. Schmidt, representing the managerial perspective, recommends a variation of the framework described above. While an officer suspected of “serious misconduct” is entitled to “the assistance of an attorney or representative,” “management may require an officer or employee to participate promptly in a brief, off-the-record interview, for the purpose of learning certain basic or preliminary information.”¹⁷⁹

5. Advice of Rights

a. Typical Provisions

Eight LEOBORs require that the department inform an officer that its investigation is, or has become a criminal matter and that advise the officer of his constitutional rights.¹⁸⁰ The California statute states: “[i]f prior to or during the

(c)(9) (2001), FLA. STAT. ANN. § 112.532(1)(i) (West 2001), MD. ANN. CODE art. 27, § 728(10) (2001), MINN. STAT. ANN. § 626.89(9) (West 2001), NEV. REV. STAT. § 289.080(1) (2001); “either/or, or both,” LA. REV. STAT. ANN. § 2531(B)(4) (West 2001), H.R. 1626, 107th Cong., § 3(f)(6) (2001).

¹⁷⁵ CAL. GOV'T CODE § 3303(i) (2001).

¹⁷⁶ FLA. STAT. ANN. § 112.532 (1)(i) (West 2001).

¹⁷⁷ “Any information that the representative obtains from the peace officer concerning the investigation is confidential and must not be disclosed except upon the: (a) Request of the peace officer; or (b) Lawful order of a court of competent jurisdiction.” NEV. REV. STAT. 289.080 (2001).

¹⁷⁸ See discussion *supra* Part VI.B.2 (Delays in Interrogation).

¹⁷⁹ SCHMIDT, *supra* note 10, at 16.

¹⁸⁰ See CAL. GOV'T CODE § 3303(h) (West 2003); DEL. CODE ANN. tit. 11 §9200(c)(8) (2003); FL. STAT. ANN. §112.532(1)(h) (West 2001); 50 ILL. COMP. STAT. 725/3.8 (2001);

interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.”¹⁸¹ Some of these provisions¹⁸² call for a difficult prognostication, i.e., the officer needs to be warned “prior to” the interrogation if she “is likely to be placed under arrest as a result of the interrogation”¹⁸³ Given that states authorize officers to use force, even lethal force, when the situation warrants, it often becomes difficult to know, before listening to the officer’s account, the likelihood or remoteness of criminal charges. Illinois and Minnesota dispense with discretion and call for Miranda-like warnings in advance of every interrogation.¹⁸⁴

b. Commentary

Fundamental due process rights require informing a police officer of a pending criminal investigation and also advising the officer of his constitutional rights in such an investigation. Additionally, providing such notice does not inhibit police accountability in any significant way.

Investigators should adopt the practice of Illinois and Minnesota and warn an officer of all his rights – including his LEOBOR rights and constitutional rights in either a criminal or non-criminal context – at the outset of every interview. They should also follow the common LEOBOR procedure of warning an officer when the investigation becomes a criminal one.

6. Time, Place, and Duration of Interrogations

a. Typical Provisions

Most state LEOBORs put limits on the time, place and duration of interrogations.¹⁸⁵ Typically, they require that questioning occur at a reasonable hour, preferably when the officer is on duty, unless the seriousness of the matter

MD. ANN. CODE art. 27 § 728(b)(9) (2001); MINN. STAT. ANN. § 626.89(9) (West 2001); N.M. STAT. ANN. § 29-14-48 (Michie 2001); R.I. GEN. LAWS § 42-28.6-2(i) (2003).

¹⁸¹ CAL. GOV’T CODE § 3303(h) (West 2001).

¹⁸² See DEL. CODE ANN. tit. 11 § 9200(c)(8) (2003); FL. STAT. ANN. § 112.532(1)(h) (West 2001); MD. ANN. CODE art. 27 § 728(b)(9) (2001); R.I. GEN. LAWS § 42-28.6-2(i) (2003).

¹⁸³ R.I. GEN. LAWS § 42-28.6-2(i) (2003).

¹⁸⁴ See 50 ILL. COMP. STAT. 725/3.8 (2001) (stating: “[n]o officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation”); MINN. STAT. ANN. §626.89(9) (West 2001) (stating “[t]he officer whose formal statement is taken has the right to have an attorney or union representative of the officer’s choosing present during the session”).

¹⁸⁵ Of the LEOBOR states, only Wisconsin remains silent on these matters.

requires otherwise.¹⁸⁶ About half provide that the questioning shall last a reasonable period of time¹⁸⁷ and allow the officer time to rest or to take care of personal necessities.¹⁸⁸ In New Mexico, questioning shall last two hours and no more than twice in two days unless the officer consents to more, and, unless urgently necessary, the officer shall not have to work and be questioned for more than fourteen hours in a day.¹⁸⁹ Three states require that the officer receive payments for any off-duty questioning.¹⁹⁰ With minor variations, half of the states prescribe that questioning shall occur at police headquarters or the unit office.¹⁹¹

b. Commentary

Limitations on the time, place and duration of interrogations are reasonable, respect the officer as an individual and as an employee, aid in the search for truth, and pose no barrier to accountability. These provisions are included in most LEOBORs because police departments have a history of abusive interrogation tactics.¹⁹²

For instance, requiring that interrogations last a reasonable length under the circumstances, allow for breaks, and avoid threatening (except as permitted by *Gardner*) or abusive language should deter intimidation and fatigue that might lead to false confessions or long-term hostility between the officer and his supervisors. Requiring that the interrogation occur during the officer's normal work hours, unless impracticable, or that the officer receive compensation for extra time, demonstrates the department's goodwill and emphasizes that aiding an investigation is a police officer's duty. .

¹⁸⁶ See H.R. 1626, 107th Cong. § 3(f)(2) (2001); CAL. GOV'T CODE § 3303(a) (West 2003); DEL. CODE ANN. tit. 11 § 9200(c)(1) (2003); FLA. STAT. ANN. § 112.532(1) (West 2001); 50 ILL. COMP. STAT. 725/3.5 (2001); MD. ANN. CODE art. 27 § 728(b)(6) (2001); MINN. STAT. ANN. § 626.89(7) (West 2001); NEV. REV. STAT. § 289.060(3)(a) (2003); R.I. GEN. LAWS § 42-28.6-2(a) (2003); VA. CODE ANN. § 9-1-504 (Michie 2001); W. VA. CODE § 8-14A-2(1) (2001).

¹⁸⁷ See H.R. 1626, 107th Cong. § 3(f)(6) (2001); CAL. GOV'T CODE § 3303(a) (West 2003); DEL. CODE ANN. tit. 11 § 920(c)(1) (2003); FL. STAT. ANN. § 112.532(1) (West 2001); 50 ILL. COMP. STAT. 725/3.5 (2001); MD. ANN. CODE art. 27 § 728(b)(6) (2001); MINN. STAT. ANN. § 626.89(7) (West 2001); R.I. GEN. LAWS § 42-28.6-2(a) (2003).

¹⁸⁸ See H.R. 1626, 107th Cong. § 3(f)(6) (2001); CAL. GOV'T CODE § 3303(d) (2003); DEL. CODE ANN. tit. 11 § 9200(c)(1) (2003); FL. STAT. ANN. § 112.532(1) (West 2001); 50 ILL. COMP. STAT. 725/3.5 (2001); MD. ANN. CODE art. 27 § 728(b)(6) (2001); MINN. STAT. ANN. § 626.89(7) (West 2001); N.M. STAT. ANN. § 29-14-4(A) (Michie 2001); R.I. GEN. LAWS § 42-28.6-2 (2003).

¹⁸⁹ N.M. STAT. ANN. § 29-14-4(d) (Michie 2001).

¹⁹⁰ See CAL. GOV'T CODE § 3303 (West 2003); MINN. STAT. ANN. § 626.89(7) (West 2001); W. VA. CODE § 8-14A-3 (2001).

¹⁹¹ See H.R. 1626, 107th Cong. § 3(f)(6) (2001); DEL. CODE ANN. tit. 11 § 9205 (2003); FLA. STAT. ANN. § 112.532(1) (West 2001); MD. ANN. CODE art. 27 § 728 (2001); MINN. STAT. ANN. § 626.89(7) (West 2001); VA. CODE ANN. § 9-1-504 (Michie 2001).

¹⁹² See JURIS & FEUILLE, *supra* note 10, at 20-24; SCHMIDT, *supra* note 10, at 10 (endorsing the basic principle that "[o]fficers and employees who are interviewed in noncriminal matters shall be treated with dignity and respect.").

However, the limits should allow for reasonable exceptions. For instance, LEOBORs should not consider incidental use of profanity by an investigator abusive language that taints the interview. Also, the limits should avoid two relatively common provisions. First, the LEOBOR should not limit the number of interviewers in the room or the number asking questions at the same time. Although numerous investigators' asking questions could unduly intimidate an officer, it is an unlikely scenario made even more improbable by the other protections in the LEOBOR. Moreover, such provisions eliminate, perhaps intentionally, effective, necessary interview tactics, like "good cop/bad cop" or its variations, that provide for an honorable retreat by the interviewee without coercion. Second, LEOBORs should not limit the place of interrogation to the precinct or unit headquarters. Internal Affairs or civilian investigators may have good reason to conduct the interview elsewhere.¹⁹³

7. Interrogators

a. Number of Interrogators

(1) Typical Provisions

Seven LEOBORs place limits on the number of investigators who may question an officer under investigation.¹⁹⁴ Three state LEOBORs provide that only one person shall question officers in any given session, although additional investigators may attend the interrogation session.¹⁹⁵

(2) Commentary

LEOBOR limitations on the number of interrogators do not pose a significant impediment to accountability. Reiter argues that "[n]ormally interviews can be accomplished by only one investigator," but advises that some sensitive cases, involving, for example, sexual harassment, may benefit from having two investigators.¹⁹⁶ He concedes that an officer being interrogated could perceive the

¹⁹³ See, e.g., Alan Feuer, *New Affidavit Likely Means Louima Case Will Drag On*, N.Y. TIMES, July 21, 2001, at B6 (describing intimidation tactics used by union representative and fellow officers when investigators attempted to interview an officer about the Louima incident in the precinct office); Kevin Flynn, *Early Interview in Louima Case Provides Spark for Renewed Interest*, N.Y. TIMES, July 27, 2001, at B1.

¹⁹⁴ See H.R. 1626, 107th Cong., § 3(f)(5) (2001), CAL. GOV'T CODE § 3303(b) (West 2003); FL. STAT. ANN. § 112.532(1)(c) (West 2001); MD. ANN. CODE art. 27 § 728(b)(3) (2001); N.M. STAT. ANN. § 29-14-4(D) (Michie 2001); R.I. GEN. LAWS § 42-28.6-2(c) (2003); W. VA. CODE § 8-14A-2 (2001).

¹⁹⁵ See FL. STAT. ANN. § 112.532(1)(c) (West 2001); MD. ANN. CODE art. 27 § 728(b)(3) (2001); R.I. GEN. LAWS § 42-28-6.2(c) (2003). See also CAL. GOV'T CODE § 3303(b) (West 2003); N.M. STAT. ANN. § 29-14-4(D) (Michie 2001) (allowing two at a time); W.VA. CODE § 8-14A-2 (2001) (allowing three).

¹⁹⁶ REITER, *supra* note 28, at 5.5.

use of more than two investigators as a form of intimidation.¹⁹⁷ Ironically, LEOBOR limitations on the number of investigators are designed to preclude the so-called “good cop/bad cop” technique, which police officers have traditionally used against criminal suspects. Officers understand the manipulative nature of this technique and, through LEOBORs, prevent it from being used against themselves in misconduct investigations.

b. Type of Investigators

(1) Typical Provisions

The Maryland LEOBOR provides that only another sworn officer (or the state attorney general or his designee, if so requested by the governor) may interrogate an officer.¹⁹⁸ No other LEOBOR restricts the kind of person who may interrogate an officer. The Rhode Island LEOBOR, meanwhile, states: “[n]o law enforcement officer shall be compelled to speak or testify before, or be questioned by, any non-governmental agency.”¹⁹⁹

(2) Commentary

The Maryland provision effectively precludes the operation of an external citizen review agency, such as exists in San Francisco, Washington, D.C., New York City, and other cities, where investigators (who are not sworn officers) investigate citizen complaints. To the extent that external citizen review agencies have been spreading steadily in the United States²⁰⁰ and many activists believe necessary for the objective, thorough, and fair investigation of complaints,²⁰¹ any LEOBOR provision that precludes non-sworn investigators becomes an impediment of police accountability.²⁰² Two affiliates of the American Civil Liberties Union argue that the provision of this Maryland law “presents a major impediment to establishing a civilian review system that is independent of and external to the respondent officer’s police department.”²⁰³

¹⁹⁷ REITER, *supra* note 28 at 5.5. Schmidt, *supra* note 10, at 10, recommends “[a] person who records or transcribes an interview session is not an ‘interviewer.’”

¹⁹⁸ MD. ANN. CODE art. 27 § 728 (d)(1) (2001).

¹⁹⁹ R.I. GEN. LAWS § 42-28.6-2(n) (2003).

²⁰⁰ See WALKER, POLICE ACCOUNTABILITY, *supra* note 8; see also <http://www.nacole.org> (providing a list of oversight agencies).

²⁰¹ See ACLU, *supra* note 20; see also NAACP, *supra* note 112, at 130-132 (quoting “Some Form of Civilian Review Must Be Adopted by All Police Departments”).

²⁰² The Rhode Island statute does not pose a similar barrier, because it bars questioning by “any non-governmental agency.” R.I. GEN. LAWS § 42-28.6-2(n) (2003). An official citizen oversight agency is, by definition, a governmental agency.

²⁰³ ACLU, *supra* note 20.

8. Prohibiting Abusive or Threatening Comments

a. Typical Provisions

Five LEOBORs specifically prohibit the use of abusive language by investigators.²⁰⁴ Seven LEOBORs specifically prohibit threats of retaliation for refusing to answer questions.²⁰⁵ Some prohibit promises of reward for answering questions.²⁰⁶

b. Commentary

The prohibition of abusive or threatening language against an employee hardly deserves comment. Employers should not subject employees to abuse or threats in any context.²⁰⁷ The prohibition is sound public policy and not an impediment to police accountability. Ironically, criminal suspects under interrogation do not benefit from nearly the same degree of protection from threats of punitive action, abusive language, or inducements or rewards. Indeed, some commentators believe that criminal investigation routinely include such tactics.²⁰⁸

9. Notice of Outcome of Investigation and Right to Respond

a. Typical Provisions

Only Delaware and the proposed federal LEOBORs require notification in writing of the investigative findings and any recommendations for disciplinary action to the officer under investigation.²⁰⁹ Uniquely, the federal bill gives the officer a chance to respond in writing to the findings and recommendations and

²⁰⁴ See CAL. GOV'T CODE § 3303(e) (West 2003); FL. STAT. ANN. § 112.532(1)(f) (West 2001); 50 ILL. COMP. STAT. 725/3.6, (2001); N.M. STAT. ANN. § 29-14-4 (Michie 2001); W. VA. CODE § 8-14A-3 (2001); see also NEV. REV. STAT. § 289.060(2)(b) (2003) (“providing that the questioning shall be limited in scope “to the alleged misconduct of the officer”).

²⁰⁵ See H.R. 1626, 107th Cong. § 3(f)(7) (2001); CAL. GOV'T CODE § 3303 (West 2003); DEL. CODE ANN. tit. 11 § 9205 (2003); FL. STAT. ANN. § 112.532(1) (West 2001); MD. ANN. CODE art. 27 § 728 (2001); R.I. GEN. LAWS § 42-28.6-2 (2003); W. VA. CODE § 8-14A-3 (2001).

²⁰⁶ See H.R. 1626, 107th Cong. § 3(f)(7) (2001); CAL. GOV'T CODE § 3303(e) (West 2003); FL. STAT. ANN. § 112.532(1)(f) (West 2001); W. VA. CODE § 8-14A-3 (2001); see also N.M. STAT. ANN. § 29-14-4 (Michie 2001) (forbidding any “illegal coercion”).

²⁰⁷ See RICHARD A. LEO & GEORGE C. THOMAS III, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 57-63 (1998) (illustrating that police use abusive language toward criminal suspects as a manipulative control technique).

²⁰⁸ *Id.* (relying upon the questionable interrogation practices reported in Leo's research).

²⁰⁹ H.R. 1626, 107th Cong. § 3(g)(1) (2001); DEL. CODE ANN. tit. 11, § 9200(c)(11) (2001) (“At the conclusion of the administrative investigation, the investigator shall inform in writing the officer of the investigative findings and any recommendation for further action.”).

refer to any additional documents, witnesses, or facts he likes.²¹⁰ The bill gives the department thirty days to provide the information and gives the officer thirty days to respond.²¹¹ Virginia gives officers a reasonable time, but not less than five days, after the notice of charges to respond orally and in writing.²¹²

b. Commentary

This notice and opportunity to respond parallels the rights associated with the disciplinary hearing that will occur later in the disciplinary process. However, one must acknowledge a legitimate interest affected at this stage. If a department conducts an investigation, but chooses not to pursue charges, an officer can face the stigma, unfair innuendo, and stress resulting from the rumors that circulate about an investigation. Therefore, in such instances – and allowing for exceptions where it will adversely affect other investigations – a department should require notice to an officer in writing of the findings and recommendations upon the closing of an investigation. Furthermore, the department should give the officer an opportunity to respond in writing and to add materials to his personnel record. This would allow the officer to determine the degree of stigma and the best way to address it.

10. Recordings of Proceedings and Transcripts

a. Typical Provisions

Most LEOBORs give the officer the right to record interviews (or “formal” interviews) or to receive copies or transcripts of any recordings.²¹³

²¹⁰ H.R. 1626, 107th Cong. § 3(g)(2) (2001).

²¹¹ *Id.*

²¹² VA. CODE ANN. § 9-1-502 (Michie 2001).

²¹³ See H.R. 1626, 107th Cong. § 3(f)(8) (2001); CAL. GOV'T CODE § 3303(g) (West 2001); DEL. CODE ANN. tit. 11, § 9200(c)(7) (2001); FLA. STAT. ANN. § 112.532(1)(g) (West 2001); 50 ILL. COMP. STAT. 725/3.7 (2001); MD. ANN. CODE art. 27, § 728(b)(8) (2001), N.M. STAT. ANN. § 29-14-4 (Michie 2001), NEV. REV. STAT. § 289.080(4) (2001), and W. VA. CODE § 8-14A-2(4) (2001). California grants the officer the further right to “any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential.” CAL. GOV'T CODE § 3303(g) (West 2001). Delaware, Nevada, and West Virginia provide copies of interviews only upon the officer's request and at his expense. DEL. CODE ANN. tit. 11, § 9200(c)(7) (2001); NEV. REV. STAT. § 289.080(4) (2001); W. VA. CODE § 8-14A-2(4) (2001). Florida, Illinois, and Minnesota, on the other hand, require that the officer receive with copies and quickly. FLA. STAT. ANN. § 112.532(1)(g) (West 2001); 50 ILL. COMP. STAT. 725/3.7 (2001); MINN. STAT. ANN. § 626.89(6) (West 2001). Maryland fixes the time of delivery after the completion of the investigation but at least ten days before any hearing. MD. ANN. CODE art. 27, § 728(b)(8) (2001). Florida specifies, “there shall be no unrecorded questions or statements” and Maryland requires officers to record “recess periods” as well. FLA. STAT. ANN. § 112.532(1)(g) (West 2001).

b. Commentary

The requirements that the investigator records the interview and that the officer under suspicion later receive copies of transcripts constitute a basic right.

11. Polygraphs

a. Typical Provisions

California, Illinois, and Maryland prohibit the use of polygraphs (or, in Illinois, “any other test questioning by means of any chemical substance”) without an officer’s consent, and the state cannot use the officer’s refusal against him.²¹⁴ New Mexico allows for a polygraph if the state exhausts “all other reasonable investigative means” and advises the officer of the reasons for the exam.²¹⁵

b. Commentary

Because of the uncertain reliability of evidence from polygraph examinations, courts often find them to be inadmissible in court.²¹⁶ Those holding employment-related investigations also preclude use of the evidence.²¹⁷ Therefore, these states appropriately prohibit the use of evidence from polygraph examinations in police misconduct investigations.

C. Hearings

Nine state LEOBORS,²¹⁸ as well as the federal bill, contain provisions relating to disciplinary hearings. Of these ten, eight have relatively extensive provisions governing hearings.²¹⁹ However, only five seem to completely replace separate state laws governing hearings for public employees.²²⁰ H.R. 1626 contains more extensive, detailed requirements for hearings than any of the state LEOBORS. Table 3 provides a summary of key provisions related to hearings in the fourteen

²¹⁴ CAL. GOV’T CODE § 3307 (West 2001); 50 ILL. COMP. STAT. ANN. 725/3.11 (West 2001); MD. ANN. CODE art. 27, § 728(b)(7)(ii) (2001)

²¹⁵ N.M. STAT. ANN. § 29-14-5 (Michie 2001).

²¹⁶ New Mexico is the only state that explicitly permits polygraph evidence. *Id.* Every other state makes admission contingent on certain factors, most often by agreement of both parties prior to trial. Federal courts use the *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), test for admissibility which grants significant discretion to the judge. For discussion of this issue, see SCHMIDT, *supra* note 10, at 18-19.

²¹⁷ See, e.g., Federal Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646, 29 U.S.C. §§ 2001-2009; CAL. LAB. CODE § 432.2 (West 2001) (applying to private employees).

²¹⁸ Delaware, Illinois, Kentucky, Maryland, Minnesota, Nevada, Rhode Island, Virginia, and West Virginia. See, e.g. MD. ANN. CODE art. 27 § 730 (2001).

²¹⁹ Delaware, Kentucky, Maryland, Nevada, Rhode Island, Virginia, West Virginia, and H.R. 1626. See, e.g., *id.*

²²⁰ Delaware, Maryland, Rhode Island, Virginia, and West Virginia. See, e.g., *id.*

state statutes.²²¹

1. Timing of the Hearing

One crucial accountability issue related to hearings involves the timing of the hearing.²²² Provisions for hearings *prior* to the imposition of discipline demand particular attention. For reasons discussed below, *post*-disciplinary hearings that are part of a disciplinary appeal process are far less consequential with regard to accountability than *pre*-disciplinary hearings.

a. Typical Provisions

Seven LEOBORS provide for a hearing before, rather than after, an officer is disciplined.²²³ Some LEOBORS are more explicit than others are. For instance, a section of the Maryland statute is entitled: "Hearing before demotion, dismissal, transfer, etc."²²⁴ Delaware more subtly requires that the hearing precede discipline by use of verb tense: "[i]f a law-enforcement officer is [suspended or charged with alleged misconduct], which charge *could* lead to any form of disciplinary action...then that officer shall be entitled to a hearing. . . ."²²⁵

b. Commentary

The timing of a hearing involves an important distinction. There is no controversy over the right to a hearing that occurs after the chief executive or other authority has imposed some form of discipline. The right to a hearing to appeal a disciplinary action is a fundamental aspect of due process.

The right to a hearing before the chief executive imposes discipline generates more controversy. It is especially problematic when linked to a requirement that a certain number of the hearing board's members be other sworn officers in the department. This provision gives rank-and-file police officers a major voice in determining discipline for police misconduct. This practice inappropriately transfers the basic management prerogative of, and responsibility for, discipline to the rank-and-file. Accordingly, as the next section reiterates, in a department with a history of tolerating misconduct, the unacceptable norms of the rank-and-file will shape disciplinary practices, thereby resulting in a tolerance of misconduct. An

²²¹See Tbl. 3, App. A.

²²² LEOBORS of Delaware, Maryland, Rhode Island, Virginia, West Virginia, and H.R. 1626 contain provisions detailing the composition of hearing boards. See *e.g.*, H.R. 1626, 107th Cong. § 727(d) (2001).

²²³ Alabama, Delaware, Kentucky, Maryland, Oregon, Rhode Island, and West Virginia. See, *e.g.*, *id.* § 730. A similar process exists based on collective bargaining agreements in some other departments. On issues surrounding the Board of Rights process in the Los Angeles Police Department, see LOS ANGELES POLICE COMM'N, REPORT OF THE RAMPART INDEP. REVIEW PANEL (2000). SCHMIDT, *supra* note 10, is silent on this issue.

²²⁴ MD. ANN. CODE art. 27, § 730 (2001).

²²⁵ DEL. CODE ANN. tit. 11, § 9203 (2003) (emphasis added).

unknown number of police departments use pre-discipline hearings. Two major police departments – those of Philadelphia²²⁶ and Los Angeles²²⁷ – use pre-discipline hearings and have been the subject of serious controversies over excessive force and the failure to adequately discipline officers for use of force.

2. Composition of the Hearing Board

a. Typical Provisions

Of the six LEOBORs with provisions concerning the composition of the hearing board, five require that police officers fill all board positions.²²⁸ The Maryland LEOBOR provides that a hearing board consist of at least three sworn officers, one of whom must be of the same rank as the officer under investigation.²²⁹ The chief appoints these officers to the board; he cannot appoint officers who were involved in the investigation. The chief may select officers from other departments.²³⁰ The Maryland LEOBOR also creates the right to a hearing for officers *after* an investigation has resulted in a recommendation of discipline, but *before* the chief executive acts upon that recommendation.²³¹

Similarly, the Rhode Island LEOBOR provides for a hearing by a three-member committee following a “recommendation” of disciplinary action, but “before taking such action.”²³² The committee consists of three “active law enforcement officers” from Rhode Island.²³³ As in Virginia, where all board members must also be law enforcement officers, one member is selected by the chief executive, another “by the aggrieved law enforcement officer,” and the third by the other two members.²³⁴

²²⁶ See the highly critical report on the Philadelphia Police Department, with a description of the pre-discipline hearings by the Police Board of Inquiry (PBI) process. PHILADELPHIA POLICE DEPARTMENT INTEGRITY AND ACCOUNTABILITY OFFICE, DISCIPLINARY SYSTEM (March 2001).

²²⁷ LOS ANGELES POLICE COMM’N, REPORT OF THE RAMPART INDEPENDENT REVIEW PANEL (2000), *supra* note 223.

²²⁸ See DEL. CODE ANN. tit. 11, § 9205 (2003), MD. ANN. CODE art. 27, § 727 (d)(1) (2003), R.I. GEN. LAWS §§ 42-28.6-1, 42-28.6-4 (2003), VA. CODE ANN. § 9-1-504 (Michie 2003), W. VA. CODE § 8-14A-1(4) (2003). In West Virginia, the board members may be either police officers or firefighters, W. VA. CODE § 8-14A-1(4)(a)(2) (2003), and there is a separate system for non-civil service police departments, W. VA. CODE § 8-14A-1(4)(b) (2003).

²²⁹ MD. ANN. CODE art. 27, § 727(d)(1) (2003).

²³⁰ *Id.*

²³¹ *Id.* at § 730(a) (2003).

²³² R.I. GEN. LAWS § 42-28.6-4 (2003).

²³³ *Id.* at § 42-28.6-1 (2003).

²³⁴ *Id.* Florida uses this model as well, but provides for a five-person board (the officer and chief each pick two members who then pick the fifth) for departments of more than 100 officers. FLA. STAT. ANN. § 112.532(2) (West 2003). Virginia specifies that the member chosen by the agency should rank at least equally to the rank of the officer but no more than two ranks above him. VA. CODE ANN. § 9-1-504 (Michie 2003). West Virginia follows the standard model for its civil service police departments; however, for the non-civil service departments, the local police union (or the state police union in the absence of a local police

The hearing committee can “sustain, modify in whole or in part, or reverse the complaint or charges” against the officer.²³⁵ The statute, however, does not specify whether a unanimous decision is required.

b. Commentary

The provisions in Delaware, Maryland, and Rhode Island are particularly dismissive of the public interest in police accountability in two respects. They link the guarantee of a *pre*-disciplinary hearing with the requirement that the hearing board consist entirely of police officers. As explained in the previous section, these provisions give rank-and-file police officers a major voice in determining discipline for police misconduct. This constitutes an inappropriate transfer of a basic management prerogative to the rank-and-file. Thus, in a department with a history of serious misconduct, the norms of the police subculture will shape the standards of discipline. Additionally, requiring that hearing boards consist only of police officers effectively bars civilian participation in the discipline oversight process.²³⁶ Moreover, the provisions in Maryland, Virginia, and the federal bill mandating inclusion on the board of an officer of the same or a similar rank as the officer gives the rank-and-file a direct role in the disciplinary process. Discipline in any organization is a management responsibility. The chief executive’s responsibility should not be diluted by ceding part of the responsibility to the rank-and-file through membership on a board in a hearing that precedes the executive’s decision.

In light of the long history of the code of silence in the police subculture, the involvement of rank-and-file officers on hearing boards creates problems. One of the greatest obstacles to the investigation and punishment of misconduct results from rank-and-file officer solidarity, including the tendency of officers to cover up other officers’ misconduct. Developing strategies for changing the norms of the rank-and-file subculture and breaking down the tradition of protecting misconduct remain some of the greatest challenges in achieving accountability.

That an aggrieved officer in Rhode Island can name one of the three members of the disciplinary hearing committee also offends a reasonable concept of accountability. This requirement allows, in effect, an officer accused of misconduct to nominate a close colleague, who may engage in similar kinds of misconduct. As a result, the aggrieved officer can reasonably assure himself of one favorable vote. A “hearing” should present the opportunity for a fair and impartial review of the case at hand. Allowing the aggrieved officer in the case to nominate a person of his choice offends the fundamental principle of impartiality.

union) chooses one member of the standing committee, the chief chooses one member, and the local business association (or by the agreement of the other two members in the absence of a local business association) chooses the third member. W. VA. CODE § 8-14A-1(4) (2003). Delaware’s statute only calls for “an impartial board of officers” and only requires that if cannot convene an impartial board, the state will. DEL. CODE ANN. tit. 11, § 9205 (2003).

²³⁵ R.I. GEN. LAWS § 42-28.6-11 (2003).

²³⁶ See discussion *infra* Part VI.E.

3. Scope of the Right to a Hearing

a. Typical Provisions

Seven LEOBORs explicitly entitle an officer to a hearing in dismissal or discipline situations.²³⁷ H.R. 1626, the proposed federal legislation, states: “[e]xcept in a case of summary punishment or emergency suspension . . . , before the imposition of any disciplinary action the law enforcement agency shall notify the officer that the officer is entitled to a due process hearing by an independent and impartial hearing officer or board.”²³⁸ Other LEOBORs assess the need for a hearing or type of hearing based on the severity of the disciplinary action involved.²³⁹

b. Commentary

Unlike the provisions relating to investigations, police officers should have the right to a hearing concerning any disciplinary action, other than an oral reprimand or non-derogatory note in a personnel file. A fair hearing protects the officer against unfair tactics or discrimination by his supervisors. The officer’s, employer’s, and public’s interests should stand on equal footing before an impartial arbiter, guided by fair rules and particularized consideration of the circumstances, hears the case. Except in cases justifying immediate suspension,²⁴⁰ the hearing should occur following the imposition of punishment as part of an appeal process.

4. Notice of Hearing and Period of Preparation

a. Typical Provisions

Most LEOBORs require that the officer receive written notice of a hearing.²⁴¹ The statutes vary widely as to the timing and contents of that notice. H.R. 1626 demands more than most state LEOBORs,²⁴² requiring that the law enforcement

²³⁷ California, Delaware, Maryland, Nevada, New Mexico, Rhode Island, and Virginia. *See, e.g.*, DEL. CODE ANN. tit. 11, § 9203 (2003). Delaware excludes only reprimands from the hearing requirement. *Id.*

²³⁸ H.R. 1626, 107th Cong. § 3(h) (2001).

²³⁹ West Virginia grants different types of hearings depending on whether the department is a civil service agency and whether the recommended discipline is (a) discharge, suspension, or reduction in rank or pay or (b) written reprimand or punitive transfer. W. VA. CODE §§ 8-14A-3(b), 3(c) (2003).

²⁴⁰ *See infra* Part VI.D.3.

²⁴¹ Delaware, Maryland, Nevada, Rhode Island, Virginia, West Virginia, and H.R. 1626. *See, e.g.*, DEL. CODE ANN. tit. 11, § 9204 (2003). Illinois requires notice, but it does not require it in writing. 50 ILL. COMP. STAT. ANN. 725/3.2 (West 2003).

²⁴² Delaware and Nevada also have stringent requirements. *See* DEL. CODE ANN. tit. 11, § 9204 (2003), NEV. REV. STAT. § 289.060(2) (2003). Delaware requires notice of “the time and place of the hearing, the issues involved, a specification of the facts the officer is

agency give written notice within thirty days of the filing of a disciplinary charge and that it include (a) the date, time, and location of the hearing, (b) the name and address of the hearing officer or board members, and (c) the name, rank or position, command, and address of the person acting as prosecutor.²⁴³ Other LEOBORs, like those of Maryland and West Virginia, require that the notice include the issues involved.²⁴⁴

Several LEOBORs provide a period of time for the officer to prepare for the hearing.²⁴⁵ H.R. 1626 provides the officer with thirty days between the notice of hearing and the hearing.²⁴⁶ It further requires that the officer cooperate in scheduling the hearing and that the hearing not occur later than sixty days after the officer receives notice.²⁴⁷ The state LEOBORs provide periods ranging from seventy-two hours to fourteen days.²⁴⁸

b. Commentary

Written notice of any adversarial hearing that could result in significant punishment or even termination is a fundamental right. Such notice should specify the date, time, and place of the hearing, the names of the judges and the prosecutors, and the issues involved. The notice need not include these individuals' addresses, as the federal bill requires.

An officer should be allowed more time to prepare for hearings where he faces the most serious sanctions – transfer, demotion, or dismissal – than for hearings where he faces lesser sanctions. Using the state LEOBORs and the federal bill as guides, thirty days might be appropriate for the former, while three days might be sufficient for the latter.

charged with committing, the rule at issue, a copy of the rule, and the range of possible penalties.” DEL. CODE ANN. tit. 11, § 9204 (2003).

²⁴³ H.R. 1626, 107th Cong. § 3(h)(4) (2001).

²⁴⁴ MD. ANN. CODE art. 27, § 730 (2003); W. VA. CODE § 8-14A-3(a) (2003). *See also* DEL. CODE ANN. tit. 11, § 9204 (2003), NEV. REV. STAT. § 289.060(2) (2003), R.I. GEN. LAWS § 42-28.6-4 (2003).

²⁴⁵ Delaware, Kentucky, Nevada, Virginia, West Virginia, H.R. 1626. *See*, DEL. CODE ANN. tit. 11, § 9204 (2003); KY. REV. STAT. ANN. § 15.520 (1)(h)(1) (Banks-Baldwin 2003); NEV. REV. STAT. § 289.060 (2003); VA. CODE ANN. § 9-1-504(A) (Michie 2003); W.VA. CODE § 8-14A-3(a) (2001); H.R. 1626, 107th Cong. § 3(h)(4)(A) (2003).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *See* DEL. CODE ANN. tit. 11, § 9204 (2003) (reasonable period); KY. REV. STAT. ANN. § 15.520 (1)(h)(1) (Banks-Baldwin 2003), (seventy-two hours); NEV. REV. STAT. § 289.060 (2003) (reasonable period); VA. CODE ANN. § 9-1-504(A) (Michie 2003) (fourteen days); W.VA. CODE § 8-14A-3(a) (2001) (ten days).

5. Rules and Procedures for Hearings

a. Rules of Evidence, Discovery, and Production of Evidence

(1) Typical Provisions

Six LEOBORs contain rules of evidence for investigative hearings. The federal bill and several state LEOBORs give hearing boards the power to subpoena witnesses or documents.²⁴⁹ Other powers given to hearing boards include the power to seek enforcement of orders in court, the power to seek orders of contempt,²⁵⁰ and the power to administer oaths.²⁵¹ Some state LEOBORs explicitly require boards to give the agency and officer ample opportunity to present evidence and respond to any issue raised²⁵² and to keep an official record of the hearing, including testimony offered and exhibits introduced.²⁵³

Certain state LEOBORs require broad discovery or production of evidence,²⁵⁴ provide for reciprocal discovery by the agency,²⁵⁵ or allow deletions of references that might reveal the identity of confidential informants.²⁵⁶ Maryland requires that the department provide the officer with a copy of the “investigatory file and any

²⁴⁹ See H.R. 1626, 107th Cong., § 3(h)(10) (2003); KY. REV. STAT. ANN. § 15.520(1)(h)(6) (Banks-Baldwin 2003); MD. ANN. CODE art. 27, § 730(j); VA. CODE ANN. § 9-1-504(B) (Michie 2003); W. VA. CODE § 8-14A-3(d)(3) (2001).

²⁵⁰ See H.R. 1626, 107th Cong., § 3(h)(10) (2001); KY. REV. STAT. ANN. § 15.520(1)(h)(6) (Banks-Baldwin 2003).

²⁵¹ See H.R. 1626, 107th Cong., § 3(h)(14) (2001); MD. ANN. CODE art. 27, § 730(h) (2003); R.I. GEN. LAWS § 42-28.6-2(d) (2003).

²⁵² See DEL. CODE ANN. tit. 11, §§ 9205(b), (d) (2003); KY. REV. STAT. ANN. § 15.520(1)(h)(7) (Banks-Baldwin 2003); MD. ANN. CODE art. 27, §§ 730(d), (f) (2003); NEV. REV. STAT. § 289.060(3)(c) (2003); R.I. GEN. LAWS § 42-28.6-5 (2003); VA. CODE ANN. § 9-1-504(A) (Michie 2003); W. VA. CODE § 8-14A-3(d)(2) (2003).

²⁵³ DEL. CODE ANN. tit. 11, § 9205(a) (2003); MD. ANN. CODE art. 27, § 730(a) (2003); R.I. GEN. LAWS § 42-28.6-5 (2003); VA. CODE ANN. § 9-1-504(B) (Michie 2003); W. VA. CODE § 8-14A-3(d)(1) (2003).

²⁵⁴ See DEL. CODE ANN. tit. 11, § 9200(c)(10) (2003) (which provides that within 48 hours of the written notification of charges, Delaware agencies, upon the officer’s request, must provide “access to transcripts, records, written statements, written reports, analyses and video tapes pertinent to the case if they are exculpatory, intended to support any disciplinary action or are to be introduced in the departmental hearing on the charges involved.”). See also MINN. STAT. ANN. § 626.89(6) (West 2003) (requiring disclosure, upon request of either party, of a list of witnesses expected to testify at the hearing on behalf of the other party, as well as the substance of their testimony, any prior statements, and the agency’s investigative report); KY. REV. STAT. ANN. § 15.520(1)(h)(2) (Banks-Baldwin 2003) (requiring production of any sworn statements or affidavits and any exculpatory statements no less than seventy-two hours before the hearing).

²⁵⁵ MINN. STAT. ANN. § 626.89(6) (West 2003) (providing disclosure upon the request of either party).

²⁵⁶ See MINN. STAT. ANN. § 626.89(6) (West 2003); MD. ANN. CODE art. 27, § 728(b)(5) (2003) (both of which allow the agency to delete references that might reveal the identity of confidential informants, unless the presiding official finds good cause to disclose the references).

exculpatory information” and the names of witnesses, minus (1) the identity of confidential sources and (2) recommendations for disposition.²⁵⁷ H.R. 1626 provides significant discovery rights to the accused police officer. At least fifteen days before the hearing, the officer must be given access to the investigative file, any documentary evidence, all physical evidence, and the name and address of all agency witnesses.²⁵⁸

Some state laws require the disclosure of the complainant’s name.²⁵⁹ Florida allows officers to review the complaint and any witness statements before being interviewed at the investigative stage.²⁶⁰ Kentucky requires the dismissal with prejudice of any claim by a complainant if the complainant does not appear, except due to circumstances beyond his control.²⁶¹

Certain states forbid the use of any “[a]dmissions or confessions obtained during the course of any interrogation not conducted in accordance with this Act. . . .”²⁶² Kentucky does not require exclusion of such evidence, but instructs the board to consider the weight or credibility of such evidence and any prejudice to the officer.²⁶³ Although the federal bill does not specify when evidence or statements must be excluded, it prevents an officer from being disciplined if the investigation was conducted “arbitrarily or unfairly,” which is likely to include a violation of the officer’s statutory rights under the LEOBOR.²⁶⁴ Similarly, California and Nevada allow an officer to apply to the courts for relief from any action in violation of the LEOBOR, including, in California, an injunction on any punitive action.²⁶⁵

Delaware, Maryland, and Rhode Island allow evidence with probative value, but not incompetent, irrelevant, immaterial, or unduly repetitious evidence.²⁶⁶ They admit records, documents, copies, excerpts, or referenced records or documents, and rebuttal evidence.²⁶⁷ They also recognize the rules of privilege, as does Nevada,²⁶⁸ and allow tribunals to take judicial notice of certain facts.²⁶⁹ Virginia’s statute merely states that the board “shall rule on the admissibility of the

²⁵⁷ MD. ANN. CODE art. 27, § 728(b)(5)(iii)(1)-(3) (2003).

²⁵⁸ H.R. 1626, 107th Cong., § 3(h)(5)-(h)(7) (2001).

²⁵⁹ See 50 ILL. COMP. STAT. 725/3.2 (West 2003) (requiring an agency, prior to the hearing, to disclose the names of all complainants to the officer); see also MINN. STAT. ANN. § 626.89(5) (West 2003) (requiring the disclosure of the written complaint signed by the complainant); discussion in Section E, *infra*

²⁶⁰ FLA. STAT. ANN. § 112.533(2)(a)(2) (West 2003).

²⁶¹ See KY. REV. STAT. ANN. §§ 15.520(1)(h)(3)-(4) (Banks-Baldwin 2003) (requiring that complainants “be notified to appear. . .”).

²⁶² See 50 ILL. COMP. STAT. 725/3.10 (West 2003). See also DEL. CODE ANN. tit. 11, § 9206 (2003) (forbidding any evidence obtained in violation of its LEOBOR to be admitted in any proceeding).

²⁶³ KY. REV. STAT. ANN. § 15.520(1)(h)(9) (Banks-Baldwin 2003).

²⁶⁴ H.R. 1626, 107th Cong., 1st Sess. § 3(h)(17)(d) (2003).

²⁶⁵ CAL. GOV’T CODE § 3309.5(c) (West 2003); NEV. REV. STAT. § 289.120 (2003).

²⁶⁶ DEL. CODE ANN. tit. 11, §§ 9205(c)-(e) (2003); MD. ANN. CODE art. 27, §§ 730(e)-730(g) (2003); R.I. GEN. LAWS § 42-28.6-6 (2003).

²⁶⁷ *Id.*

²⁶⁸ NEV. REV. STAT. § 289.080(3) (2003).

²⁶⁹ See DEL. CODE ANN. tit. 11, §§ 9205(c)-(e) (2003); MD. ANN. CODE art. 27, §§ 730(e)-730(g) (2003).

evidence.²⁷⁰

(2) Commentary

On these issues it is probably better to specify standards rather than rules. Hearing officers or boards should have the powers necessary to fulfill their adjudicatory role and should follow procedures that promote fair administrative proceedings. Admirably, to ensure greater fairness, the federal bill would require that the procedures be developed by an agency other than the accused officer's police department.

Both sides should have ample opportunity to present evidence, examine, and cross-examine witnesses. A full record should be kept. The accused should receive written notice of the outcome and of his right to appeal to an appropriate tribunal.

It is difficult to select rules of evidence to be used in these hearings. The arguments for and against the admission of hearsay and documents are well developed elsewhere and typically have mixed results for all parties. If a LEOBOR adopted the procedures recommended in this Article, the exclusion of evidence acquired in violation of those procedures would be both rare and justified. Otherwise, exclusion in administrative hearings should be avoided in favor of appeals or weighing the prejudicial effect of evidence acquired in violation of LEOBORs, as is done in Kentucky. The disclosure of complainants' names is highly problematic.²⁷¹

b. Standard of Proof

(1) Typical Provisions

Only Delaware and the federal bill specify the standard of proof to be used in a misconduct investigation. Delaware requires that "guilt has been established by substantial evidence."²⁷² H.R. 1626 requires two different burdens of proof: clear and convincing evidence for charges that involve lying, fraud, moral turpitude, or criminal behavior, and preponderance of the evidence for all other charges.²⁷³

(2) Commentary

H.R. 1626 disregards the important interests of police officers, the government, and the public in requiring a higher standard of proof for internal discipline of "false statement or representation, fraud, dishonesty, deceit, moral turpitude, or criminal behavior."²⁷⁴ Preponderance of the evidence should be the standard of

²⁷⁰ VA. CODE ANN. § 9-1-504(B) (Michie 2003).

²⁷¹ See *infra* Part VI.E.

²⁷² DEL. CODE ANN. tit. 11, § 9205(e) (2003).

²⁷³ H.R. 1626, 107th Cong., § 3(h)(16) (2001).

²⁷⁴ *Id.*

proof in all hearings.²⁷⁵

6. Notice of Outcome

a. Typical Provisions

Like the federal bill, some state statutes require that the hearing officer or board issue a written notice of its final decision on each charge.²⁷⁶ Several states have a provision similar to that of Virginia, which provides: “[t]he recommendations of the hearing panel, and the reasons therefor, shall be in writing and transmitted promptly to the law-enforcement officer. . . .”²⁷⁷

b. Commentary

The requirement of notice of the final outcome of a disciplinary proceeding hardly needs comment. It represents fundamental fairness and does not operate as an impediment to police accountability.

7. Appeals of Discipline

a. Typical Provisions

Most LEOBORs and the pending federal bill provide a right of appeal of disciplinary actions.²⁷⁸ H.R. 1626 gives the officer the choice of either a “court of

²⁷⁵ There might be good cause for a clear and convincing evidence standard in cases that suggested an officer was being targeted unfairly for dismissal by an employer, say, by pursuing numerous minor charges against the officer and seeking discharge based on the accumulated infractions. However, it is difficult to formulate a rule that would target such instances aptly, and it is likely that the broad right to a hearing for any disciplinary action is enough to forestall such targeting. Schmidt, *supra* note 10, is silent on the issue of standard of proof.

²⁷⁶ H.R. 1626, 107th Cong., § 3(h)(15) (2001). *See also* MD. ANN. CODE art. 27, § 731 (2003) (requiring Maryland hearing boards to make findings of fact, to conduct a separate penalty hearing (if the officer is found guilty) to determine what his punishment should be, and to make a non-binding recommendation of discipline to the chief. The chief must review the entire record, meet with the officer again, and give him a chance to make a statement).

²⁷⁷ VA. CODE ANN. § 9-1-504(D) (Michie 2003). *See also* MD. ANN. CODE art. 27, § 731 (2003); R.I. GEN. LAWS § 42-28.6-11 (2003); W. VA. CODE § 8-14A-3(d)(4) (2003). Delaware requires that the officer receive a “copy of the decision or order accompanying findings and conclusions along with the written action and right of appeal, if any. . . .” DEL. CODE ANN. tit. 11, § 9207 (2003).

²⁷⁸ Maryland specifies that appeals of the board’s decision will go to the state circuit court for the county. MD. ANN. CODE art. 27, § 732 (2003). West Virginia calls the board’s decisions binding “unless it is overturned in the appeal process.” W. VA. CODE § 8-14A-3(e) (2003). It allows either the agency or the officer to appeal to either “the applicable civil service commission” or, for non-civil service departments, to the county circuit court. W. VA. CODE § 8-14A-5 (2003). *See also* KY. REV. STAT. ANN. §§ 15.520(2)-(3) (Banks-Baldwin 2003); R.I. GEN. LAWS § 42-28.6-12 (2003). Strikingly, Delaware does not require

competent jurisdiction” or an arbitrator as provided in a collective bargaining agreement or in any state administrative law.²⁷⁹

b. Commentary

The right to appeal a disciplinary action is a fundamental due process right. Though the basic right to appeal is no impediment to police accountability the specific appellate procedures used in many jurisdictions are widely regarded as such an impediment. Anecdotal evidence suggests that police officers who choose to appeal are highly successful in having sanctions overturned. It was widely reported that in Cincinnati, prior to the 2002 riot and the initiation of a federal “pattern or practice” suit, that the previous thirteen officers who had appealed their termination from the department had succeeded in having their terminations overturned.²⁸⁰

The apparent problem with the appellate process in Cincinnati and other jurisdictions lies in the process and not with the basic right to an appeal. For example, many observers believe that officers are represented by more experienced and competent counsel than are the city or county governments defending the personnel actions.²⁸¹ Some observers, meanwhile, believe that arbitrators have a natural tendency to “split the difference” and give something to each side – a practice that results in systematic mitigation of punishment.²⁸² Unfortunately, there is very little research on this critical aspect of police discipline procedures.

D. *Suspensions and other Adverse Actions*

Table 4 provides a summary of key aspects related to suspensions and adverse actions in the provisions of the fourteen state statutes.²⁸³

1. Suspension Pending Outcome of Investigation

a. Typical Provisions

Five LEOBORs allow a department to suspend an officer at any time if he “poses an immediate threat to the safety of that officer or others or the property of

the right to appeal, but only requires notice of the right to appeal “if any” exists. DEL. CODE ANN. tit. 11, § 9207 (2003).

²⁷⁹ H.R. 1626, 107th Cong., § 3(h)(20) (2001).

²⁸⁰ *Cincinnati Officer Acquitted in Killing That Ignited Riots*, N.Y. TIMES, Sept. 27, 2001, at A14.

²⁸¹ Interviews by the first author with officials and community activists in Cincinnati, Chicago and other communities. The point is purely anecdotal and needs to be investigated through the proper social science methods.

²⁸² *Id.*

²⁸³ See Tbl. 4, App. A.

others.”²⁸⁴ H.R. 1626 requires that the officer be paid during such suspension, but state laws vary on this point.²⁸⁵ Rhode Island has the most intricate statute concerning immediate suspension. It allows summary suspension for two days without pay for minor violations when the facts are not in dispute, and the officer may appeal.²⁸⁶ A Rhode Island chief may summarily suspend an officer when it is in the best interest of the public, but the officer must be paid during such emergency suspension.²⁸⁷ A department may suspend an officer awaiting a hearing, but must pay him.²⁸⁸ An officer who is suspended or dismissed by a hearing committee is not entitled to pay and benefits.²⁸⁹ However, an officer who is suspended following a felony indictment or a felony or misdemeanor conviction may keep his medical benefits and insurance during his suspension.²⁹⁰

b. Commentary

There is little room for controversy over authorizing a department to impose an immediate suspension, prior to a hearing but with pay, an officer who poses an immediate danger to the community. A department should also be allowed to immediately suspend an officer who has engaged in some gross misconduct, even if the officer does not pose an immediate threat to any other person. A particularly egregious use of excessive force, for example, might warrant an immediate suspension of an officer without pay, even if there is no probable cause to believe that the officer is likely to commit the same act again.²⁹¹ Due process

²⁸⁴ H.R. 1626, 107th Cong., § 3(a)(3) (2001). Maryland allows for summary punishment for minor offenses and emergency suspension when, in the chief’s view, it is in the best interest of the public. MD. ANN. CODE art. 27, § 734A (2003). The Virginia statute provides that officers may be immediately suspended without pay if their presence on the job is deemed to be a “substantial and immediate threat to the welfare of his agency or the public” and may be suspended for “refusing to obey a direct order issued in conformance with the agency’s written and disseminated regulations.” VA. CODE ANN. § 9-1-505 (Michie 2003). West Virginia permits “immediate temporary suspension, pending an investigation,” of any officer who shows up at work “under the influence of alcohol or controlled substances which would prevent the officer . . . from performing his duties . . . or under the influence of an apparent mental or emotional disorder.” W. VA. CODE § 8-14A-2 (2003). It also permits punitive action to be taken prior to a hearing “if exigent circumstances exist which require it.” W. VA. CODE § 8-14A-3(b) (2003).

²⁸⁵ The Virginia statute does not specify with or without pay (this provision says: “[n]othing in this chapter shall prevent the immediate suspension without pay . . .” VA. CODE ANN. § 9-1-505 (Michie 2003). Maryland allows immediate suspension *without* pay only when an officer has been charged with a felony. An officer may be suspended *with* pay when it “is in the best interest of the public and the law enforcement agency.” MD. ANN. CODE art. 27, §§ 734A-2, 734A-3 (2003).

²⁸⁶ R.I. GEN. LAWS § 42-28.6-13 (2003).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ The authors would like to thank Gennaco, *supra* note 125, for bringing their attention to this issue.

considerations dictate that the terms of such suspensions be spelled out in departmental rules and regulations. From an accountability perspective, a LEOBOR should not deprive a department of this power. Finally, departments should be allowed to suspend immediately (without pay) indicted officers until their hearing(s).

2. Personnel Records

a. Typical Provisions

Most LEOBORs forbid placing adverse material into an officer's personnel record unless the officer has been allowed to review the material.²⁹²

b. Commentary

Many LEOBORs provide appropriate rights to officers to see and respond to anything that goes into their personnel files. Some, however, define "personnel file" too broadly to include investigative files, databases, or any other records. The Maryland LEOBOR provides for personnel files' being expunged of complaints. Some files and databases are essential to the supervisors' management job and to the public interest in accountability. Such files and databases should not be counted as personnel files.

3. Punitive Reassignment and/or Extra Work

a. Typical Provisions

Three LEOBORs explicitly prohibit punishing officers with unpopular assignments. The California statute, for example, provides: "[n]o public safety officer shall be loaned or temporarily reassigned to a location or duty assignment if a sworn member of his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances."²⁹³ Delaware forbids compelling an officer "to work extra duty without compensation as a penalty for a disciplinary infraction."²⁹⁴ Rhode Island prescribes how long an officer may be suspended and whether he is suspended with

²⁹² H.R. 1626, 107th Cong. § 3(o) (2001). California, Delaware, Maryland, Minnesota, Nevada, New Mexico, and Rhode Island. California, New Mexico, and Nevada require that the officer sign the document, or that his refusal to sign be noted, and give the officer thirty days to attach a response. CAL. GOV'T CODE §§ 3305-06 (2003). Florida gives the officer the right to review his file at any reasonable time and to attach a concise response to anything he deems derogatory. FLA. STAT. ANN. § 112.533(3) (West 2003). Delaware and Maryland also require disclosure, but exempt the internal investigation and intelligence division files. DEL. CODE ANN. tit. 11, § 9201 (2003); MD. ANN. CODE art. 27, § 728(b)(12) (2003).

²⁹³ CAL. GOV'T CODE § 3303(j) (2003).

²⁹⁴ DEL. CODE ANN. tit. 11, § 9208 (2003).

or without pay based on the alleged infraction.²⁹⁵

b. Commentary

Punitive reassignment, for whatever reason, is repugnant to standards of fair play. At the same time, however, reassignment as a response to performance problems is a valuable, although underutilized aspect of police personnel systems. Police departments reassign personnel on a regular basis, usually under provisions specified by the collective bargaining agreement. However, in general, departments have not reassigned officers who are having performance problems from sensitive assignments. For example, patrol officers who accumulate many citizen complaints or who use force too frequently are often left in their assignments, where they could easily be transferred to assignments in which they would have minimal contact with the public. Early intervention (EI) systems are a new accountability mechanism designed to identify officers with persistent performance problems and to intervene to reduce those problems. Some EI systems call for transfer or reassignment of "problem officers" with documented performance problems.²⁹⁶

4. Statute of Limitations on Discipline

a. Typical Provisions

Some LEOBORs prevent imposing discipline after a certain amount of time has expired. Kentucky requires the dismissal with prejudice of any charges if a hearing is not held within sixty days of an officer's suspension.²⁹⁷ H.R. 1626 prevents a department from filing disciplinary charges if one year has passed since the alleged misconduct occurred²⁹⁸ or ninety days have passed since the start of an investigation.²⁹⁹ It alone imposes such a stringent limitation. The Maryland LEOBOR prohibits the filing of administrative charges more than one year after the act came to the agency official's attention, unless it involves criminal activity or excessive force.³⁰⁰

b. Commentary

Police departments should not be given an unlimited amount of time to hold a hearing after charges have been filed. Statutes of limitations alleviate potential

²⁹⁵ R.I. GEN. LAWS § 42-28.6-13 (2003).

²⁹⁶ Samuel Walker, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE (2003), available at <http://www.cops.usdoj.gov>.

²⁹⁷ KY. REV. STAT. ANN. § 15.520(1)(h)(8) (Banks-Baldwin 2003).

²⁹⁸ Or when the agency should have reasonably learned of the alleged misconduct. H.R. 1626, 107th Cong. § 3(h)(3) (2001).

²⁹⁹ H.R. 1626, 107th Cong. § 3(h)(3) (2001).

³⁰⁰ MD. CODE ANN., art. 27, § 730(b) (2003).

perpetual anxiety and prevent prosecutions based on stale evidence. At the same time, however, officers should not escape investigation and potential discipline solely because the department failed to meet a procedural deadline. Delay in investigating and resolving citizen complaints is a pervasive national problem. In some departments, many complaints are not resolved for over twelve months. In the most notorious instance, the previous civilian complaint review board in Washington, D.C., took more than three years to resolve many complaints.³⁰¹

These delays are often due to inadequate staffing of complaint investigation units, including both police internal affairs units and external civilian review boards. Some activists suspect that delays in some cases are part of a police department's deliberate strategy. Such factors should not allow officers to avoid investigation and discipline.

The public's and employer's interest in flexibility is greater when the allegation involves a direct effect on the public, as opposed to the violation of purely internal or personnel rules. For non-public, minor charges, the ninety-day/one-year limit might be appropriate. For public charges, the limitation should be as long as one year from the filing of charges or three years from the discovery of the incident.

5. Prohibitions on Retaliation

a. Typical Provisions

Most LEOBORs prohibit retaliatory punitive action, or threats of punitive action against police officers who are subject to misconduct investigations.³⁰² California and Nevada add protections for exercising any rights under internal grievance procedures. Nevada protects the officer's representative from retaliation for not disclosing confidential information.³⁰³

b. Commentary

Protection against retaliatory actions by an employer is a fundamental right and poses no barrier to police accountability. LEOBORs should, as most do, protect an officer from retaliatory actions by his employer for exercising his rights under the LEOBOR. They should also, as only one partially does,³⁰⁴ provide protections for "whistleblowers," those officers who report the misconduct of their supervisors, fellow officers, and/or union representatives.

E. Provisions Relating to Citizen Complaints

Table 5 provides a summary of key aspects related to citizen complaints in the

³⁰¹ WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

³⁰² California, Florida, Illinois, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, and Wisconsin, H.R. 1626. *See e.g.*, H.R. 1626, 107th Cong. § 3(1) (2001).

³⁰³ NEV. REV. STAT. § 289.080 (2003).

³⁰⁴ *See id.*

provisions of the fourteen state statutes.³⁰⁵

1. Existing Provisions

An important source of information about officer misconduct is the people served by a law enforcement agency.³⁰⁶ Improving the way police departments handle citizen complaints has been a decades-long priority for civil rights activists; it has also encountered strong resistance from police officers and their unions.³⁰⁷ Skeptics worry that citizen complaints are often frivolous or malicious, stemming from individuals' resentment at being stopped or caught, rather than any injustice or violation of rules.³⁰⁸ As a general matter, all LEOBORs insert themselves into this controversy by regulating how officers shall be investigated and disciplined. Some LEOBORs address this issue by explicitly regulating different aspects of the citizen complaint process.

H.R. 1626 has more provisions relating to citizen complaints than any of the state LEOBORs. Although some of the bill's provisions are very severe, there are a few state LEOBORs with even more restrictive provisions. The federal bill benignly requires every agency to adopt a "written complaint procedure" that (1) allows written citizen complaints to be submitted to any law enforcement agency, (2) provides public access to complaint forms and information about the process, and (3) requires complainants to be notified of the final disposition of the complaint and reasons for it.³⁰⁹ It is not clear whether these provisions are meant to exclude other possibilities, such as the receipt of complaints orally or by entities other than law enforcement agencies. Without clear language excluding these important alternatives, it can be assumed that the bill would allow such concurrent procedures.

More importantly, the federal bill allows an agency to discard a complaint without conducting an investigation if the allegations do not violate any laws (including, presumably, departmental regulations) or if the complainant "fails to comply substantially with the complaint procedure."³¹⁰ It also requires that investigations of citizen complaints begin within fifteen days of their being made.³¹¹ This last provision might seem to benefit members of the public by

³⁰⁵ See Tbl. 5, App. A.

³⁰⁶ See e.g., WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

³⁰⁷ See *supra* Section IV.A.

³⁰⁸ Senator John Edwards (Democrat-North Carolina) summarized this view in his statements supporting S. 490, the Law Enforcement Officers Due Process Act: "These complaints range from accusations that an officer took too long to arrive at a crime scene, used too much force, or was not forceful enough, to claims that the officer was rude or didn't show proper respect. Some complaints against officers are legitimate. However, some complaints are generated to intimidate an officer who is simply doing his or her job, into dropping charges." 147 CONG. REC. S2075 (daily ed. Mar. 8, 2003) (statement of Sen. Edwards), available at <http://www.sspba.org/edwards.htm>.

³⁰⁹ H.R. 1626, 107th Cong. § 3(d)(1) (2001).

³¹⁰ H.R. 1626, 107th Cong. § 3(d)(2)(B) (2001).

³¹¹ H.R. 1626, 107th Cong. § 3(d)(2)(A) (2001).

guaranteeing them speedier handling of complaints. However, it also benefits bad officers in busy departments by preventing investigations if one is not started within two weeks of the receipt of a citizen complaint.

Some states simply require agencies to have a written set of procedures for the investigation of complaints against officers,³¹² and to make them available to the public.³¹³ These basic requirements constitute the greatest support for civilian complaints to be found in LEOBORs.

Some LEOBORs impose certain restrictions on the filing of citizen complaints and/or on the complainants themselves. In Maryland, complaints alleging police brutality must be duly sworn and filed by the complainant, a family member, or a witness within ninety days of the incident.³¹⁴ Florida can charge a complainant with a first-degree misdemeanor³¹⁵ for failing to keep confidential the substance of the complaint and “all information obtained pursuant to the investigation by the agency of such complaint” until the investigation ceases to be active.³¹⁶

Kentucky, Maryland, and Rhode Island restrict the involvement of civilians in investigating police misconduct. Maryland forbids anyone other than a law enforcement officer or the state attorney general from interviewing or investigating police officers.³¹⁷ Rhode Island provides that “no law enforcement officer shall be compelled to speak or testify before, or be questioned by, any non-governmental agency.”³¹⁸ The former prevents the use of civilian investigators, like those employed by the Civilian Complaints Review Board in New York City. The latter would likely prevent the use of a civilian review boards, unless the legislature or the courts deemed it a governmental agency. Kentucky covers both by prohibiting officers from being compelled to speak or be questioned by “any person or body of a nongovernmental nature.”³¹⁹

No LEOBORs explicitly establish a right of civilians to make complaints confidentially or anonymously. To the contrary, in Florida, Illinois, Maryland, Minnesota, and New Mexico, the officer is entitled to learn/know the identity of the complainant(s).³²⁰ New Mexico is one of the few states with an exception, and

³¹² California, Florida, Nevada, and Virginia. *See e.g.*, CAL. GOV'T CODE § 832.5 (2003) (not part of the LEOBOR); NEV. REV. STAT. § 289.055 (2003).

³¹³ California, Nevada, and Virginia. *See, e.g., id.*

³¹⁴ MD. CODE ANN., art. 27, §§ 727(h), 728(b)(4) (2003).

³¹⁵ FLA. STAT. ANN. § 112.533(4) (West 2003).

³¹⁶ *Id.* at § 112.533(2)(a).

³¹⁷ MD. CODE ANN., art. 27, §§ 727(h), 728(b)(3) (2003).

³¹⁸ R.I. GEN. LAWS § 42-28.6-2(n) (2003).

³¹⁹ KY. REV. STAT. ANN. § 15.520(1)(g) (Banks-Baldwin 2003).

³²⁰ Florida does so by giving the officer access to “the complaint and all statements regardless of form made by the complainant and witnesses immediately prior to the . . . investigative interview.” FLA. STAT. ANN. § 112.533(2)(a) (West 2003). Illinois and New Mexico require that their police departments disclose the names of all known complainants to the officer. 50 ILL. COMP. STAT. ANN. 725/3.2 (West 2003); N.M. STAT. ANN. § 29-14-6 (Michie 2003). Minnesota prohibits interrogation of an officer (unless there is a signed, written complaint) and requires disclosure of the signed complaint prior to a hearing. MINN. STAT. ANN. § 626.89(5) (West 2003). Maryland requires that a complaint be “duly sworn to

allows a chief to prevent disclosure if it is necessary to protect an informant or would compromise the integrity of an investigation.³²¹ The right to confront witnesses against oneself is crucial to a fair trial, but the LEOBORs do not adequately address or deal with the potential for officers to intimidate and retaliate against complainants.³²²

A few states regulate how or for how long a complaint must be kept on file. California mandates a minimum of five years.³²³ Virginia requires the agency to assist individuals in filing complaints and to maintain “adequate” records on the nature and disposition of the cases.³²⁴ Maryland allows an officer to have his file expunged three years after dismissal or a finding of not guilty.³²⁵

Instead of complicating/burdening the handling of complaints with time limits and other restrictions, LEOBORs should promote police integrity through a robust regime of standards for the processing and investigation of complaints according to widely known best practices.³²⁶ An LEOBOR should state that the authorities will accept anonymous and oral complaints; that citizens can file complaints at libraries and similarly welcoming spots, as well as at police stations; and that complaint procedures and forms must be available on the Internet, at schools, and in other community centers.

2. Commentary

Imposing criminal penalties for filing false complaints raises potential First Amendment issues. A citizen complaint against a police officer is, in effect, a petition for redress to the government, which the First Amendment specifically protects.³²⁷ The Florida provision penalizing a complainant for disclosing the nature of his complaint violates the complainant’s freedom of speech under the First Amendment.

Limitations on the retention of citizen complaints and related information pose a barrier to one of the most important new police accountability mechanisms: Early

before an official authorized to administer oaths” in order for it to go before a hearing committee. MD. CODE ANN., art. 27, § 728(b)(4) (2003).

³²¹ N.M. STAT. ANN. § 29-14-4(c)(2) (Michie 2003). *See also* MD. ANN. CODE art. 27, § 728(b)(5)(iii)(1) (2003) (excluding confidential sources).

³²² For example, the New Jersey Attorney General’s final report on the state police reported two instances of retaliation. In one, a trooper appeared as a witness on behalf of a fellow trooper who was a defendant in a municipal case. After the proceeding, the trooper who appeared as a witness pulled over the complainants for a traffic violation one mile from the courthouse. The trooper, who was out of his assigned area, claimed he did not recognize the complainants. In another retaliation incident, a trooper changed a warning to a summons when the mother of the person he had stopped called to complain about the stop. JOHN J. FARMER, JR. & PAUL H. ZOUBEK, FINAL REPORT OF THE STATE POLICE REVIEW TEAM 94 (July 1999), available at http://www.state.nj.us/lps/Rpt_ii.pdf.

³²³ CAL. PENAL CODE § 832.5(b) (West 2003).

³²⁴ VA. CODE ANN. § 9-1-600(B)(3) (Michie 2003).

³²⁵ MD. CODE ANN., art. 27, § 728(b)(12)(ii) (2003).

³²⁶ *See* WALKER, POLICE ACCOUNTABILITY, *supra* note 8.

³²⁷ U.S. CONST. amend. I.

Intervention Systems (EISs). EISs are data-based management tools containing systematic information of officer performance, including, but not limited to, citizen complaints, officer use-of-force reports, and officer involvement in civil litigation. Police managers analyze officer performance data for the purpose of identifying those officers who appear to have repeated problems when dealing with citizens. Identified officers are then subject to some form of informal, non-disciplinary intervention designed to correct their performance problems. Insofar as a LEOBOR limits the data that can be entered into an EIS database, it limits the utility of the system.

VII. CONCLUSION

A. *Summary of Findings*

This Article has reviewed the provisions of the existing fourteen state LEOBORs and a pending bill in Congress. Many, if not most, of the provisions of the current state statutes are consistent with basic standards of due process and pose no barrier to police accountability. The proposed federal legislation is, however, far more problematic. Providing officers with formal notice of charges against them, for example, or providing them with representation at interrogations, and prohibiting abusive or threatening remarks are appropriate in any personnel system that respects the rights of its employees.

The potential impediments to police accountability are limited primarily to five provisions found in some LEOBORs and the pending federal bill. These provisions include: (1) language that sets the scope of the LEOBORs too broadly, such that it might apply to routine supervisory activities; (2) formal waiting periods that delay investigations; (3) prohibitions on the use of non-sworn investigators in misconduct investigations; (4) pre-disciplinary hearings that include rank-and-file officers on the hearing board; and (5) statutes of limitations on the retention and use of data on officer misconduct. Other problems include: the failure to allow for reasonable exceptions to provisions regulating the time, place, and manner of investigative interviews; excessive limitations on how many officers can participate, how many can speak at one time, and the use of “foul” language; requiring the disclosure of the names of complainant(s) in every case; overlybroad definitions of “personnel files,” to which officers have access and/or to which they can contribute; very short statutes of limitations on prosecutions; lack of emergency suspension provisions; and the lack of protections for whistleblowers.

The United States has become a rights-oriented society, committed to the protection of individual rights. Conservative critics of the contemporary rights culture have argued for decades that excessive regard for individual rights cripples the effective administration of major social institutions, such as public schools, the police, and prisons.³²⁸ In current controversies over police misconduct, civil rights advocates have argued that regard for the rights of police officers has impeded efforts to hold the police accountable, and in particular to reduce misconduct that

³²⁸ MARY ANN GLENDON, RIGHTS TALK 109-110 (1991).

not only violates the dignity of individual victims, but also is disproportionately visited upon poor people and members of racial and ethnic minority groups. The purpose of this Article has been to examine the content of LEOBORs in order to determine whether any specific protections of police officers' rights do in fact, or at least potentially, impede efforts to reduce misconduct.

Our conclusion is a mixed one. The majority of LEOBOR provisions are reasonable, even laudable, in a society committed to the protection of individual rights. Police departments' power to discipline police officers is like other forms of power. It can be used for good or evil. It can be abused through overutilization or underutilization. Police officers are like other employees that depend on their supervisors' approval for their continued employment and advancement. Although police officers do not have the bargaining disadvantages that at-will officers once had, they still face a powerful foe when their employer becomes an adversary. Police officers are required to follow rules such as wearing their hats at all times, trimming their hair, or residing within city limits. Many people would not abide by these rules, even without the more serious stresses and dangers associated with the job. Especially when charged with violations of rules of a purely organizational or internal character, our society should protect police officers from arbitrary or excessive discipline.

However, when interacting with the public, police officers actualize the special powers and discretion that our democratic society entrusts to them. They must let transparency, the rule of law, and the public interest in accountability govern their actions. They are not unprotected when accused of breaking that trust, but the public's need for truth, liberty, and order weigh against additional, special protections for officers.

B. *Future Research and Policy Development*

As an initial assessment of the impact of LEOBORs on police accountability, this Article has merely touched the surface of a complex subject. More empirical research and discussion of policy alternatives are necessary.

1. Research Needs

The Article consists of a content analysis of LEOBORs and a discussion of the probable effect(s) of various provisions on police accountability. Empirical research on the actual, day-to-day impact of LEOBORs and police unions on police disciplinary procedures is necessary. We do not know, for example, how various provisions affect accountability in practice, whether certain provisions are more pernicious than others, or whether other factors, such as the prevailing organizational culture, mediate the impact of certain provisions. One real possibility is that officers invoke formal rights on a systematic basis, even if only for the purpose of delay, thereby impeding and undermining the disciplinary process. The question of whether this occurs demands empirical investigation. Perhaps potentially troublesome provisions have a less serious effect on agencies

with generally high standards of accountability than on agencies with poor records on accountability. Although such evidence might not alter the conclusion that it is bad policy to have such provisions on the books, it would nonetheless put the provisions' relative danger in proper perspective.

LEOBORs are only one of the formal mechanisms protecting the rights of police officers that have a potentially adverse effect on accountability. As mentioned at the outset of this Article, local collective bargaining agreements are also very important in this regard and, indeed, many contain their own bills of rights. A content analysis of police collective bargaining agreements is currently underway.³²⁹ Empirical research on the day-to-day impact of various provisions of these agreements is necessary.

Additional research is also needed on the impact of state and local civil service statutes on police accountability. State procedures governing the appeal of police officer disciplinary cases are of particular concern. There is considerable anecdotal evidence that arbitration procedures in particular mitigate formal disciplinary actions to an unhealthy extent.³³⁰

2. Policy Development

This Article has identified five provisions of LEOBORs with a particularly detrimental effect on police accountability. This evidence suggests on its face that such provisions should be removed from those statutes where they currently exist. To reiterate, it is *not* that statutory protections of police officers' rights are inherently offensive to police accountability. The problems are located in particular provisions that exist in certain state LEOBORs.

Removing an existing LEOBOR provision raises significant legislative and political challenges. Only rarely have police unions given up an existing provision. Those events have occurred only in the context of extremely local, and often bitterly fought, controversy over misconduct, as with New York City's 48-hour rule.³³¹ As noted in Section IV, the development of LEOBORs to date has largely involved a two-party struggle between rank-and-file officers and police managers. The interests of the public have rarely been an active factor. The terms of the debate change when we introduce the public interest in enhancing police accountability by ensuring that law enforcement agencies are fully capable of investigating alleged misconduct and appropriately disciplining officers who are

³²⁹ KADLECK & WALKER, *supra* note 3.

³³⁰ Interviews by the first author with officials and community activists in Cincinnati, Chicago and other communities. The point is purely anecdotal and needs to be investigated through the proper social science methods.

³³¹ In 1996, the City of Seattle eliminated the extraordinary practice of not allowing face-to-face interviews with officers under investigation and allowing only written interrogatories. It appears, however, that this was a practice that developed independent of a collective bargaining agreement. As a result of the political pressures resulting from a major corruption scandal, the practice was eliminated. SEATTLE POLICE DEPARTMENT, ACCOUNTABILITY ACTION PLAN (Sept. 21, 1999) (on file with the Boston University Public Interest Law Journal).

found “guilty.” The public interest in ensuring fair and effective police discipline dictates that law enforcement agencies be capable of disciplining officers, while respecting the basic due process rights of officers under investigation.

This Article found several provisions of LEOBORs that are ambiguous and consequently open to legitimate misunderstanding. Particularly important is the issue of when a supervisor’s questions move from the realm of legitimate supervision into an investigation of a specific allegation of officer misconduct. In an important policy initiative arising out of a suit by officers, the Office of Internal Review (OIR) in the Los Angeles Sheriff’s Department took the lead in providing training to department “executives, supervisors, and investigators” regarding officers’ rights under applicable law and contract provisions. The OIR found that “the relevant law and its application have considerable gray area”³³² Given the complexity of the law of officers’ rights, the training program instituted by the LASD is one that other law enforcement agencies could and should emulate.

This Article’s policy implications are substantial. The last decade has witnessed the emergence of important new initiatives related to police accountability. A nationally recognized set of best practices related to police accountability has emerged.³³³ These practices include a comprehensive use-of-force reporting system, an open and accessible citizen complaint procedure, and an early intervention system (EIS) for identifying officers with performance problems. These best practices are embodied in the consent decrees and memoranda of understanding brought by the U.S. Justice Department under Section 14141 of the 1994 Violent Crime Control Act.³³⁴ While those best practices are designed to enhance the investigation and punishment of officers who are guilty of misconduct, their effectiveness may be blunted, if not nullified, by the inappropriate provisions of LEOBORs identified in this Article.³³⁵

³³² LOS ANGELES SHERIFF’S DEP’T OFFICE OF INTERNAL REVIEW, SECOND ANNUAL REPORT (2003), at 39-40, available at <http://www.laoir.com>.

³³³ See WALKER, POLICE ACCOUNTABILITY, *supra* note 8; Livingston, *Department of Justice*, *supra* note 8.

³³⁴ 42 U.S.C. § 14141 (2003).

³³⁵ See CONFERENCE ON POLICE PATTERN OR PRACTICE LITIGATION, *supra* note 13.