

LAW ENFORCEMENT PERSPECTIVES ON PUBLIC ACCESS TO MISCONDUCT RECORDS

Rachel Moran[†] and *Jessica Hodge*[†]

TABLE OF CONTENTS

INTRODUCTION.....	102
I. CONTROVERSIES SURROUNDING DISCLOSURE LAWS	107
II. SURVEY AND PHONE INTERVIEWS	116
A. <i>The survey</i>	116
B. <i>Phone interviews</i>	120
III. RESULTS AND FINDINGS	121
A. <i>Survey results</i>	121
1. Harms	121
2. Benefits.....	124
3. Reasons for providing records.....	127
4. Circumstances in which disclosure should not be permitted....	128
5. Additional thoughts	129
B. <i>Interview Results</i>	130
1. Harms	130
2. Benefits.....	132
3. Reasons for disclosure.....	134
4. Situations in which disclosure should not be permitted	136
5. Comparison to other administrators and officers	139

[†] Associate Professor, University of St. Thomas (MN) School of Law. Thank you to my fellow Bellow Scholars and advisors Anna Carpenter, Colleen Shanahan, Rebecca Sandefur, Nermeen Arastu, Daria Fisher Page, Fatma Marouf, Alyx Mark, Margo Lindauer, and Mary Spector; Clinical Law Review Writer’s Workshop reviewers Amna Akbar, Ji Seon Song, Russell Gabriel, Madalyn Wasilczuk, and Karen Pita Loo; Michael Robak and Nicole Catlin for their research and project management support; Amelia McNamara for her statistical analysis suggestions; and research assistants Joseph Strand, Stephanie Luhring, Kailey Meadows, Megan Kratzke, and Lulu Regules Verduzco.

[†] Associate Professor, Sociology & Criminal Justice Department, University of St. Thomas (MN).

IV. SIGNIFICANT FINDINGS AND SUGGESTIONS	142
CONCLUSION.....	147
APPENDIX A	147
Introductory Email.....	147
APPENDIX B.....	148
Informed Consent Language	148
Law Enforcement Perspectives of Public Access to Police Misconduct Records.....	148
APPENDIX C.....	149
Survey.....	149
APPENDIX D	152
Phone Interview Script	152
Interview Guide	152
Law Enforcement Perspectives of Public Access to Police Misconduct Records.....	152
APPENDIX E.....	153
Reminder Email.....	153

INTRODUCTION

Law enforcement officers around the country are accused of misconduct every day. Their misconduct is alleged and documented in the form of civilian complaints, internal affairs reports, performance reviews, disciplinary board findings, body camera footage, and other records. These misconduct records contain information that is arguably both relevant to the public's interest in holding law enforcement officers accountable and personal to the officer. The question of who may access these records is highly controversial and hotly disputed.¹ Laws protecting misconduct records from disclosure are often enacted at the behest of law enforcement unions who claim that public access would seriously harm officers in the form of loss of privacy, damage to reputation, and even physical danger via retaliation.² Conversely, transparency advocates

¹ See *infra* Part I.

² E.g., Verified Petition, *Patrolmen's Benevolent Ass'n of N.Y. v. de Blasio* (No. 1) (Apr. 10, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/04/Patrolman-v-DeBlasio.pdf> [<https://perma.cc/KH6X-CA6Z>]; *Walnut Creek Police Officers Ass'n v. City of Walnut Creek*, No. N19-0109 (2019) (order denying preliminary injunctions), https://www.aclunc.org/docs/SB_1421_Order_2.8.2019.pdf [<https://perma.cc/K62Y-F7Z4>]; Liam Dillon, *Here's How California Became the Most Secretive State on Police Misconduct*, LA TIMES (Aug. 15, 2018, 3:00 AM), <http://www.latimes.com/politics/la-me-california-police-discipline-secret-20180815-story.html#>

argue that preventing public access to these records disincentivizes reform and creates environments where abusive departments and officers remain unaccountable.³

What is missing from these heated debates is data. The notion that disclosure of misconduct records will inevitably harm officers is, as one criminologist has explained, “based on a total lack of data.”⁴ The assumption that public access to misconduct records harms officers has fueled laws preventing public access to the records, with little inquiry into whether that assumption is supported by fact.⁵ Similarly, while proponents of transparency argue that disclosure of records will improve accountability, they rarely cite more than anecdote to support their position.⁶ Though policing scholars have acknowledged officers’ claims

[<https://perma.cc/6B2T-GTLP>]; Katherine Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 126–28 (2017); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154 (1999); *Prisoners’ Legal Servs. v N.Y. State Dept. of Correctional Servs.*, 73 N.Y.2d 26, 31–32 (1988); *Md. Dep’t of State Police v. Dashiell*, 443 Md. 435, 455 (2015); *see also* Benjamin Levin, *What’s Wrong With Police Unions?*, COLUM. L. REV. 120: 1333, 1337 (2020) (discussing the power of police unions and reasoning that “because police are a more powerful lobby, politicians are more likely to support pro-police policies that hamper accountability”).

³ See Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Disciplinary Records from the Public*, 22 CUNY L. REV. 148, 175 (2019); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1199, 1210–11, 1239 (2017); Melody Gutierrez, *Stephon Clark Killing Prompts Bid to Open Police Disciplinary Records*, SAN FRAN. CHRON. (Apr. 9, 2018), <http://www.govtech.com/em/disaster/Stephon-Clark-Killing-Prompts-Bid-to-Open-Police-Disciplinary-Records.html> [<https://perma.cc/UL88-UHGC>]. Professor Moran has previously written about the systemic concerns associated with lack of access to information regarding officer misconduct. See Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153 (2019); Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339 (2018); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837 (2016).

⁴Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers’ Names*, WASH. POST (Feb. 24, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names> [<https://perma.cc/K78B-PDYE>] (quoting John Worrall, professor at University of Texas at Dallas). Professor Moran spoke with Professor Worrall in late 2018 and he was unaware of any subsequent research into this issue since his 2016 statement. The authors’ own research and interdisciplinary literature review have similarly failed to uncover any attempts to gather data on this topic.

⁵ See Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 157–58 (2019) (describing genesis of laws in California and New York preventing access to misconduct records); *see also infra* Part I (detailing various proposals restricting access to misconduct records on theory that public access endangers officers).

⁶ Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Disciplinary Records from the Public*, 22 CUNY L. REV. 148 (2019); Cynthia Conti-Cook & Dan Quart, *Holding law enforcement accountable begins with full repeal of 50-a*, CITY & STATE NY, (Feb. 6, 2019), <https://www.cityandstateny.com/articles/opinion/opinion/full-repeal-50a-nypd-oversight.html> [<https://perma.cc/3DN7-WSZP>]; Stephanie Wykstra, *In Response to Police Misconduct, a Flourishing of Online Databases*, SALON (June 8, 2019), https://www.salon.com/2019/06/08/in-response-to-police-misconduct-a-flourishing-of-online-databases_partner [<https://perma.cc/D3XM-HK4J>]; *see also infra*, Part I.

that disclosure of misconduct records will harm them in some way,⁷ few or none have empirically studied the issue of whether permitting public access to officer misconduct records either harms officers or benefits the law enforcement agency and the public they ostensibly serve.

This article begins filling that research void. Over the summer of 2019, the authors—a law professor who has published multiple articles on the topic of police accountability and access to misconduct records, and a criminologist with experience surveying law enforcement officials—surveyed 344⁸ law enforcement administrators (primarily police chiefs and sheriffs) in twelve states that permit public access to some or all law enforcement misconduct records. The survey⁹ allowed administrators to respond anonymously to a variety of questions regarding whether they disclose misconduct records to the public and, if so, how disclosure has harmed or benefitted their law enforcement agency or the community it serves. The survey asked administrators to provide specific examples of both harms and benefits.¹⁰ The survey also asked administrators to explain why they release records to the public: whether they do so simply because it is required by law, or whether they have other reasons for providing the records, including a desire to satisfy the demands of media or advocacy groups or a belief that the public has a right to know.¹¹

In addition to the anonymous survey, Professor Moran also completed follow-up phone interviews during the summer and fall of 2019 with thirty-three survey respondents.¹² These interviews provided deeper insight into administrators' experiences with and beliefs about the benefits and harms of making law enforcement misconduct records accessible to the public.

The results of both the survey and follow-up interviews are enlightening.¹³ Contrary to the popular narrative that most or all law enforcement officials oppose public access to misconduct records, the survey revealed deep divisions in administrators' opinions on this topic.

⁷ *E.g.*, Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 752 (2017) (noting that police officers believe public access to misconduct records could damage officers' reputations and "might facilitate reprisals if the officer's name and home address are released."); Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 845 (2019).

⁸ More than 400 administrators responded to the survey, but some only completed portions of the survey. For the sake of consistency in evaluating responses we include only those respondents who completed the entire survey.

⁹ The survey questions are reproduced in full in Appendix C.

¹⁰ *Id.*

¹¹ For a full list of questions in the survey and possible responses from administrators, please see Appendix C.

¹² As described in Part II, *infra*, these administrators all volunteered to participate in follow-up phone conversations. A script for the phone interviews is reproduced in Appendix D.

¹³ All responses from both the survey and phone interviews are saved on file with the authors.

More administrators than not said they support laws requiring public access to misconduct records, and many said they would favor disclosure even if not required by law.¹⁴ Twenty-four percent of respondents identified that disclosing records benefitted their law enforcement agencies or communities, while only sixteen percent said disclosure harmed their officers.¹⁵ Of the administrators who said their officers were harmed by disclosure of misconduct records, most of this harm came in the form of damaged reputation or embarrassment.¹⁶ Only one of the 344 respondents indicated that an officer had experienced physical harm as a result of disclosure, and it was unclear from the response whether the incident involved actual or threatened physical harm.¹⁷

While a significant percentage of administrators expressed support for public access to misconduct records, others voiced distrust and frustration over the media misconstruing misconduct records,¹⁸ and said public access enables uninformed criticism of officers.¹⁹ This group also voiced concern that people requesting or reviewing the records seemed uninterested in ascertaining the truth and were simply digging for information that could discredit their officers.²⁰

The administrators who participated in voluntary follow-up phone interviews expressed a strong preference for transparency and disclosure of misconduct records.²¹ Of the thirty-three respondents, nearly two-thirds said that their departments had benefited from disclosing misconduct records to the public, while only seven said their officers had been harmed by disclosure.²² More than half expressed a personal preference for making misconduct records accessible to the public, and many believed that open records policies enhance community trust and

¹⁴ All survey results are saved on file with the authors. The results are discussed in greater detail *infra* Part III.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Specifically, this respondent noted only that the officer had suffered “[p]hysical and verbal harassment.” *Id.*

¹⁸ All survey responses are saved on file with the authors.

¹⁹ For example, one respondent wrote, “Nobody is perfect, we all make mistakes, but the media loves to destroy our reputation over any little thing they can find.” Another noted, “Public misconstrued record fueled by media misinformation.”

²⁰ One respondent complained, “An officer is pre-judged by social media or main stream media; the posters come out with their own version of the truth. Post investigation which reveals the officer was in compliance with law and policy; the posters come out with ‘cover-up’ allegations . . . the problem is truth is not the goal of those who seek to harm law enforcement entities.”

²¹ Detailed notes from all thirty-three phone interviews are saved on file with the authors.

²² *Id.*

serve as a mechanism for holding officers accountable.²³ A surprising number also volunteered that they had observed a generational shift in attitudes toward disclosure.²⁴ These respondents said that, while previous generations of law enforcement administrators consistently opposed disclosure, today's administrators are increasingly recognizing that the public has both an expectation and a right to access information about officers in their community.²⁵ Several administrators acknowledged that their views on the topic of disclosing misconduct records varied from their rank-and-file officers, and bemoaned that administrators' voices are rarely heard in the discourse surrounding whether these records should be accessible to the public.²⁶

This article discloses the results of our research. It does so in four parts. Part I examines the current controversies surrounding access to misconduct records, as well as the laws and policies animating these debates. Part I also describes recent theoretical scholarship around these issues and the absence of empirical research supporting advocates and scholars on either side of the debates.

Part II describes the survey itself in greater detail, the methodologies employed in creating and distributing the survey, and the structure and substance of the follow-up phone interviews. Part II also provides demographic statistics regarding the administrators who responded to both the surveys and phone interviews.

Part III discusses the results of both the survey and phone interviews, particularly highlighting results that contradict popular narratives surrounding law enforcement attitudes toward and experiences with release of misconduct records to the public. Finally, Part IV summarizes the major takeaways from this research project and how its results might influence law enforcement agencies, advocates, legislatures, courts, and other policymakers moving forward.

²³ To quote one administrator, "I think it's a good thing when the public can see the degree of thoroughness and the comprehensive approach we take to investigating complaints no matter how they turn out. When they see that we take complaints seriously and we investigate them seriously, I think that builds trust and enhances the credibility of the department."

²⁴ All responses are saved on file with the authors.

²⁵ *Id.* One administrator described "an evolution happening between the old school chiefs who are more likely to be resistant to any disclosure . . . and this kind of new wave of up and coming or younger chiefs that tend to see things . . . in a little bit of a different light." Another noted, "I think that there is probably a growing acquiescence that we need to accept [disclosure] is the way of the world now." *Id.*

²⁶ As one commented, "[W]e don't frequently get to share our thoughts on this topic." *Id.*

I. CONTROVERSIES SURROUNDING DISCLOSURE LAWS

While law enforcement misconduct has plagued many communities for decades,²⁷ it has begun attracting more consistent national attention in the last six years or so. Many cite the shooting death of eighteen-year-old Michael Brown at the hands of Ferguson police officer Darren Wilson, subsequent nationwide protests, and the rising prominence of the Movement for Black Lives—particularly after the killing of George Floyd under the knees of Minneapolis police²⁸—as catalysts of this change.²⁹ While some still dismiss law enforcement misconduct as limited to a few “bad apple” officers,³⁰ growing bodies of research

²⁷ E.g., Ricardo Lopez, *Minnesota’s Decades-Long Failure to Confront Police Abuse*, THE NEW YORKER, June 10, 2020, <https://www.newyorker.com/news/news-desk/minnesotas-decades-long-failure-to-confront-police-abuse> [<https://perma.cc/DW9E-UXGH>]; Chicago Tribune Staff, *Jon Burge and Chicago’s Legacy of Police Torture*, CHI. TRIB., Sept. 19, 2018, 12:22 PM, <https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html> [<https://perma.cc/74E5-LRRK>] (detailing Chicago Police Department’s history of torturing black men); Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, <https://www.nytimes.com/1992/04/30/us/the-police-verdict-los-angeles-policemen-acquitted-in-taped-beating.html> [<https://perma.cc/N4X6-YL4F>] (describing acquittal of Los Angeles police officers in violent beating of Rodney King); Press Release, U.S. Dep’t of Justice, *Three Atlanta Police Officers Charged in Connection with the Fatal Shooting of an Elderly Atlanta Woman* (Apr. 26, 2007), https://www.justice.gov/archive/opa/pr/2007/April/07_crt_299.html [<https://perma.cc/XZ45-CFK5>] (U.S. attorney denouncing “culture of misconduct” with Atlanta police department); U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2*, 15 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/9YZG-GLMJ>] (noting that Ferguson Police Department’s pattern of “unconstitutional policing” has been unchecked for many years); U.S. DEP’T OF JUST., *INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 12–24* (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/8SM9-TVC9>] (detailing patterns of abuse by Cleveland police officers).

²⁸ Paul P. Murphy, *New Video Appears to Show Three Police Officers Kneeling on George Floyd*, CNN, Jun. 3, 2020, 8:13 PM, <https://www.cnn.com/2020/05/29/us/george-floyd-new-video-officers-kneel-trnd/index.html> [<https://perma.cc/SL5U-XL6S>].

²⁹ See Timothy Williams & John Eligon, *The Lives of Ferguson Activists, Five Years Later*, NY TIMES, Aug. 9, 2019, <https://www.nytimes.com/2019/08/09/us/ferguson-activists.html> [<https://perma.cc/ZA2M-5VQM>] (describing Michael Brown’s shooting and subsequent protests as “the beginning of a social justice movement that would sweep the nation”); Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES, Nov. 26, 2014, <https://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html> [<https://perma.cc/NH59-VUMC>] (discussing public reaction to the shooting death of Michael Brown); Wesley Lowery, *Why Minneapolis Was the Breaking Point*, THE ATLANTIC, Jun. 10, 2020, <https://www.theatlantic.com/politics/archive/2020/06/Wesley-lowery-george-floyd-minneapolis-black-lives/612391> [<https://perma.cc/7KZX-ZCKX>]; *About Us*, THE MOVEMENT FOR BLACK LIVES, <https://m4bl.org/about-us> [<https://perma.cc/SJ7N-U25M>] (last visited Nov. 4, 2020).

³⁰ See Kristine Levan & Kelsey Stevenson, *There’s Gonna Be Bad Apples’: Police–Community Relations through the Lens of Media Exposure Among University Students*, 8 THE INT’L J. FOR CRIME, JUST., AND SOC. DEMOCRACY 83, 94 (2019); Editorial Board, *Investigate Policing*

indicate that many law enforcement agencies engage in systemically problematic practices including racially discriminatory stops and searches,³¹ use of excessive force,³² and unwillingness to investigate or discipline officers with lengthy histories of misconduct.³³

in the USA: Our View, USA TODAY, Apr. 17, 2017, <https://www.usatoday.com/story/opinion/2017/04/17/investigate-policing-in-the-usa-editorials-debates/100423136> [https://perma.cc/SW6F-QYYB] (describing then-Attorney General Jeff Sessions's adoption of the "bad apples" approach to addressing police misconduct).

³¹ New York City's stop-and-frisk policy, which a federal court found disproportionately targeted people of color, is probably the best-known example. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013); see also U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 18 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/9YZG-GLMJ] (describing Ferguson Police Department's history "suspicionless, legally unsupported stops" of black residents); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUMAN BEHAVIOR 736, 736–39 (2020) (describing study showing that police are far more likely to pull over black drivers than white); INTER-AMERICAN COMM'N ON HUM. RTS., AFRICAN AMERICANS, POLICE USE OF FORCE, AND HUMAN RIGHTS IN THE UNITED STATES 77 (2018) (citing "strong evidence" that police disproportionately stop and arrest people of color).

³² INTER-AMERICAN COMM'N ON HUM. RTS., AFRICAN AMERICANS, POLICE USE OF FORCE, AND HUMAN RIGHTS IN THE UNITED STATES 58–65 (2018) (summarizing multiple sources describing police systematically using excessive force on people of color); U.S. DEP'T OF JUST., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 12–24 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/8SM9-TVC9] (detailing patterns of excessive force by Cleveland police officers); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 3–9 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [https://perma.cc/FGF3-7M7U] (detailing patterns of unreasonable force by New Orleans police officers); *Officer Involved: A KPCC Investigation Into Police Shootings in Los Angeles County*, KPCC, <https://projects.scpr.org/officer-involved/#0> [https://perma.cc/BE2H-JJ4B] (last visited Nov. 4, 2020) (detailing Los Angeles Police Department's disparate use of fatal force on black people).

³³ See *Noble v. City of Camden*, 112 F. Supp. 3d 208, 217–18 (D.N.J. 2015) (citing statistics showing that Camden, New Jersey Police Department received 174 complaints of excessive force and investigated only six); U.S. DEP'T OF JUST., INVESTIGATION OF ALBUQUERQUE POLICE DEPARTMENT 23–29 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf [https://perma.cc/8K54-PYZH] (finding that Albuquerque Police Department routinely approved officers' obviously excessive uses of force); Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY, Oct. 17, 2019, <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001> [https://perma.cc/APU2-2T39] (investigation identifying "at least 1,200 officers with proven histories of lying and other serious misconduct who had not been flagged by prosecutors"); Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS, Mar. 5, 2018, https://www.buzzfeed.com/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious?utm_term=.qumQJgADK#.fjrOLAKaz [https://perma.cc/RQ4S-ZDSG] (detailing numerous NYPD officers who had committed serious misconduct but retained their jobs); see also Osagie K. Obasogie, *The Bad-Apple Myth of Policing*, THE ATLANTIC, Aug. 2, 2019, <https://www.theatlantic.com/politics/archive/2019/08/how-courts-judge-police-use-force/594832> (debunking the notion that police violence is limited to a few bad actors) [https://perma.cc/T6F4-PZK7].

As concerns over law enforcement misconduct have risen, so too have questions regarding existing mechanisms for holding law enforcement agencies and individual officers accountable.³⁴ States take a wide variety of approaches to the question of whether law enforcement misconduct records are accessible to the public. Some states prevent the public from accessing virtually any law enforcement misconduct records, outside certain litigation contexts.³⁵ Other states grant public access to a limited category of misconduct records (*e.g.*, only those involving sustained findings of misconduct and resulting discipline to the officer) but deny access to most others.³⁶ A minority make all or a substantial portion of misconduct records presumptively available to anyone who requests them.³⁷ In 2015, WNYC News published a fifty-state survey summarizing each state's approach to whether law enforcement disciplinary records are available to the public.³⁸ Though at least two states have modified their records laws substantially in the five years

³⁴ While access to misconduct records is the focus of this article, it is certainly not the only option for holding police officers accountable. Other scholars have proposed, for example, abolishing qualified immunity (*see* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018)); requiring mandatory professional liability insurance for police (*see* Deborah Ramirez et al., *Policing the Police: Could Mandatory Professional Liability Insurance for Police Provide a New Accountability Model?*, 45 AM. J. CRIM. L. 407 (2019)); organizing regular public observation of police (*see* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016)); and improving the civilian review process (*see* Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033 (2016)), to name just a few proposals.

³⁵ *E.g.*, N.Y. CIV. RIGHTS LAW § 50-a(1) (repealed 2020); DEL. CODE ANN. tit. 11, § 9200(d) (2018).

³⁶ *E.g.*, MD. CODE ANN., GEN. PROVISIONS §§ 4-301, -311 (2018); IOWA CODE § 22.7(11)(a)(5) (2018) (permitting disclosure of disciplinary records resulting in discharge or demotion); N.C. GEN. STAT. §§ 153A-98(a)–(b) (2018) (protecting personnel files and disciplinary records from disclosure, but permitting disclosure of limited information pertaining to dismissal, suspensions, or demotions); OKLA. STAT. ANN. tit. 51, § 24A.7 (2014) (making personnel and disciplinary records confidential except to the extent they pertain to “final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination”); 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(7)(viii) (2009) (exempting information pertaining to criticism, demotion, discipline, or discharge, except for the “final action of an agency that results in demotion or discharge”).

³⁷ *See* ALA. CODE § 36-12-40 (2004); ARIZ. REV. STAT. ANN. §§ 38-1109, 39-123, 39-128; CONN. GEN. STAT. ANN. § 1-210(b)(2) (2019); *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 175 (1993); FLA. STAT. ANN. §§ 119.071(2)(k), 112.533(2)(a) (2020); GA. CODE ANN. § 50-18-72(a)(8) (2020); ME. REV. STAT. ANN. tit. 5, §§ 7070(2)(E), 7070-A (2019); MINN. STAT. ANN. § 13.43(a) (2020); N.D. CENT. CODE ANN. § 44-04-18.1(6); OHIO REV. CODE ANN. § 149.43(A)(1)(h), (A)(2), (B)(1) (2019); UTAH CODE ANN. §§ 63G-2-301(3)(o), -305(10) (2020); WASH. REV. CODE ANN. §§ 42.56.070 (2017); WIS. STAT. ANN. §§ 19.35, 19.36(10)(b) (2017).

³⁸ Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records> [<https://perma.cc/HG62-NMWS>].

since the survey was published,³⁹ at the time it characterized police misconduct records as confidential in twenty-three states, of “limited availability” in fifteen states, and publicly available in only twelve.⁴⁰

These laws are the source of considerable and ongoing controversy. After Minneapolis police killed George Floyd, many people were outraged to learn that Derek Chauvin, the officer charged as principally responsible for Mr. Floyd’s murder,⁴¹ had been the subject of at least eighteen prior misconduct complaints.⁴² Public access to meaningful information about most of those complaints is restricted because the complaints did not result in discipline for Mr. Chauvin.⁴³

But Minnesota has far from the most controversial police records law. In New York—the state that until the summer of 2020 had the most secretive police misconduct records law in the country⁴⁴—advocates for years called repeatedly and vociferously for repeal of the law that police departments and courts interpreted as preventing disclosure of any records relating to allegations of or investigations into officer misconduct.⁴⁵ Transparency advocates blamed the records law for

³⁹ California modified its law enforcement records law in 2019 to permit public access to records of investigations into officer shootings and other major uses of force, as well as confirmed incidents of officers lying on duty or committing sexual assault. *See* S.B. 1421, 2017–2018 Sess. (Cal. 2018); CAL. PENAL CODE §§ 832.7, 832.8 (2019). New York repealed its records law, which had previously prevented virtually any release of law enforcement misconduct records, in the summer of 2020 after the killing of George Floyd. *See* S.B. 8496, 2019 Leg., 243th Sess. (N.Y. 2020) (repealing N.Y. CIV. RIGHTS LAW § 50-a). Michigan and Oregon are, at the time of publication, also considering legislation that would expand public access to police misconduct records in those states. *See* House Bill 3145, Or. Leg. Assembly 2021; George Hunter, *Innocence Advocates Push Police Transparency Bills*, DETROIT NEWS, <https://www.detroitnews.com/story/news/local/michigan/2021/02/19/innocence-advocates-push-police-transparency-bills/4506024001/>.

⁴⁰ Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records> [<https://perma.cc/HG62-NMWS>].

⁴¹ Marty Johnson, *Derek Chauvin Charge Upgraded to Second-Degree Murder; Other Officers Charged*, THE HILL, Jun. 3, 2020, <https://thehill.com/homenews/state-watch/500949-chauvins-charges-upped-to-second-degree-murder-three-other-officers> [<https://perma.cc/2C57-9FD6>].

⁴² Dakin Andone et al., *The Minneapolis Police Officer Who Knelt on George Floyd’s Neck Had 18 Previous Complaints Against Him, Police Department Says*, CNN, <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html>. [<https://perma.cc/N6D7-WST4>].

⁴³ *See* MINN. STAT. ANN. § 13.43(a)(4)-(5) (2020) (permitting public access to “the existence and status of any complaint” against a police officer regardless of whether it resulted in discipline, but prohibiting additional information about the complaint unless it resulted in discipline against the officer).

⁴⁴ N.Y. CIV. RIGHTS LAW § 50-a(1) (repealed 2020).

⁴⁵ *See Civil Rights, Good Government and Community Groups Call on Governor Cuomo to Promote Police Transparency and Accountability Through Full Repeal of Police Secrecy Law 50-A*, COMMUNITIES UNITED FOR POLICE REFORM (Jan. 6, 2020), <https://www.changethenypd.org/releases/civil-rights-good-government-and-community-groups-call-governor-cuomo-promote->

allowing misconduct in the New York Police Department to flourish, and argued that public access would incentivize accountability and make heavily-policed communities safer.⁴⁶ In return, the NYPD union labeled proposals to release misconduct records “Orwellian,”⁴⁷ arguing that public access to even summaries of misconduct would provide “another tool to be exploited by those who seek to do harm to New York City police officers.”⁴⁸ Within weeks of the New York legislature repealing the law, police unions across the state filed lawsuits to prevent release of the records, and those lawsuits are currently ongoing.⁴⁹

police [<https://perma.cc/X78P-3JX3>]; *LAS, Advocates Urge Repeal of Law 50-a That Hides Police Misconduct Records*, LEGAL AID SOCIETY OF NYC (Jan. 7, 2020), <https://www.legalaidnyc.org/news/legal-aid-repeal-law-50a-hides-police-misconduct> [<https://perma.cc/M47C-FJUC>]; Graham Rayman, *NYC Advocates Press for Changes to Law That Keeps Cops' Disciplinary Records Private*, NY DAILY NEWS, Oct. 16, 2019, 6:39 PM, <https://www.nydailynews.com/new-york/nyc-crime/ny-advocates-protest-cop-confidentiality-20191016-4myd2k4b7nca3b3nae7c6drseq-story.html> [<https://perma.cc/S255-M9A7>]; Dean Meminger, *Advocates Rally to Repeal 50A Law*, SPECTRUM NEWS, Oct. 17, 2019, 9:47 AM, <https://www.ny1.com/nyc/all-boroughs/news/2019/10/17/advocates-rally-to-repeal-50a-law> [<https://perma.cc/6PPT-VMUP>].

⁴⁶ See, e.g., Alvin Bragg, *Police Discipline: Turn On the Lights*, NY DAILY NEWS, Mar. 11, 2019, 5:00 AM, <https://www.nydailynews.com/opinion/ny-oped-police-discipline-turn-on-the-lights-20190308-story.html> [<https://perma.cc/WNH8-RRCT>] (“Repeal of Section 50-a will increase trust in the system and provide some comfort for victims’ families. This increased trust between police and communities will make all of us safer, including police officers, who serve with honor and work hard every day to protect us.”); Karyn Carlo, *Opinion: New York’s Police Secrecy Law Endangers Our Communities*, June 16, 2019, <https://citylimits.org/2019/06/16/nypd-50-a-police-secrecy-cuomo> [<https://perma.cc/8P9Z-GEED>] (former NYPD officer arguing that repealing Section 50-a would increase public trust and safety); Legal Aid Society of NYC, *LAS, Advocates Urge Repeal of Law 50-a That Hides Police Misconduct Records* (Jan. 7, 2020), <https://www.legalaidnyc.org/news/legal-aid-repeal-law-50a-hides-police-misconduct> (urging NY Governor Cuomo to “end officially sanctioned secrecy for police misconduct”) [<https://perma.cc/M47C-FJUC>].

⁴⁷ Verified Pet. at 3, *Patrolmen’s Benevolent Ass’n of New York v. de Blasio*, 171 A.D.3d 636 (N.Y. App. Div., 1st Dep’t, 2019), <https://www.courthousenews.com/wp-content/uploads/2018/04/Patrolman-v-DeBlasio.pdf> [<https://perma.cc/YSE8-PHAR>].

⁴⁸ *Id.* at 6; see also Jeff Coltin & Amanda Luz Henning Santiago, *A Guide to 50-a, the Most Contentious State Law on the Books*, CITY & STATE N.Y., Oct. 18, 2019, <https://www.cityandstateny.com/articles/policy/criminal-justice/reformers-look-to-repeal-or-reform-50a.html> [<https://perma.cc/2G5C-7MZS>] (citing NYPD union representative insinuating in late 2019 that repeal of Section 50-a would “put officers at risk for violent retaliative action”).

⁴⁹ See Verified Petition/ Complaint Under Article 75, United States and New York Constitutions, Common Law, and Article 78 Seeking Injunctive and Declaratory Relief, *Police Benevolent Ass’n of New York v. de Blasio* (Sup. Ct. N.Y. Cnty., filed July 14, 2020); Verified Petition/ Complaint Under Article 75, United States and New York Constitutions, and Article 78 Seeking Injunctive and Declaratory Relief, *Buffalo Police Benevolent Ass’n v. Brown*, No. 807664/2020 (Sup. Ct. Erie Cnty., filed July 22, 2020). Most recently, the Second Circuit Court of Appeals rejected the New York police unions’ attempt to prevent disclosure of records in February 2021. See *Police Benevolent Ass’n of New York et al. v. de Blasio et al.*, Summary Order, Case 20-2789, *12 (2d Cir. Feb. 16, 2021) (“we cannot say that the District Court abused its discretion when it determined that the Unions have not sufficiently demonstrated that . . . dangers and risks are likely to increase because of the City’s planned disclosures. In arriving at that conclusion, we

Opponents of public access used similar rhetoric as California debated whether to modify its own records law. Until 2019, California had a law enforcement records law even more secretive than New York's, preventing not only the public but also local prosecutor's agencies from accessing misconduct records.⁵⁰ When in 2018 the California legislature was considering amending that law to permit limited public access to misconduct records, an attorney for one of California's law enforcement unions argued that allowing public access would endanger officers' lives.⁵¹ The attorney speculated that the proposed law would cause officers to hesitate in moments of conflict, knowing that the public would later find out about any force they used.⁵² Another union representative denounced an earlier version of the bill as "one of the most insidious and dangerous bills we've seen come along in many years and maybe decades."⁵³

The notion that public access to misconduct records would physically endanger officers is by no means unique to California union representatives. In 2016 the Virginia legislature considered a bill that would have prevented police departments or government agencies from disclosing the names of police officers, including those accused of misconduct.⁵⁴ The president of Virginia's Fraternal Order of Police claimed that the bill was necessary "to keep our officers safe," arguing that "law enforcement officers have been attacked and even assassinated"

note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers.").

⁵⁰ Cal. Penal Code §§ 832.7–2.8 (West 2019); Ass'n for L.A. Deputy Sheriffs v. Superior Ct., 13 Cal. App. 5th 413, 435 (2017), *rev'd and remanded*, Ass'n for L.A. Deputy Sheriffs v. Superior Ct., 251 Cal. Rptr. 3d 320 (Cal. 2019); *see also* Liam Dillon & Maya Lau, *Gov. Jerry Brown Signs Landmark Laws That Unwind Decades of Secrecy Surrounding Police Misconduct, Use of Force*, L.A. TIMES, Sep. 30, 2018, https://www.latimes.com/politics/la-pol-ca-police-misconduct-rules-changed-20180930-story.html?utm_source=dlvr.it&utm_medium=twitter# [https://perma.cc/4QS4-GFQH].

⁵¹ Liam Dillon, *Must Reads: Here's How California Became the Most Secretive State on Police Misconduct*, LA TIMES, Aug. 15, 2018, <http://www.latimes.com/politics/la-me-california-police-discipline-secret-20180815-story.html> [https://perma.cc/R66X-9MML].

⁵² *Id.*

⁵³ *Id.*; *see also* Steve Reilly & Mark Nichols, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY, Oct. 17, 2019, <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001> [https://perma.cc/QLY6-EJSY] (noting that police unions have been "especially outspoken opponents" of laws requiring disclosure of police misconduct records).

⁵⁴ Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers' Names*, WASH. POST, Feb. 24, 2016, <https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names> [https://perma.cc/K78B-PDYE]; S.B. 552, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=sb552&submit=GO> [https://perma.cc/JAT3-V2NJ].

because of anti-law enforcement sentiments and that disclosing personnel records of police officers “puts them at risk.”⁵⁵

Lawmakers in Pennsylvania, Kentucky, and Kansas have grappled with similar concerns. In 2015, a Pennsylvania state legislator introduced a bill to prevent public access to information regarding the identity of officers involved in shootings or use of force incidents.⁵⁶ Proponents of the bill suggested that it would protect officers’ safety and reputations, as they might otherwise experience retaliation for the shootings.⁵⁷

In 2019, a Kentucky legislator proposed a bill that would exempt law enforcement discipline records from the state’s open records act.⁵⁸ The legislator said the bill was intended to prevent “safety issues,” as officers might experience retaliation if their discipline records were accessible to the public.⁵⁹ That same year the police department in Wichita, Kansas persuaded the city’s Citizen Review Board not to recommend releasing the names of officers involved in shootings, citing “concerns over potential death threats to the families of officers.”⁶⁰ A civil rights attorney who had sued the city over previous shootings labeled the policy “hogwash,” arguing that the police department could not point to any specific threats and that police officers “should not be protected from public scrutiny.”⁶¹

State supreme courts have also been asked to opine on issues relating to access to law enforcement misconduct records. In 2019, the New Jersey Supreme Court agreed to consider whether the State Police are required to disclose the name of an officer terminated for racially offensive behavior.⁶² A coalition of media organizations have filed an amicus brief arguing that disclosure of such information helps foster

⁵⁵ Jackman, *supra* note 54. The bill failed in the state House of Representatives. *See* S.B. 552, *supra* note 54.

⁵⁶ *See* H.B. 1538, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

⁵⁷ Martina White, Protecting Identities of Police Officers Under Investigation, YOUTUBE (Sept. 21, 2015), <https://youtu.be/ToKx2wwJreA> (police union representative describing the bill as “common sense legislation” to protect officers from people with an “outward disdain for police officers”); *see also* Thomas Wilkinson, Jr. & Matthew Glazer, *First Amendment Under Arrest: Photographing Police in Public Places at Issue on Multiple Fronts*, 61 VILL. L. REV. 55, 61-62 (2017) (discussing the proposed legislation).

⁵⁸ Deborah Yetter, *Major Effort to Restrict Access to Kentucky Open Records Proposed*, COURIER J., Jan. 7, 2019, <https://www.courier-journal.com/story/news/2019/01/07/kentuckybill-limits-open-records-access-law/2503148002> [<https://perma.cc/C2AR-8TYE>]; B.R. 821 §2(1)(q), (2)(a), 2019 Gen. Assemb., Reg. Sess. (Ky. 2019).

⁵⁹ Yetter, *supra* note 58.

⁶⁰ Jason Tidd, *Should Wichita Police Name Cops Who Shoot People? Citing Death Threats, Board Says No*, WICHITA EAGLE, May 29, 2019, <https://www.kansas.com/news/local/crime/article228859984.html> [<https://perma.cc/G5W4-JQEV>].

⁶¹ *Id.*

⁶² *Libertarians for Transparent Gov’t v. N.J. State Police*, 218 A.3d 306 (N.J.), *certiorari granted* Oct. 10, 2019.

accountability among law enforcement agencies.⁶³ Meanwhile, in 2020 Chicago's Fraternal Order of Police petitioned the Illinois Supreme Court to authorize destruction of misconduct records more than five years old.⁶⁴ The state supreme court rejected the police union's claim, reasoning that public policy favored retention of the records.⁶⁵

Most scholars who study police accountability and access to misconduct records have argued that public access is necessary to hold officers accountable. Seth Stoughton says that because police officers are public servants, the public has a "strong . . . interest in identifying how officers are using their public authority."⁶⁶ Cynthia Conti-Cook posits that, while police unions insist that that public access would endanger officers and violate their privacy, hiding such information actually harms civilians.⁶⁷ Conti-Cook concludes that "the harms caused by police privacy protections to the public significantly outweigh transparency's potential harm to police officers' privacy."⁶⁸

Stephen Rushin has labeled lack of accessibility to information about police misconduct a significant barrier to reform.⁶⁹ Erik Luna has called for "systematic visibility of policing decisions," reasoning that police departments cannot be held accountable if they "deny public access to the materials upon which their decisions are made."⁷⁰ Professor Moran noted in *Police Privacy* that public access to misconduct records "could empower civilians, journalists, and advocacy groups to identify both problematic police officers . . . and patterns of violence in certain police departments."⁷¹

63 Brief Amici Curiae of Reporters Comm. for Freedom of the Press and 16 Other Media Orgs. In Support of Plaintiff-Petitioner Seeking Reversal at 2, *Libertarians for Transparent Gov't v. N.J. State Police* (2019) No. 083079, <https://www.rcfp.org/wp-content/uploads/2020/01/RCFP-amicus-brief-Libertarians-for-Transparent-Government-v.-New-Jersey-State-Police.pdf> [<https://perma.cc/6UNB-4445>].

64 *City of Chicago v. Fraternal Order of Police*, 2019 IL 172907, ¶1; see also Dana Kozlov, *Police Union Wants All Officer Misconduct Records Destroyed After 5 Years; Some Are Furious About Idea*, CBS CHICAGO (Jan. 16, 2020), <https://chicago.cbslocal.com/2020/01/16/chicago-police-union-fop-police-misconduct-records> [<https://perma.cc/SKK4-8JWX>].

65 *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831, ¶¶35–37.

66 John Kelly & Mark Nichols, *We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (last updated June 11, 2020), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002> [<https://perma.cc/4Q7V-RHQE>].

67 Conti-Cook, *supra* note 3 at 175.

68 Conti-Cook, *supra* note 3 at 149; see also Bies, *supra* note 2 at 118–20 (arguing that public access to officer misconduct records is important for improving accountability, trust, and community relations).

69 Rushin, *supra* note 3, at 1199, 1210–11, 1239–1240.

70 Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120, 1131 (2000).

71 Moran, *supra* note 3 at 190.

Other scholars have cautioned against providing misconduct records to the public, or at least acknowledged police unions' concerns that disclosure could harm law enforcement officers. Most notably, Kate Levine has critiqued the scholarship in this area for making little effort to empirically defend its claims regarding "the transformative power of greater police visibility."⁷² Levine argues that public access to law enforcement disciplinary records is "at the very least, worthy of skeptical examination" given the privacy tradeoffs involved in making such records accessible.⁷³ Catherine Fisk and L. Song Richardson have written that public access to police disciplinary records is "clearly desirable," but acknowledged that such access could harm officers if the records unfairly stigmatize the officer or "facilitate reprisals if the officer's name and home address are released."⁷⁴

While several scholars have opined on the theoretical benefits or harms of access to law enforcement misconduct records, few or none have attempted to empirically study how public access affects law enforcement departments, individual officers, or the communities they police. In *Police Privacy* Professor Moran pointed out that "[n]o data exists at a national level that can prove a causal connection between increasing public access to misconduct records and decreasing police misconduct."⁷⁵ Cynthia Conti-Cook has conceded that "relatively few modern examples of public access to police misconduct information" exist to assess whether access benefits departments or communities.⁷⁶ Kate Levine has likewise bemoaned that debates regarding public access to misconduct records rarely go beyond "reflexive arguments."⁷⁷

One recent empirical study tracked a decade of civilian complaints against police officers in Chicago, and found a statistically significant correlation suggesting that police officers who receive multiple misconduct complaints are more likely to commit "serious misconduct as measured by civil rights litigation."⁷⁸ While that study is helpful in understanding the correlation between complaints and actual misconduct, it did not attempt to assess the correlation between misconduct and public access, nor to answer the question of whether public access harms or benefits law enforcement agencies and the communities which they police.

⁷² Levine, *supra* note 3 at 844.

⁷³ *Id.* at 845.

⁷⁴ Fisk & Richardson, *supra* note 7 at 752.

⁷⁵ Moran, *supra* note 3 at 162.

⁷⁶ Conti-Cook, *supra* note 3 at 172.

⁷⁷ Levine, *supra* note 3 at 846.

⁷⁸ Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J. 225, 227 (2019).

The authors designed the research study described in Part II as a response to this lack of empirical evidence. We make no claim that this is an exhaustive study of the effects of public access laws on law enforcement or communities. It does, however, advance the conversation beyond rhetoric, and provides data points that are both enlightening and potentially surprising.

II. SURVEY AND PHONE INTERVIEWS

A. *The survey*

To assess how laws permitting public access to misconduct records affect both law enforcement agencies and the communities they serve, the authors drafted a survey⁷⁹ for law enforcement administrators.⁸⁰ We selected administrators as the target audience for several reasons. First, they fill managerial roles and are responsible for understanding and implementing public records laws. Second, they are, as a consequence of these managerial roles, more likely than individual officers to know how regularly they receive requests for disclosure of misconduct records and how such disclosures affect their department. Third, many administrators have had lengthy careers in law enforcement, and thus can provide a longer arc of perspective regarding the effects of disclosure.⁸¹ Fourth, although law enforcement unions are consistently and vocally opposed to disclosure,⁸² administrators' voices are far less frequently heard in the conversations surrounding disclosure laws.

The survey began by defining two key terms: "misconduct records" and "public access."⁸³ The survey defined "misconduct records" as including complaints civilians lodged against law enforcement officers, internal affairs records regarding allegations of officer misconduct, disciplinary findings against officers, and performance evaluations

⁷⁹ The survey is reproduced in full in Appendix C.

⁸⁰ By "administrators" we mean primarily police chiefs and sheriffs, with a few other administrative positions such as deputies, chiefs of staff, and captains included. As explained in more detail below, we obtained contact information for all survey recipients from the National Directory of Law Enforcement Administrators. *See infra* Appendix A.

⁸¹ The survey and phone interviews confirmed this proposition. The phone interview participants averaged careers of at least thirty years in law enforcement. Although we did not ask the survey respondents how long they had served in law enforcement generally, we did ask how long they had held their current administrative positions. *See infra* Appendix C. More than twenty-five percent of the survey respondents had held their current positions for more than ten years.

⁸² *See supra* Part I, notes 45–61 (citing numerous law enforcement union representatives opposing public access laws or proposals).

⁸³ *See infra* Appendix C.

addressing officer misconduct.⁸⁴ The survey defined “public access” as “the opportunity for members of the public to request and receive copies of the records.”⁸⁵

The survey then asked administrators whether they were aware of any incidents in which public access to misconduct records (1) caused harm to an officer within their department; or (2) benefited their department or the community it serves.⁸⁶ If the respondent answered yes to either question, the survey asked administrators to select specific types of harm or benefit from a menu of options.⁸⁷ The “harm” options included physical harm, threats, reputational harm, harm to job performance, and distraction for the officer.⁸⁸ Respondents also had the option to select “other” and write in another form of harm.⁸⁹ Respondents who said their departments or communities had benefited from public access to misconduct records could select from an array of benefits including improved police-community relations, increased community trust, accountability within the department, reduced police misconduct, improved transparency, “made community safer,” or “other.”⁹⁰

After selecting from the menu of harms and benefits, administrators were then asked to provide specific examples of ways in which public access to misconduct records caused harm or benefit to their departments or communities.⁹¹ Administrators could type their own responses to these questions.⁹²

Next, the survey asked administrators why their department shares misconduct records with the public.⁹³ The survey allowed administrators to select from a lengthy array of options, including that disclosure is required by law; the public has a right to access these records; disclosure

⁸⁴ See *infra* Appendix C. This definition is consistent with the definition Professor Moran used in two earlier articles, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1361 (2018) and *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 154 (2019); It is consistent with other scholars’ definitions as well. See Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015); Conti-Cook, *supra* note 3 at 152 (employing similar definitions); Levine, *supra* note 3 at 859–60 (acknowledging that a precise definition for police disciplinary records is challenging because jurisdictions do not take a uniform approach to such records). While the survey specifically referenced “police” misconduct records, we distributed it to sheriff’s agencies as well. A few sheriffs emailed to inquire whether they should complete the survey, and the authors responded that the survey was applicable to both sheriff’s agencies and police departments.

⁸⁵ See Appendix C.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

satisfies the demands of the public or various interest groups; disclosure helps educate the public; disclosure is “the right thing to do,” and others.⁹⁴ Respondents also had the option to say the question is inapplicable because their department does not share misconduct records with the public.⁹⁵

The substantive portion of the survey ended with two open-ended questions. The first asked respondents under what circumstances, if any, public access to misconduct records should be restricted.⁹⁶ The second asked respondents to share any additional thoughts they wished to provide on the topic.⁹⁷ Both questions allowed respondents to type in individualized answers.⁹⁸

The survey was completely anonymous. It closed by asking for basic demographic information, including the region of the country in which the respondent worked, the size of the community the department served, the respondent’s title, and the number of years the respondent had worked in that position.⁹⁹

We distributed the survey via email to law enforcement administrators in twelve states representing a wide range of geographic locations, populations, city sizes, and political leanings.¹⁰⁰ We selected these states intentionally because laws in those states permit public access to at least some law enforcement misconduct records.¹⁰¹

To obtain administrators’ contact information for purposes of distributing the survey, we purchased an online license to access the 2019 National Law Enforcement Administrators database and electronic directory, which purports to contain the largest and most accurate

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ These states are Alabama, Arizona, Connecticut, Florida, Georgia, Maine, Minnesota, North Dakota, Ohio, Utah, Washington, and Wisconsin.

¹⁰¹ The relevant records disclosure laws are: Alabama: ALA. CODE § 36-12-40 (2018); Arizona: ARIZ. REV. STAT. ANN. § 39-123 (2019), ARIZ. REV. STAT. ANN. § 39-128 (2008), ARIZ. REV. STAT. ANN. § 38-1109 (2015); Connecticut: FOI Sec. 1-210(b)(2); *Perkins v. Freedom of Information Commission*, 228 Conn. 158 (Conn. 1993); Florida: FLA. STAT. § 119.071(k) (2020); FLA. STAT. § 112.533(2)(a) (2020); Georgia: GA. CODE ANN. § 50-18-72(a)(8) (2020); Maine: ME. STAT. tit. 5, § 7070(2)(E) (2019); ME. STAT. tit. 5, § 7070-A (2019); Minnesota: MINN. STAT. § 13.43, subdiv. 2(4)–(5) (2020); North Dakota: N.D. CENT. CODE § 44-04-18.1, subdiv. 6 (2019); Ohio: OHIO REV. CODE ANN. § 149.43(1)(h), (2) (LexisNexis 2020); Utah: UTAH CODE ANN. § 63G-2-301(3)(o) (West 2020); UTAH CODE ANN. § 63G-2-305(10) (West 2020); Washington: WASH. REV. CODE § 42.56.050 (2006); WASH. REV. CODE § 42.50.070 (2017); Wisconsin: WIS. STAT. § 19.35 (2017); WIS. STAT. § 19.36(10)(b) (2017); see also Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records> [<https://perma.cc/8UU6-K57C>] (identifying the twelve states selected for our survey as the only twelve states that make misconduct records publicly available without significant exceptions).

directory of law enforcement administrators in the United States.¹⁰² Using this database, we distributed the survey, along with an introductory email and informed consent language,¹⁰³ to administrators with listed email addresses in each of the twelve states.¹⁰⁴

We distributed the initial emails in early July of 2019 and followed up with a second reminder email¹⁰⁵ in late July. By the end of August 2019,¹⁰⁶ 344 law enforcement administrators had anonymously completed the survey.¹⁰⁷ Just over half of the respondents worked in midwestern law enforcement agencies, while twenty-five percent worked in the south, twenty percent in the west, and five percent in the northeast.¹⁰⁸ They worked in communities ranging in size from fewer than 10,000 to more than 1,000,000 residents.¹⁰⁹ The vast majority served as the heads of law enforcement agencies (police chiefs or sheriffs), while a much smaller number filled administrative roles such as captain, deputy, sergeant, chief of staff, or administrator of a law enforcement training program.¹¹⁰ More than one-quarter of the respondents had held their current administrative positions for over ten years.¹¹¹

102 See SafetySource.com, 2020 National Directory of Law Enforcement Administrators, <https://www.safetysource.com/directories/index.cfm?fuseaction=displayReference&ReferenceID=1> [<https://perma.cc/YF92-LF4Q>] (last visited Jan. 14, 2020). Other scholars have used this same database for surveys of law enforcement administrators. See, e.g., Stephen Rushin & Roger Michalski, *Police Executive Opinions of Legal Regulation*, 2018 U. ILL. L. REV. 1841, n. 105–06 (2018). Funding for this license was made possible by the generosity of the University of St. Thomas Law Library and Department of Sociology & Criminal Justice.

103 Copies of the introductory letter and informed consent language, both of the University of St. Thomas Institutional Review Board reviewed and approved, are reproduced in Appendices A and B.

104 Because the National Directory of Law Enforcement Administrators database contains contact information for administrators not relevant to this survey (e.g., military officials, prosecutors, federal law enforcement, etc.), we narrowed the search terms to include administrators in relevant state and municipal law enforcement agencies or training programs. We also excluded administrators without listed email addresses. Our initial pool of contacts included nearly 4400 administrators, but several hundred of our emails were returned as undeliverable. The final number of distributed emails was 4131.

105 Text from the reminder email is reproduced in Appendix E.

106 We deactivated the survey in late August of 2019.

107 A significantly higher number of administrators completed portions of the survey. However, in this article we have included only responses from completed surveys. Using only the completed surveys, our response rate was 8.4% (344 completed surveys from 4,131 distributed emails). Some of this response rate is due to outdated or rarely used email addresses: in addition to the several hundred undeliverable emails mentioned above in note 104, we also received numerous notifications indicating that the email account was generally unmonitored or that the administrator had moved, changed jobs, or retired.

108 All survey response data is saved on file with the authors.

109 *Id.*

110 *Id.*

111 *Id.*

B. *Phone interviews*

Every administrator who completed the survey was given an option at the end of the survey to provide their contact information for a follow-up phone interview.¹¹² These interviews were entirely voluntary and no incentives were provided for participation. Over the summer and fall of 2019, Professor Moran completed thirty-three¹¹³ phone interviews with administrators from ten of the twelve surveyed states.¹¹⁴ Twenty-five of the interviewees worked as police chiefs, six as sheriffs, and two as chief of staff or captain of their law enforcement agency.¹¹⁵ Fifteen administrators lived and worked in a midwestern state, nine worked in a western state, and the rest were divided almost evenly between the south and northeast.¹¹⁶ Two-thirds of the respondents worked in communities of between 10,000 to 100,000 people, but community sizes ranged from under 10,000 to more than 500,000.¹¹⁷ While most interviewees led agencies of fifty or fewer officers, department sizes spanned fewer than ten employees to more than 1,000.¹¹⁸ The average respondent had spent more than nine years as an administrator and thirty years in law enforcement.¹¹⁹

Interviews ranged in length from seven to sixty minutes, with an average length of thirty-one minutes.¹²⁰ Professor Moran began each interview by informing the participants that she would record their name and identifying information for her notetaking purposes only, and that responses included in any future publication would be stripped of identifying data.¹²¹ Each respondent verbally consented to this arrangement. Because the interviewees' survey responses were anonymous, the authors could not review these responses in advance and

¹¹² This contact information was collected in a separate database and not traceable to any individual survey responses.

¹¹³ Twelve additional administrators expressed an interest in participating in the survey, but either did not respond to repeated attempts to schedule interviews or neglected to provide contact information so that the authors could follow up with them.

¹¹⁴ The phone interview respondents served as law enforcement administrators in Arizona, Connecticut, Florida, Georgia, Maine, Minnesota, Ohio, Utah, and Washington. No respondents from Alabama or North Dakota participated in the phone interviews.

¹¹⁵ Demographic information about each of the phone interviewees is saved on file with the authors.

¹¹⁶ Detailed notes and data collected from each interview are saved on file with the authors.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ The seven minute interview was an outlier. The interviewee called the author expressing uncertainty over whether he wanted to participate in the survey, and after speaking for several minutes, ultimately said he would make up his mind later regarding whether to participate. He did not reschedule the interview.

¹²¹ *See* Appendix D.

had no preconceived sense of how the administrator would answer the interview questions. The initial interview questions tracked the language of the survey:¹²² administrators were asked whether they were aware of any incidents in which public access to law enforcement misconduct records caused harm to an officer in their department or benefit to either the department or the community.¹²³ If the respondents answered yes to either question, they were invited to provide additional information about those incidents.¹²⁴

Respondents were then asked to explain, in their own words, whether and why their office shares misconduct records with the public.¹²⁵ The administrators were also asked whether they believe public access to misconduct records should be restricted in some circumstances, and if so, under what circumstances.¹²⁶

The next set of questions asked respondents how their views on the topic of public access to misconduct records compared or contrasted with those of other law enforcement administrators, as well as those of non-administrative officers in their agency.¹²⁷ In closing, respondents were asked to provide basic demographic information about themselves, their law enforcement agencies, and the communities in which those agencies were located.¹²⁸ They were also given an opportunity to share any additional thoughts related to this topic that the conversation had not yet covered.¹²⁹

III. RESULTS AND FINDINGS

A. *Survey results*

1. Harms

Of the 344 completed survey responses, fifty-six administrators (sixteen percent) indicated that they believed officers in their department had been harmed by public access to records of officer misconduct.¹³⁰

Reputational harm: The most frequent type of harm, which forty-six administrators cited, was damage to officer reputation or

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ A detailed spreadsheet containing all completed survey responses is on file with the authors.

credibility.¹³¹ A few administrators believed that the reputational damage was justified given the misconduct in question: for example, one administrator referenced a misconduct incident that prevented the accused officer from being selected for another job, which in the respondent's view was "totally justifiable."¹³² Many, however, complained that officers' reputations were harmed when information was misconstrued or taken out of context. One administrator described how, after one of his officers was involved in a shooting, misconduct records from an officer not involved in the shooting were released and spurred "large protests" in which multiple officers were unfairly labeled as murderers.¹³³ Another said that "media misinformation" caused the public to misunderstand an officer's record.¹³⁴ Another recounted an incident in which a husband and wife both served as officers in the department; the husband was accused of domestic assault against his wife, and the resulting media attention resulted in both officers losing their jobs.¹³⁵

Relatedly, multiple administrators expressed concern that releasing misconduct records to people who have little interest in understanding the "truth" can cause more harm than good. One respondent worried that officers are "pre-judged by social media or main stream media" who "come out with their own version of the truth" before a misconduct investigation is completed; when a subsequent investigation concludes that the officer was not at fault, those same people allege that the police are involved in a "cover-up."¹³⁶ Another complained of "very biased news reporting" that caused a lieutenant to lose his job.¹³⁷ One administrator noted that, after an officer was involved in a shooting, "Some in the public passed judg[.]ment based on emotion not information and facts. . . . When facts were available, they had already been dismissed due to pre[-]conceived opinions."¹³⁸

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

Other administrators said officers' reputations had been harmed by allegations that were unfounded¹³⁹ or not sustained¹⁴⁰ but still used to discredit the officers.¹⁴¹ One noted that, after a controversial incident, the media fixated on an involved officer's misconduct record from years earlier, "with zero mention of any commendations or excellent performance in recent years."¹⁴² Several administrators complained that attorneys take misconduct records out of context to destroy an officer's credibility in court.¹⁴³

Distraction or harm to job performance: Nine percent of survey respondents—the highest percentage other than those selecting reputational harm—indicated that public access to misconduct records created a "distraction" for officers.¹⁴⁴ Examples of these distractions included "family issues" and an officer's ex-spouse using the misconduct records in a custody battle.¹⁴⁵ One respondent said the morale of the whole department suffered after an officer's misconduct records were released and protests occurred in response.¹⁴⁶

Fewer than eight percent of respondents indicated that public access to misconduct records negatively affected an officer's job performance.¹⁴⁷ The most vivid example involved a civilian obtaining access to and releasing a police department's operations plan.¹⁴⁸ One administrator noted that an officer "lost credit in public[']s eye even th[ough] he was cleared" of misconduct.¹⁴⁹ Another complained that the fact an officer "missed traffic court or was late twice in ninety days" is not relevant for the public to know, but providing public access to this kind of information "chips away at the confidence of the public and staff of the department."¹⁵⁰ One gave an example of a sheriff who simply

¹³⁹ Most law enforcement agencies define an "unfounded" complaint as one in which the allegations are determined to be untrue. See *Standards and Guidelines for Internal Affairs*, U.S. DEP'T OF JUST. CMTY. ORIENTED POLICING SERVS., §4.1 (Aug. 21, 2009), <https://cops.usdoj.gov/ric/Publications/cops-p164-pub.pdf> [<https://perma.cc/YC98-UVCL>].

¹⁴⁰ Most law enforcement agencies label a complaint as "not sustained" when the agency has determined that the allegations "cannot be proven true or untrue by a preponderance of the evidence." See *id.*

¹⁴¹ All completed survey responses are on file with the authors.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

retired rather than face the negative publicity and media pressure surrounding a misconduct allegation.¹⁵¹

Physical harm or threats: No survey respondents provided any examples of physical harm to an officer, and only one of the 344 respondents selected the option indicating that an officer in his department had suffered physical harm.¹⁵² When given an opportunity to elucidate, that respondent answered, “physical and verbal harassment.”¹⁵³

Twenty respondents (slightly fewer than six percent) did indicate that their officers had received threats as a result of disclosure of misconduct records.¹⁵⁴ The most serious incident was described as involving “[p]rison gang members [who] tried to kill an officer.”¹⁵⁵ Another said that, after an officer was publicly identified as involved in a shooting, someone “threatened to kill the officer.”¹⁵⁶ One administrator stated that community members threatened an officer’s children at school and another said that, after an officer was fired, “people showed up at his residence.”¹⁵⁷

A few administrators described online threats. One said that “keyboard warriors” threatened an officer who had been accused of domestic violence.¹⁵⁸ Another mentioned that officers’ social media accounts had been hacked.¹⁵⁹

“Other” harm: Although very few administrators indicated “other” harm outside of the categories already identified, two are of note. One described an officer who was “ostracized publicly on social media to the point we were checking on him daily” for “suicide prevention.”¹⁶⁰ Another mentioned an officer who required mental health counseling and described the toll of receiving “nothing but negative [feedback] after a long career of serving your community.”¹⁶¹

2. Benefits

While sixteen percent of administrators said their officers had been harmed by public access to misconduct records, twenty-four percent (eighty-four administrators) stated that either their department or the

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

community it serves had benefited from public access to law enforcement misconduct records.¹⁶²

Improved community relations and trust: The overwhelmingly most frequent type of benefits involved some variation of improving public trust, promoting transparency, and proving to the community that the department took misconduct seriously and held its officers accountable. Seventy-eight administrators said public access to misconduct records promoted transparency, sixty-eight said records disclosure increased public trust, and forty-eight saw a benefit in the form of improved police-community relations.¹⁶³

Some of the benefits mentioned were specific and tangible. One administrator noted receiving anecdotal evidence of improved community relations in the form of supportive civilian feedback.¹⁶⁴ One said that, when the media requested information about officer misconduct, the department was able to provide written reports of terminations, suspensions, and other discipline proving that the department policed its own officers.¹⁶⁵ Another described inheriting a use of force complaint from a previous chief who had failed to investigate the incident or provide any information to the public.¹⁶⁶ The complainants took this failure to investigate or disclose information “as a sign of a cover-up and turned up the negative rhetoric towards the department.”¹⁶⁷ After the new chief took over, the department completed its investigation and provided records to anyone who requested them.¹⁶⁸

Other benefits were less measurable. One administrator described an officer well-known in the community who the department disciplined for misuse of equipment; releasing records of that discipline showed that the department’s investigation had been fair and impartial.¹⁶⁹ Several commented that providing records of misconduct investigations and subsequent discipline of involved officers allowed the community to see that their investigations were thorough and professional.¹⁷⁰ Another said the benefit was both communal and personal: choosing to release records of misconduct before the public even requested them built a level of trust from his community, but also “kept my integrity intact because it was the right thing to do.”¹⁷¹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Quite a few administrators found that disclosing misconduct records improved or clarified information the public had received about a misconduct incident, and quashed false rumors about the event.¹⁷² One administrator disclosed unredacted body camera video to “refute edited video posted online” and disprove a harassment complaint.¹⁷³ Another said their office allows anyone to review recorded video as long as it does not compromise an active investigation, and noted that this policy “quickly abate[d] false allegations.”¹⁷⁴ Another found that releasing records “quelled negative social media reports.”¹⁷⁵

Some administrators used this portion of the survey to describe their general philosophy about records disclosure. One said that “being open about misconduct issues helps reduce the opinion that the profession has a ‘bunkered’ mentality and hides its problems.”¹⁷⁶ Although releasing misconduct information is a “short term hassle,” it pays off in “long term benefits of establishing a reputation of not hiding things.”¹⁷⁷ Another said that public trust was the department’s top priority and opined, “If we do not have the trust of those we serve, we are swimming against the current.”¹⁷⁸ Another noted that an open records policy “simply shows that we are not afraid to discuss/show our process.”¹⁷⁹

Promoted departmental accountability or reduced misconduct: Sixty-two (eighteen percent) of respondents indicated that public access to misconduct records had promoted accountability within their own department.¹⁸⁰ A smaller number (seven percent) said it had reduced misconduct in the department.¹⁸¹

Several administrators said that making records publicly available benefitted other law enforcement agencies by deterring them from hiring officers with histories of misconduct.¹⁸² One described an officer who had committed a crime and, even though the prosecutor’s office declined to file charges, resigned rather than face termination when the officer knew the records would be made public.¹⁸³ Other administrators said that making records publicly accessible improved their department’s own ability to “promptly correct officer behavior.”¹⁸⁴ When they receive

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

complaints, they follow up promptly with the complainant and make information about the incident and any subsequent investigation available to anyone who requests it.¹⁸⁵

The importance of dispelling false rumors arose again as a mechanism for holding officers accountable. One administrator described an incident where people had complained that the administration was “singling out . . . certain officers.”¹⁸⁶ Disclosing records of the officers’ misconduct “provided the community with the full picture of the activity the officer had been involved in” and quashed those rumors.¹⁸⁷

Made community safer: Less than three percent of respondents said that public access to police misconduct records made their communities safer.¹⁸⁸ One who took this position reasoned that disclosure “provides proof to the community that the department operates professionally and with good ethics, training and education. Holding our employees to a high performance standard . . . makes the community safer.”¹⁸⁹

3. Reasons for providing records

When asked why they share misconduct records with the public, more than sixty-two percent of respondents selected that disclosure is required by law.¹⁹⁰ This was by far the most frequent response, and is unsurprising as we only surveyed administrators in states where disclosure is required by law.¹⁹¹ The next three most popular responses all contradict the common narrative that law enforcement is almost universally opposed to public access. Thirty-nine percent of respondents said they believe disclosure “enhances the reputation of the department,” thirty-eight percent indicated they disclose records because they believe the public deserves to know how the department is performing, and thirty-seven percent answered that they “personally think it is important” to share misconduct records with the public.¹⁹²

At least one-third of respondents indicated they disclose misconduct records because it satisfies the public or media demand for information, and another one-third said they believe disclosure “helps educate the public.”¹⁹³

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See supra* notes 100–101 (listing the states surveyed and applicable state records laws).

¹⁹² All survey responses are on file with the authors.

¹⁹³ *Id.*

Fifty-two administrators (fifteen percent of respondents) indicated that they do not disclose records to the public.¹⁹⁴ This is notable because the survey was distributed exclusively to administrators in states with laws requiring disclosure of at least some misconduct records.¹⁹⁵

4. Circumstances In Which Disclosure Should Not Be Permitted

Survey respondents were all asked to answer, in their own words, the following question: “Under what circumstances, if any, should public access to police misconduct records be restricted?”¹⁹⁶ Though the responses varied widely, one answer dominated the conversation. 120 (thirty-five percent) of respondents said that misconduct records should not be disclosed if an investigation into the incident is still active.¹⁹⁷ Many of those respondents opined that premature disclosure while the investigation is ongoing can taint public opinion or put undue pressure on the investigators to reach a specific conclusion.¹⁹⁸ Others noted that the laws in their states do not permit disclosure until the investigation has concluded, and they approved of those laws.¹⁹⁹

The second most frequent response, from forty-six respondents, was that the public should not have access to records of alleged misconduct deemed unfounded or not sustained.²⁰⁰ While some of the states involved in this survey have laws prohibiting disclosure of unfounded complaints, others permit public access to all misconduct allegations, whether or not sustained.²⁰¹ One respondent decried what they called “completely

¹⁹⁴ *Id.*

¹⁹⁵ *See supra* note **Error! Bookmark not defined.** (citing relevant records laws applicable to each of the surveyed states).

¹⁹⁶ *See infra* Appendix C.

¹⁹⁷ All survey responses are on file with the authors.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; *see also, e.g.*, FLA. STAT. § 119.071(2)(k) (2020) (Florida statute exempting records of misconduct complaints from public access “until the investigation ceases to be active”).

²⁰⁰ In most law enforcement agencies “unfounded” means that the allegation is deemed to have been untrue, while “not sustained” simply means that the allegation was not proven or disproven. *See supra* note **Error! Bookmark not defined.**–**Error! Bookmark not defined.**

²⁰¹ *See* FLA. STAT. § 119.071(2)(k) (2020) (Florida statute indicating that, once a misconduct investigation is concluded, records of that investigation are no longer exempt from public access regardless of whether the investigation resulted in formal charges or discipline); *compare, e.g.*, ME. STAT. tit. 5, § 7070(2)(E) (2019) (Maine statute exempting “complaints, charges or accusations of misconduct” from public access unless those complaints result in discipline), *with* Minn. Stat. § 13.43(2)(a)(4) (2020) (Minnesota statute permitting public access to “the existence and status of any complaints or charges against [government] employee[s], regardless of whether the complaint or charge resulted in a disciplinary action”).

absurd, unfounded complaints which end up as ‘factual’ accounts on social media.”²⁰² Another simply noted, “You can’t un-ring a bell.”²⁰³

No other response achieved consensus from more than twenty respondents.²⁰⁴ Nineteen respondents said they should be allowed to withhold records when disclosure would put a law enforcement officer or family member in harm, while thirteen respondents said states should prohibit disclosure when it would jeopardize the safety of “those involved,” and another twelve suggested that records should be restricted as required to protect innocent victims or children.²⁰⁵ Fifteen suggested that laws should prohibit disclosure of confidential, sensitive, or highly personal information, such as medical or financial records or personal phone numbers.²⁰⁶ Several others simply proposed that redaction should be permitted where appropriate, without explaining precisely what type of information should be redacted.²⁰⁷

Only eight administrators, or just over two percent of the survey respondents, took the position that the public should never be permitted to access misconduct records.²⁰⁸ Another eight said that disclosure should occur only by court order, and eleven believed that disclosure should occur only where an officer is charged with a crime or other “egregious” misconduct.²⁰⁹ In contrast, twenty administrators said they could not conceive of any circumstances in which public access should be restricted.²¹⁰

5. Additional Thoughts

Near the end of the survey, administrators were invited to share any additional thoughts they had related to the survey topics.²¹¹ This category, perhaps more than any other, revealed administrators’ stark differences in opinions and approaches on this topic. Those in favor of public disclosure wrote things such as, “there’s no reason this information shouldn’t be made public,” “it’s the right thing to do,” and “shining a light on bad apples is the ONLY disinfectant that will help rid our profession of the rotten ones.”²¹²

²⁰² All survey responses are on file with the authors.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See infra* Appendix C.

²¹² All survey responses are on file with the authors.

Administrators opposed to disclosure took similarly strong positions. One wrote, “too often officers who have done no wrong are crucified by some in the public . . . releasing files exacerbates situations, it doesn’t alleviate them. Second[-]guessing law enforcement ha[s] become a hobby in this country.”²¹³ Another warned, “if police have to make misconduct public one of two things will happen. Police administrators will be reluctant to discipline or the general public will not want to be cops for fear that when they make a mistake, everyone will know about it. Either option[] is bad.”²¹⁴ One administrator, perhaps recognizing the variety of viewpoints on this subject, responded simply, “I would be very interested in seeing the results of this study.”²¹⁵

B. *Interview Results*

Administrators who completed the online survey were given an option at the end of the survey to provide contact information²¹⁶ if they were willing to participate in a follow-up conversation with one of the researchers.²¹⁷ Thirty-three administrators completed phone interviews during the summer and fall of 2019.

1. Harms

Of the thirty-three administrators who participated in follow-up interviews, only seven (twenty-one percent) said that officers in their department had been harmed by disclosure of misconduct records.²¹⁸ These harms are summarized as follows:

An officer who had previously been disciplined for sexual harassment several years earlier was embarrassed after a member of the public obtained records of that incident and posted them on social media. The officer had since gotten married and did not want his spouse to know about the previous sexual harassment incident.²¹⁹

An officer who arrested a woman for alleged domestic assault later began a sexual relationship with the woman he had arrested, while her assault charge was still pending. The woman’s husband (the alleged

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ This contact information was collected in a separate database and not traceable to any individual survey responses.

²¹⁷ *See* Appendix C.

²¹⁸ Detailed notes from each phone interview are on file with the authors.

²¹⁹ *Id.*

victim in the domestic assault case) found out about the relationship and made his wife report it to the police department. The department investigated and confirmed the inappropriate relationship, and the officer subsequently resigned before he could be fired. The husband “would not let the situation go,” and began harassing the officer on social media and reporting him to numerous governmental agencies.²²⁰

After a police officer shot and killed someone while on duty, the media obtained training records from the officer and discovered that he had performed poorly in a previous training involving decision-making under difficult circumstances. The media overreacted and made the chief look foolish for hiring the officer. Scrutiny surrounding this incident may have also discouraged other officer candidates from applying for jobs.²²¹

An officer, who was fired from one police department for lying, had a hard time getting another job as a police officer.²²²

An officer who engaged in misconduct that did not involve lying was put on a local prosecutor’s “*Brady*”²²³ list of officers who may be impeached were they to testify in court. Local media assumed that all officers on the list were liars.²²⁴

An officer’s ex-spouse obtained and used misconduct records, including multiple records regarding alleged misconduct that was not sustained, in divorce proceedings against the officer.²²⁵

A subordinate in the police department was unhappy about a supervisor’s conduct, so the subordinate leaked information to the media about discipline that had been meted against the supervisor more than ten years earlier. This probably harmed the supervisor’s reputation.²²⁶

An officer resigned after he was found to have committed misconduct, and information relating to the incident was released to the public. The chief thought it was “somewhat unfair” that the officer felt the need to resign.²²⁷

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ A “*Brady*” list is shorthand for a list of officers who have histories of misconduct that may constitute exculpatory evidence in a criminal case and therefore must be disclosed to defense counsel. The name derives from *Brady v. Maryland*, 373 U.S. 83 (1963), which held that prosecutors have a constitutional obligation to provide material exculpatory evidence to the defense.

²²⁴ Detailed notes from all interviews are on file with the authors.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

2. Benefits

In contrast to the seven interviewees who said disclosure of misconduct records had harmed officers in their department, twenty respondents (sixty percent) said their department or community had benefited from disclosure of such records.²²⁸ The most popular benefit identified by sixteen of the twenty administrators involved some form of building public trust or showing the community that the department took misconduct seriously.²²⁹ Five administrators said their department benefited from disclosing misconduct records because those records provided a more thorough picture of an incident than what the media or public had previously believed.²³⁰ Others said they benefited from public access to misconduct records by improving their own hiring decisions, warning prospective employers about officers with histories of misconduct, and discouraging other officers from engaging in misconduct.²³¹

Some of the administrators provided very specific reasons to support their belief that disclosing misconduct records had improved public trust. One chief explained that, after he disclosed an officer's personnel file to a civilian complaining of misconduct, that civilian emailed him back to say she appreciated that he held his officers accountable.²³² Another said a civilian threatened to file a complaint, but after the chief met with and showed the civilian body camera footage from the incident, the civilian decided not to file a complaint.²³³ Multiple administrators described situations in which officers engaged in behavior ranging from relatively minor (showing up late for work) to criminal (reckless driving, driving under the influence, burglary, domestic violence, assault, sexual assault).²³⁴ Rather than allow rumors to circulate unchecked, the department immediately released information about the misconduct and their subsequent firing of the officers.²³⁵ The departments' prompt responses and termination quelled complaints and killed what otherwise would have been major news stories criticizing the departments.²³⁶ To quote one administrator, "[t]he coverup becomes more harmful than the

²²⁸ Detailed notes from all interviews are on file with the authors. Some administrators identified both harm and benefit, and thus are counted in each of these categories.

²²⁹ Detailed notes from all interviews are on file with the authors.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ Detailed notes from all interviews are on file with the authors.

²³⁵ *Id.*

²³⁶ *Id.*

release of information. When you try to keep things tamped down or secret it only makes multiple people look bad.”²³⁷

A few chiefs described taking over police departments that had histories of retaining officers with lengthy misconduct records and refusing to provide those records to the public.²³⁸ These chiefs went through a process of “cleaning house” by firing numerous officers.²³⁹ Once they terminated the officers and disclosed that information to the public, they believed the community became much more amenable to working with the department.²⁴⁰

Other described benefits were mostly intangible. One police chief recounted an incident where a civilian had been arrested for a “minor disturbance” and filed a complaint about an officer’s conduct during the arrest.²⁴¹ The department investigated and found no misconduct.²⁴² The civilian then demanded records from the investigation, and the department provided everything the civilian requested.²⁴³ The chief also met with the complainant individually.²⁴⁴ The chief perceived that the complainant, and the community generally, felt “heard” because the department had gone out of its way to listen and be transparent about the investigation.²⁴⁵ Some administrators noted that, since adopting a practice of transparency in disclosing misconduct records, they had heard positive discussions in the community about that practice.²⁴⁶ A few administrators said they had held their positions longer than previous administrators, and believed that their tenure was due in part to their transparency and resulting positive relationship with the community.²⁴⁷

Many of the administrators recognized that the benefits they had described were not easily measurable. One administrator who had served in law enforcement for more than four decades explained that public access “benefits the department over the long haul. The individual misconduct incident doesn’t necessarily pay off (in terms of an immediate positive response from the public), but a reputation of being forthright and honest over the long haul benefits the agency and everyone in it.”²⁴⁸ Several administrators also noted benefits to officers within their

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

departments. One chief described his practice of drafting an executive summary every time an officer is disciplined and emailing that summary to his officers.²⁴⁹ The chief believed that this practice not only quashed rumors about the misconduct, but also isolated the officers inclined to misconduct and assured the rest of the officers that the department was committed to good policing.²⁵⁰

One administrator offered an anecdotal but tragic warning about the dangers of not reviewing misconduct records²⁵¹. His department terminated an officer and recorded the basis for the termination in a way that should have deterred other police departments from hiring the officer.²⁵² Instead, a neighboring police department hired the officer without ever investigating requesting or reviewing those personnel records.²⁵³ Shortly after the hire, the officer who had previously been terminated killed a civilian.²⁵⁴

3. Reasons for disclosure

When asked why they disclose misconduct records to the public, the most common response from twenty of the thirty-three interviewees was that the law required them to do so.²⁵⁵ But many provided other reasons as well. Thirteen administrators said they disclose records because it is the right thing to do, or that they have nothing to hide.²⁵⁶ Twelve answered that they disclose records because they serve the public and the public has a right to know.²⁵⁷ Eleven said they believe disclosure increases public trust and shows that the department takes misconduct seriously.²⁵⁸

One administrator described his reasoning this way: “I feel like we have nothing to hide. Transparency is super important in building public trust . . . it helps us identify gaps and blind spots, and it also helps send a message to the community that we’re legitimate.”²⁵⁹ Another commented, “I’m a believer personally that we are accountable to the people we serve. I believe in demonstrating accountability, demonstrating transparency, it’s a way to affirm for the people we serve

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

that we're doing the job they expect us to be doing."²⁶⁰ Many administrators noted that public confidence in law enforcement had decreased in recent years. As one expressed, "We're in that time when it seems like across the nation there is mistrust of law enforcement unfortunately. Access to these public records is definitely something that can help build trust."²⁶¹

Almost one-third of the interviewees said they believe disclosing records helps quash rumors about misconduct.²⁶² One described an incident from a previous department in a small city, where a young police officer was charged with reckless endangerment.²⁶³ Other people who witnessed the incident posted about it on social media, and "rumors were starting to fly."²⁶⁴ The department took appropriate action against the officer and then publicly disclosed the results of the investigation, in part to contradict some of the false information disseminated online.²⁶⁵

Many administrators expressed concern that refusing to disclose misconduct records exacerbates suspicions about the misconduct.²⁶⁶ Said one:

I've seen it throughout my career where if news organizations have to fight to get the story, it becomes more of a story. When information is released it increases confidence of the community in their law enforcement, because their department is not just saying they're holding officers accountable but are actually sharing the information.²⁶⁷

Another chief presided over a department that had six officer-involved shootings in a ten-day span.²⁶⁸ The department investigated every shooting and then "released all the information as soon as the investigation was done. It was over with as soon as we released the investigation."²⁶⁹ According to that chief, agencies that let investigations drag on for years without releasing records invite unwelcome suspicion.²⁷⁰ Another administrator opined, "If we make a mistake and

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

come out and admit it, that takes the sting out of it with the media.”²⁷¹ Another administrator echoed, “If we don’t provide records that are legally requested and we don’t provide the full context of what’s going on, there’s always the shroud of the unknown. If we’re not driving the narrative people will make assumptions.”²⁷² One stated simply, “The coverup is more damaging than the hard truth.”²⁷³

A small number of respondents stated that they disclose records because it helps hold their officers accountable, improves hiring decisions for other departments, or reduces the “us v[ersus] them” mentality between the department and community.²⁷⁴ One chief said his officers know that any misconduct will be recorded and accessible to the public, and that deters some officers from engaging in questionable behavior.²⁷⁵

Although in the minority, several administrators said they saw no benefit at all to disclosing records and did so only because disclosure was required by law.²⁷⁶ A few opined that the results of internal investigations were not the public’s business.²⁷⁷ Others expressed concern that civilians would “cherrypick[] bits and pieces and tak[e] things out of context.”²⁷⁸

4. Situations in which disclosure should not be permitted

All administrators were asked whether there were any situations in which the public should not have access to law enforcement misconduct records.²⁷⁹ Administrators gave a wide variety of responses. The most common response, from seven administrators, was that the public should not have access to officers’ medical or mental health-related information.²⁸⁰ These administrators expressed concern that law enforcement is a stressful and demanding job, and that sometimes officers make poor decisions as a result of stress, anxiety, or exposure to trauma.²⁸¹ They were concerned that public access to mental health information could discourage officers from seeking help.²⁸²

One administrator explained that his department sometimes documents when officers have become noticeably agitated or moody, and

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See Appendix D.

²⁸⁰ Notes from all interviews are on file with the authors.

²⁸¹ *Id.*

²⁸² *Id.*

may address these mood variations by encouraging officers to seek mental health assistance.²⁸³ If such recommendations were flagged as disciplinary concerns or accessible personnel records, officers would resist getting help.²⁸⁴ Similarly, another administrator noted that psychological distress can impact an officer's fitness for duty, and that some departments condition return to active duty on an officer undergoing therapy or some other assistance.²⁸⁵ If information about that suspension were accessible to the public, officers would be discouraged from acknowledging when they need assistance.²⁸⁶ Another administrator commented, "It's hard enough as it is to encourage officers to get help," and allowing the public to see that a police officer had pursued mental health treatment in response to a misconduct incident would dissuade officers from seeking needed help.²⁸⁷ One candidly stated that his own mental health had deteriorated after years in law enforcement, and that he was more judgmental and less understanding than when he began his career decades earlier.²⁸⁸

In addition to concerns regarding access to mental health-related records, five administrators opined that the public should not have access to "personal" information, and cited financial records, personal phone numbers, and home addresses as examples of information that should be restricted.²⁸⁹ Several mentioned that their states' records laws already exclude this information.²⁹⁰ Others said the public should not have access to records containing information that could identify victims of criminal conduct, children, or family members of officers.²⁹¹

Five administrators said the public should not have access to misconduct records until the misconduct investigation has concluded, and another four said the public should not have access to records involved in pending litigation.²⁹²

Several administrators suggested that disclosure should hinge on the severity of the misconduct, stating that records of misconduct should not be publicly available if the misconduct was "not serious," "just a mistake," or remediable with training.²⁹³ They acknowledged that the

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*; *see, e.g.*, A.R.S. § 39-123 (2020) (Arizona statute excluding home phone numbers and addresses from public record); Ga. Code Ann., § 50-18-72(a)(2) (2020) (Georgia statute excluding medical records from public access).

²⁹¹ Notes from all interviews are on file with the authors.

²⁹² *Id.*

²⁹³ *Id.*

question of what constitutes serious misconduct is subjective. One stated candidly, “The problem is, I don’t know how to draw a line. This is a complicated issue and there is a lot of nuance here. In law enforcement we have to hire human beings, and human beings are going to continue to make mistakes The question about what are legitimate mistakes and what kind of information should be protected, that’s an incredibly complicated issue.”²⁹⁴ Another explained his reasoning as follows: “Mistakes of the head involve thinking you were doing the right thing and it ended up not being the right thing. Those things are good learning experiences, and those officers can with training turn out to be good officers. But mistakes of the heart are intentional misconduct. Those should always be shared [with the public] because those officers intended to do what they did.”²⁹⁵ Three interviewees opined that the public should not have access to records of unsubstantiated complaints against officers, and two said the public should not have access to misconduct from many years ago.²⁹⁶

A few administrators attempted to create bright-line rules regarding access to misconduct. Just one of the thirty-three phone interviewees said the public should have no access to misconduct records at all.²⁹⁷ Another said the public should have no access to anything in an officer’s personnel file.²⁹⁸ One warned that, if the public had access to all records within an officer’s personnel file, departments would simply stop recording misconduct or disciplining their officers.²⁹⁹ Another said the public should have access to nothing beyond a summary of internal investigative findings, noting that internal investigations often involve interviewing officers about their fellow officers’ conduct and people would not speak as candidly about their colleagues if they knew their responses were accessible to the public.³⁰⁰

Four interviewees staked out positions in favor of unlimited disclosure, opining that the public should have access to all records with no exceptions.³⁰¹ To quote one administrator, “It’s the public’s business. This is public conduct by a public official. Give me a break.”³⁰²

Many administrators commented on the complexity of determining what kind of misconduct records should be accessible and said they would have trouble drawing lines or providing proposals to legislators or

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

policy makers.³⁰³ One, however, had no such compunctions. This administrator said that he “could give two shits about whether the public has access to misconduct records,” because he “just do[es]n’t do any discipline.”³⁰⁴

5. Comparison to other administrators and officers

Interviewees were asked how their views regarding public access to misconduct records compared to administrators in other agencies and non-administrative officers³⁰⁵ in their own agency.³⁰⁶ Their responses again revealed a wide variety of opinions.

On the question of how their views compared to non-administrative officers in their own department, approximately half of the interviewees said they believed their officers were generally opposed to public access.³⁰⁷ Several characterized this as a resistance to officers “having their dirty laundry aired,” and recognized that release of misconduct records is often embarrassing to the named officers.³⁰⁸ Some of these administrators acknowledged that their own views had shifted after they took on management positions, and that they would not expect their officers to take a “big picture” approach to the importance of releasing records.³⁰⁹ One administrator who strongly supported disclosure of misconduct records conceded that his lower-level officers “totally don’t share my views,” and said he was not sure any patrol officer in any agency would approve of discipline records being publicly available.³¹⁰

Nearly one-third of the interviewees, however, said they believed non-administrative officers within their department supported transparency and disclosure of misconduct records.³¹¹ Many of these administrators said they discussed the topic extensively with their staff and had gone to great lengths to build a culture of transparency and accountability.³¹² One prioritized building a culture of “legitimacy and trust” in his department.³¹³ Another said he had to convince his officers of the benefits of transparency, but believed most of them eventually

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *E.g.*, the “rank and file” patrol officer or other law enforcement officers in non-supervisory positions.

³⁰⁶ *See* Appendix D.

³⁰⁷ Detailed notes from all interviews are on file with the authors.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

agreed that improved relationships with the community made their jobs easier.³¹⁴ One chief said he had started requiring officers to write an apology letter to the rest of the department after a misconduct incident, and his officers embraced this so thoroughly that, when the deputy chief forgot to send out an apology letter after a particular incident, multiple officers asked why they had not received the letter.³¹⁵

Several administrators expressed frustration with law-enforcement unions that they perceived as misrepresenting the departments' views on disclosure of misconduct records and hampering their efforts to improve accountability.³¹⁶ One complained that politically powerful police unions had convinced legislators to compromise accountability in exchange for union support.³¹⁷ The administrator called this compromise a "cruel joke on the public," noting that elected legislators were prioritizing law-enforcement preferences even when it came at a cost to public safety and accountability.³¹⁸

Interviewees expressed similarly varied opinions about the views of other administrators. Some who supported disclosure of misconduct records believed themselves to be outliers in their area, surrounded by other administrators firmly opposed to disclosure.³¹⁹ Others estimated that their stances supporting disclosure were "probably normal" and "mainstream."³²⁰ In contrast, two police chiefs strongly opposed to disclosure of public records said they were not aware of a single administrator who favored disclosure.³²¹

Several administrators acknowledged that their own views on transparency had changed significantly over the years, in part due to exposure to chiefs with different opinions. One said he had "certainly . . . changed my position over the years," becoming more open to transparency after communicating with people in his community and hearing positive experiences of police chiefs and sheriffs in states that required disclosure.³²² Another commented, "[w]hat has really changed me is hearing from the community. Community members saying how important it is that the officers who are doing the job believe in high standards, and that the administration holds them to those standards."³²³

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

Relatedly, one administrator described how his own approach to the issue evolved dramatically after he worked in states with different records laws. His first law-enforcement job was in a midwestern state that did not permit disclosure of police records, and he assumed that lack of public access was “normal and appropriate.”³²⁴ When he moved to a state that permitted public access, he was initially “horrified” at the idea of releasing misconduct records to the public, but began to see benefits both in improving public confidence in the department and deterring misconduct by officers.³²⁵ He then served in California, where the “tremendous union influence over legislators” hamstrung the few chiefs who favored transparency.³²⁶ Now serving in a fourth state that permits broad access to misconduct records, this chief believed that many police departments are slowly recognizing the benefit of laws requiring disclosure, but expressed doubt that unions will ever embrace such laws.³²⁷

A consistent theme that nearly half of the interviewees broached spontaneously was that of generational differences in approaches to privacy expectations and disclosure of misconduct records.³²⁸ Although the scripted interview questions did not include this topic, sixteen of the thirty-three administrators volunteered that they believed older generations of law-enforcement administrators and officers are more opposed to transparency, and that younger officers were more likely to embrace transparency and accountability.³²⁹ Some administrators speculated that this perceived generational gap may be the product of advancements in technology and use of social media, such that new officers today are accustomed to living “in the public domain.”³³⁰ Others said police officers today know that body cameras and other video will capture most of their behavior on duty, so the idea that the public may have access to information about their conduct is not surprising or alarming.³³¹

One interviewee explained that some administrators who have been in charge of their agencies for many years believe, “this is my city, I’ll release what I want, we don’t need people finding out about our business.”³³² Newer chiefs, in contrast, have a better understanding of public records laws and greater respect for the public’s right to know how

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

their law enforcement agencies are run.³³³ Many of the administrators who supported release of records also said that they and other administrators have witnessed the havoc that an entrenched culture of secrecy can wreak on a department and are increasingly striving to avoid that approach.³³⁴ One described this generational shift as “a little bit of a sea change” in police departments’ views on transparency, finding that new police chiefs are more likely to recognize “there is absolute legitimacy to transparency and public trust.”³³⁵

IV. SIGNIFICANT FINDINGS AND SUGGESTIONS

Diversity of opinions: The results of this study provide several important insights for law enforcement officials and policymakers to consider. The first and most notable is simply the diversity of law enforcement opinions on this topic and the error of assuming that all law enforcement officials oppose public access to misconduct records. While union representatives opposing release tend to occupy the most prominent space in debates about access to misconduct records,³³⁶ the survey and phone interviews revealed enormous varieties in approaches to the topic. Administrators ranged from strong proponents of public access (*e.g.*, “Being truthful and transparent is a must so that [the] department can maintain credibility”³³⁷) to staunch opponents (*e.g.*, “Private employees[?] misconduct records are not open to the public, why should public employees be subject to the embarrassment”). Several administrators complained that their voices on this topic are rarely heard and remarked on how pleased they were to receive a survey asking for their thoughts on an issue that they believe is often oversimplified or misrepresented in popular dialogue.³³⁸

Slight evidence of harm: A second significant finding is the minimal evidence that public access to misconduct records resulted in harm to officers. Only sixteen percent of survey respondents identified that public access had caused any harm to their officers.³³⁹ The survey respondents were largely administrators who have devoted their careers to law enforcement, and one could anticipate they may have a favorable law

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *See supra* Part I.

³³⁷ All responses from both the survey and phone interview are on file with the authors.

³³⁸ To quote one interviewee, “Thanks for what you’re doing. This topic is very worth of inquiry.” Another commented, “I actually appreciate this being researched and getting all sides. Because we don’t frequently get to share our thoughts on this topic.” *Id.*

³³⁹ All survey responses are on file with the authors.

enforcement bias that could influence their survey responses. Indeed, many of the respondents in both the survey and phone interviews exhibited a strong pro law enforcement mindset.³⁴⁰ Even in this group of administrators with substantial years of experience upon which to draw, fewer than one in five believed that public access to misconduct records had harmed their officers.³⁴¹

The reputational harm that administrators did identify sometimes appeared justified. While some of the described damage to reputation seemed potentially unfair—for example, unfounded complaints that linger to tarnish an officer’s reputation years after the complaints are determined to be untrue³⁴²—other reputational damage appeared appropriate given the misconduct at issue. The reality that an officer fired by one department for misconduct had trouble finding new employment in law enforcement³⁴³ might well be positive for both law enforcement generally and the communities in which that officer would otherwise have worked. Similarly, the fact that an officer was embarrassed after his wife found out he had previously been disciplined for sexually harassing another woman³⁴⁴ could certainly be harmful to the officer and his marriage, but might also be considered an appropriate consequence for his behavior.

Even slighter evidence of physical harm: Another striking aspect of the study is the almost total absence of data supporting claims of physical harm to officers. As noted in Part I, opponents of public access argue with somewhat surprising regularity that disclosure of misconduct records would physically endanger officers.³⁴⁵ They have used this fear as a basis for proposed laws and policies banning the public from learning even the names of officers who have been accused of or disciplined for misconduct.³⁴⁶ The results of this research call into question these claims of physical danger. Out of 344 respondents across twelve states representing widely varied department sizes and regions of the country,

³⁴⁰ See, e.g., “Police officers have an incredibly difficult job in today’s world. Officers respond to, and are thrust into situations that are chaotic and rapidly evolving . . . An officer’s actions, or in-actions, are then put under a microscope and scrutinized by person(s) who have never experienced such situations, let alone attempted to de-escalate them”; “The current climate of blaming the officers will result in cultivating police departments full of officers who do nothing for fear of getting in trouble”; “Law enforcement officers continue to have their personal rights (free speech) taken away through social media and other outlets. . . . We have allowed fanatics to ruin careers and create bottlenecks in our courts and law enforcement administration operations. What a shame!” *Id.*

³⁴¹ All survey responses are on file with the authors.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ See *supra* Part I.

³⁴⁶ See *supra* Part I.

only one identified any physical harm to an officer in their department.³⁴⁷ This administrator described the harm as “[p]hysical and verbal harassment,” with no additional information provided.³⁴⁸

This observation is not meant to discount the significance of non-physical forms of harm, particularly the few reported instances involving threats of violence or members of the public appearing at an officer’s home.³⁴⁹ The single account of an officer being publicly criticized to the extent that he felt suicidal was also deeply concerning.³⁵⁰ But even these reports were scant, and none involved actual physical harm. The results of this study suggest that law and policymakers may wish to employ more skepticism when unions invoke fears of physical danger and retaliation as a basis to refuse public access to misconduct records.

Benefits to law enforcement agencies: When proponents of open records laws advocate for public access to misconduct records, they typically frame their arguments in terms of benefits for civilians: that communities need to be safe from abusive officers, able to hold departments accountable, etc.³⁵¹ But many of the respondents in this study identified benefits to the law enforcement agencies themselves. Administrators repeatedly stated that making records accessible to the public quelled rumors and allowed the department to provide a fuller picture of events than what had previously been reported.³⁵² Many also believed that quickly and thoroughly disclosing information about misconduct diffused what might otherwise turn into a media uproar, noting that the misconduct itself is often less egregious than what people assume when they believe a coverup is occurring.³⁵³

This perspective—that providing public access to misconduct records can aid the law enforcement agency itself, in addition to the community it serves—is almost entirely missing from current conversations about public access laws. Multiple administrators compared law enforcement concerns about open records to similar fears five or ten years earlier regarding body cameras: many police officers objected to body cameras as overly invasive, but have since found them helpful in resolving claims of police misconduct.³⁵⁴ Here too, perhaps some law enforcement agencies—particularly those that thoroughly and

³⁴⁷ All survey responses are on file with the authors.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *See supra* Part I.

³⁵² All survey and interview responses are on file with the authors.

³⁵³ One administrator told a story of a death in the jail he operated. “People asked, ‘What do we do,’ and [I] said, ‘start telling the truth right away.’ . . . When you try to keep things tamped down or secret it only makes multiple people look bad.” *Id.*

³⁵⁴ All survey and interview responses are on file with the authors.

fairly investigate incidents of misconduct—are discounting the benefit that access to misconduct records could provide their own department, in the form of greater detail and quality of information regarding an allegation of misconduct.

Suggestions for revisions to existing laws or proposals for new laws: Both survey and interviews were invited to articulate in their own words in what situations the public should not have access to misconduct records.³⁵⁵ These questions yielded answers that could inform future records laws. Numerous administrators expressed concern that disclosure of information relating to officers' mental health would violate the officers' privacy and deter officers from seeking needed mental health assistance.³⁵⁶ Somewhat relatedly, other administrators suggested that highly personal information such as medical records, financial records, and officers' personal phone numbers and addresses should be protected from public eye.³⁵⁷

Some state laws already explicitly protect this kind of information from disclosure.³⁵⁸ Other statutes, however, prohibit disclosure of information if disclosure would “constitute an unwarranted invasion of privacy,”³⁵⁹ and provide no guidance as to what types of disclosure would satisfy this standard. In *Police Privacy*, Professor Moran concluded that highly personal and intimate information such as medical, mental health, sexual, or financial history does fall under the umbrella of information traditionally protected by privacy law, and thus, perhaps, should be exempted from laws otherwise permitting public access to officer misconduct records.³⁶⁰ This study—particularly the expressed concerns that officers may be deterred from seeking mental health assistance if that

³⁵⁵ See Appendices C and D.

³⁵⁶ See *supra* Part III.B.4.

³⁵⁷ All survey and interview responses are on file with the authors.

³⁵⁸ E.g., ARIZ. REV. STAT. ANN. § 39-123 (2020) (Arizona statute excluding home phone numbers and addresses from public record); GA. CODE ANN. § 50-18-72(a)(2) (2020) (Georgia statute excluding medical records from public access).

³⁵⁹ E.g., CONN. GEN. STAT. § 1-210(b)(2) (2020) (exempting personnel records from disclosure to the public if such disclosure would constitute an “invasion of personal privacy”); D.C. CODE § 2-534(a)(3) (2020) (exempting records of investigations conducted by the Office of Police Complaints, to the extent disclosure would “[c]onstitute an unwarranted invasion of personal privacy”); MICH. COMP. LAWS ANN. § 15.243(1)(a), (b) (2018) (precluding disclosure of personal information that would “constitute a clearly unwarranted invasion of . . . privacy”); N.H. REV. STAT. ANN. § 91-A:5(IV) (2020) (exempting personnel records “and other files whose disclosure would constitute invasion of privacy”).

³⁶⁰ Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 180-81 (2019) (reasoning that most misconduct records do not qualify as private information, but that information involving an officer's medical, mental health, or intimate partner history may well be private); see also *id.* at 184 (“[S]ome misconduct records likely do implicate the kinds [of] intimate and personal issues generally deemed private . . .”). I use the term “perhaps” to modify this conclusion because even highly personal information may be appropriate to disclose if it involves on-duty conduct (e.g., an officer engaging in a sexual relationship with a witness the officer met while on duty).

information was publicly available—provides additional evidence that lawmakers would do well to clarify what constitutes an unwarranted invasion of personal privacy.

Approximately fourteen percent of survey respondents said that the public should not have access to records of misconduct allegations that were deemed unfounded or not sustained.³⁶¹ Those who chose to explain this answer typically reasoned that false accusations unfairly damage officers' reputations.³⁶² When the media or members of the public learn of these allegations, they fixate on the accusation itself rather than any subsequent determination that the misconduct was not proven.³⁶³

While this reasoning makes sense at a superficial level, the potential effects on law enforcement accountability efforts of permitting access only to sustained complaints are worrying. This is a problem Professor Moran has addressed in previous work: internal affairs units within law enforcement agencies are tasked with investigating complaints of misconduct by their own officers, and these units traditionally sustain an extremely low percentage of complaints.³⁶⁴ Making misconduct allegations public record only if the allegations are sustained could incentivize internal affairs units to sustain even fewer complaints. Even if such a law does not improperly galvanize those agencies not to sustain complaints, it still lets public access hinge entirely on the decision of the law enforcement agencies themselves regarding whether misconduct allegations are valid.

Conversely, if the public has access to all records of misconduct allegations—whether sustained or not—it may better assess whether its law enforcement agencies are taking misconduct complaints and investigations seriously. As Professor Moran noted in *Police Privacy*, “If the public can review these records and identify patterns of police departments rejecting civilian complaints and absolving their officers . . . it can begin to demand accountability from police department leadership. Without access to such data, the public cannot detect patterns in whether and how the department responds to misconduct allegations”³⁶⁵ Confidence in the reliability of misconduct investigations can benefit law enforcement agencies. Many of the administrators responding to our survey and phone interviews made this

³⁶¹ All survey responses are on file with the authors.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 844, 853-65 (2016); see also James Queally, *California Police Uphold Few Complaints of Officer Misconduct and Investigations Stay Secret*, L.A. TIMES, Sep. 23, 2018, [http://www.latimes.com/local/lanow/la-me-police-misconductcomplaints-20180923-story.html# \[https://perma.cc/78V3-NE3Y\]](http://www.latimes.com/local/lanow/la-me-police-misconductcomplaints-20180923-story.html# [https://perma.cc/78V3-NE3Y]) (in California, internal affairs units reject approximately 92-98% of complaints regarding officer misconduct).

³⁶⁵ Moran, *supra* note 360, at 194.

very point, reasoning that public access is beneficial when it allows the community to see that their agencies take misconduct allegations seriously, investigate thoroughly, and discipline where appropriate.³⁶⁶

CONCLUSION

This article begins filling the data void in the flourishing debates around public access to law enforcement misconduct records. While by no means exhaustive, it provides an important contribution by collecting and providing information regarding law enforcement agencies' experiences with public disclosure. And it gleans this information from voices rarely heard in the debates surrounding public records laws: law enforcement administrators themselves. This article should inform ongoing discourse regarding public access laws as courts, lawmakers, and administrators continue to grapple with these laws.

APPENDIX A

Introductory Email

Dear [Title/Name]:

We are professors at the University of St. Thomas, and are writing to ask you to participate in a brief, anonymous survey regarding law enforcement leaders' opinions on public access to police misconduct records.

We obtained your information from the 2019 National Directory of Law Enforcement Administrators. You were selected for this survey because you are a police chief in a state that sometimes permits public access to these records. Many states are considering changes to laws regulating who has access to records of police misconduct and your voices are important to this discussion.

The survey should take approximately five minutes to complete. All information will be confidential and your name will not appear in any subsequent findings or reports resulting from this study.

To participate, please complete the survey online at [link inserted here].

Please call or email if you have any questions about the survey or the research project. We appreciate your time and very much look forward to hearing your thoughts.

³⁶⁶ See *supra* Part III.A.2, B.2.

Sincerely,

Rachel Moran
Assistant Professor of Law
University of St. Thomas School of Law
rmoran@stthomas.edu
(651) 962-4810

Jessica Hodge, Ph.D.
Associate Professor, Sociology & Criminal Justice
University of St. Thomas
jhodge@stthomas.edu
(651) 962-5631

APPENDIX B

Informed Consent Language

Law Enforcement Perspectives of Public Access to Police Misconduct Records

Thank you for agreeing to participate in this survey.

Your agency is one of approximately 4000 agencies across the country that we are contacting for this study. Your participation is voluntary; if you do not wish to participate, you may stop at any time. You may also choose to not answer any questions that you do not want to answer. Responses will be completely confidential and your name will not appear in any subsequent materials resulting from this study. Your specific agency or county will also not be named.

The findings may be used in professional presentations or be published in professional journals; however, your identity will be protected and your real name will never be used or connected with the survey materials. If you decide later that you do not want us to use the information you have shared, you can let us know and we will remove your information from the study.

There are no direct benefits to you for participating. There are no known risks associated with this study except for the possible breach of confidentiality. To lessen this risk, we are not recording any identifying information with the survey data. You will receive no compensation for your time to participate in this study.

Taking part in this survey is your agreement to participate; the alternative would be to not participate.

Thank you again for participating in the survey. Please call or email if you have any questions about the survey or the research project.

Contact Information:

Rachel Moran
Assistant Professor of Law
University of St. Thomas School of Law
rmoran@stthomas.edu
(651) 962-4810

Jessica Hodge, Ph.D.
Associate Professor, Sociology & Criminal Justice
University of St. Thomas
jhodge@stthomas.edu
(651) 962-5631

APPENDIX C

Survey

This survey addresses law enforcement leaders' attitudes and experiences on the question of how permitting public access to records of police misconduct helps or harms police officers, police departments, and the communities they serve.

For purposes of this survey, we define "police misconduct records" as including, among others, complaints lodged by civilians against police officers, internal affairs records regarding allegations of police officer misconduct, disciplinary findings against officers, and performance evaluations finding misconduct by officers.

We define "public access" as the opportunity for members of the public to request and receive copies of the records.

Are you aware of any incidents in which public access to police misconduct records caused harm to a police officer in *your* department?

No

Yes

[If "no," skip to Question 2]

1.b. Please identify the type of harm caused to the officer(s) (select all that apply):

Physical harm (e.g., officer was assaulted by member(s) of the public)

Threats to the officer by member(s) of the public

Harm to the officer's reputation

Harm to the officer's job performance (e.g., the officer was less likely to engage with members of the public in the field)

Created a distraction for the officer(s)

Other (please specify):

1.c. Please provide specific examples of how public access to police misconduct records caused harm to a police officer in your department:

Are you aware of any incidents in which public access to police misconduct records benefited *your* police department or the community it serves?

No

Yes

[If "no," skip to Question 3]

2.b. Please identify the type of benefit received by your police department or the community it serves (select all that apply):

Improved police-community relations

Promoted community trust

Promoted accountability within the department

Reduced police misconduct

Promoted transparency

Made community safer

Other (please describe):

2.c. Please provide specific examples of ways in which public access to police misconduct records benefited your police department or the community it serves:

Your department shares police misconduct records with the public, because _____ (select all that apply):

It is required by law.

It satisfies public desire for information.

It satisfies media demand for information.

It satisfies demand from a civilian oversight agency.

It satisfies demand from groups like the American Civil Liberties Union (ACLU) or the National Association for the Advancement of Colored People (NAACP).

Other law enforcement agencies do it.

It is required by a court decision or other judicial mandate.

It enhances the reputation of the department.

The public deserves to know how we make strategic decisions.

The public deserves to know how we are performing as an agency.

It helps educate the public.

It allows our department to communicate directly with the public.

I personally think it is important.

Not applicable; we do not share police misconduct records with the public.

Under what circumstances, if any, should public access to police misconduct records be restricted?

Please share any additional thoughts or information you wish to provide on this topic:

Demographic data:

What is the size of the community your police department serves?

1,000,000 and over

500,000 to 999,999

250,000 to 499,999

100,000 to 249,999

50,000 to 99,999

25,000 to 49,999

10,000 to 24,999

Under 10,000

In what region of the country is your police department located?

Midwest

Northeast

South

West

Which of the following best describes your role within the department?

Chief/Inspector/Head of Department or Agency

Associate/Assistant/Deputy Chief

Communications/Public Relations/Information Officer

Other (please specify): _____

How long have you served in this position?

Less than 1 year

1 -5 years

6-10 years

11-15 years

16+ years

Follow up:

Are you willing to speak with one of the researchers in order to expand on the information provided in the survey? If yes, please follow this link [link to new survey inserted here] and provide your contact information. We will contact you soon.

APPENDIX D

*Phone Interview Script**Interview Guide**Law Enforcement Perspectives of Public Access to Police Misconduct Records*

Thank you for agreeing to participate in a follow-up phone interview. The survey you completed was anonymous, so I have no idea how you answered. For purposes of this phone interview, I will record your name and law enforcement agency for my notetaking purposes, and I will share it only with the other researcher who is conducting this study with me. Any information we include in our final report or publication will be stripped of identifying details.

[Obtain permission to proceed in this manner.]

Are you aware of any incidents in which public access to police misconduct records caused harm to a police officer in *your* department?

No

Yes

[If “no,” skip to Question 2]

Please describe specific examples of how public access to police misconduct records caused harm to a police officer in your department (probe: who was involved, what type of harm was caused, what negative outcomes occurred, how was the incident/harm handled or managed by the department).

Are you aware of any incidents in which public access to police [or law enforcement] misconduct records benefited *your* department or the community it serves?

No

Yes

[If “no,” skip to Question 3]

Please describe specific examples of ways in which public access to police misconduct records benefited your police department or the community it serves (probe: who was involved, what type of benefit occurred, what positive outcomes were generated for the department/community)

Why does your department share police misconduct records with the public? (probe: do you think this process should continue – why or why not?)

Under what circumstances, if any, should public access to police misconduct records be restricted? (probe: what incidents have occurred

that lead you to believe that records should be restricted, how should the restrictions be decided, who currently has the authority to decide on whether records are released and should this be changed?)

Do you think your lower-level non-administrative officers share these same views, or do you think they would take a different approach to privacy issues? [Probe: Why do you think this?]

What about other law enforcement administrators: how do you think your views on this topic compare to other administrators?

Please share any additional thoughts or information you wish to provide on this topic:

Demographic data:

What is the size of the community your police department serves?

How many officers are in your department?

In what region of the country is your police department located?

Midwest

Northeast

South

West

Which of the following best describes your role within the department?

Chief/Inspector/Head of Department or Agency

Associate/Assistant/Deputy Chief

Communications/Public Relations/Information Officer

Other (please specify): _____

How long have you served in this position?

Less than 1 year

1 -5 years

6-10 years

11-15 years

16+ years

How long have you served in law enforcement?

APPENDIX E

Reminder Email

Dear [Title/Name]:

We recently contacted you regarding participating in a brief, anonymous survey regarding law enforcement leaders' opinions on public access to police misconduct records.

This is a quick reminder to please complete the survey if you have not already done so. We greatly appreciate your time in contributing to our research goals.

To participate, please complete the survey online at https://stthomas.az1.qualtrics.com/jfe/form/SV_85Inpl1kW3vYx4p. *If you have already completed the survey, thank you. You do not need to do anything further.*

The survey should take approximately five minutes to complete. All information will be confidential and your name will not appear in any subsequent findings or reports resulting from this study.

Please call or email if you have any questions about the survey or the research project. We appreciate your time and very much look forward to hearing your thoughts.

Sincerely,

Rachel Moran
Assistant Professor of Law
University of St. Thomas School of Law
rmoran@stthomas.edu
(651) 962-4810

Jessica Hodge, Ph.D.
Associate Professor, Sociology & Criminal Justice
University of St. Thomas
jhodge@stthomas.edu
(651) 962-5631