Effectively Implementing Civilian Oversight Boards to Ensure Police Accountability and Strengthen Police-Community Relations

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KEVIN KING*

I. Introducing the Need for Civilian Oversight Boards to Curb Police Misconduct

It stops today.¹

On July 17, 2014, at about 4:45 p.m., Officer Justin Damico and Officer Daniel Pantaleo approached Eric Garner to arrest him for selling untaxed cigarettes.² Eric was arrested on the same charge a few months prior as well as in the previous week.³ This time, Eric was upset and protested, stating, “Every time you see me you, you want to mess with me. I’m tired of it. It stops today.”⁴ Officer Damico responded, “What are you making a scene for?” Eric was insistent and explained, “Every time you see me you want to harass me, you want to stop me, tell me I’m selling cigarettes. I’m minding my business, officer. I’m minding my business. Please just leave me

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4. Id.
alone. I told you the last time. Please just leave me alone.”

Officer Pantaleo then approached Eric from behind and began attempting to place him in handcuffs. Eric put his hands up and repeated, “Please don’t touch me. Don’t touch me please.” Officer Pantaleo responded by grabbing Eric by the neck and placing him in a chokehold. Two additional officers responded. In a jerking motion, Officer Pantaleo pulled Eric to the ground by his neck and sustained the chokehold. As he was about to hit the ground, Eric gasped for air. Shortly after, Officer Pantaleo released the chokehold and placed both hands on the top of Eric’s head as he laid face down. Officer Pantaleo immediately pushed Eric’s face into the pavement as the other officers placed him in handcuffs. As this happened, Eric repeated, “I can’t breathe. I can’t breathe. I can’t breathe.” Seconds later, Eric was laid on his side, limp and unresponsive. Eric was suffering from cardiac arrest.

Emergency medical services (hereinafter “EMS”) arrived at the scene four minutes later. While waiting, one officer checked Eric’s pulse and another searched his pockets. Eric remained in handcuffs. Once an emergency medical technician (hereinafter “EMT”) arrived, she asked, “Sir, is anything hurting right now?” Eric remained unresponsive. His head dangled limp. An officer informed him, “Sir, EMS is here. Answer their questions, O.K.?" The EMT then felt for a pulse, tapped him, and said, “Sir, it’s EMS. Come on. We’re here to help, alright?” Eric remained unresponsive. Shortly after that, the

5. Sanburn, supra note 1.
6. Id.
7. Id.
8. Goldstein & Schweber, supra note 3.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
officers removed the handcuffs, placed Eric in a stretcher and EMS transported him to Richmond University Medical Center.\textsuperscript{25} Eric was 43 years old and a father of six.\textsuperscript{26} On July 17th, 2014, he protested years of harassment at the hands of law enforcement. He was insistent—"It stops today!" Tragically, he was right. His lifelong struggle with law enforcement ended with his death. Upon conducting the autopsy, a spokeswoman for the New York City Medical Examiner stated that Eric died from neck compressions (the chokehold), the compression of his chest, and his prone position while being physically restrained by police.\textsuperscript{27} Asthma, heart disease, and obesity were listed as contributing factors.\textsuperscript{28} In 2014, Eric died from the same chokehold that the New York Police Department (hereinafter "NYPD") banned its officers from using in 1993.\textsuperscript{29}

\textit{Mike Brown had to die for our voices to be heard.}\textsuperscript{30}

Tragedies such as the killing of Eric Garner, spark widespread distrust in police forces and are often used as a platform for activism. Activists seek punishment of accused police officers and policy changes to mold and monitor police conduct. Civilian oversight boards have been an essential aspect of police misconduct prevention strategy.\textsuperscript{31} These boards are entities separate from police departments, designed to handle civilian complaints about police misconduct.\textsuperscript{32} They are largely comprised of civilians who are not sworn police officers.\textsuperscript{33} The purpose of these boards is to give every civilian the opportunity to correct any perceived injustice. These boards are present in most major cities and are often formed shortly after a major tragedy, such as the killing of Michael Brown in Ferguson, Missouri.\textsuperscript{34}

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\begin{footnotesize}
24. CBS NEWS, \textit{supra} note 16
25. \textit{Id.}
28. \textit{Id.}
32. \textit{Id.}
33. \textit{Id.} at 4.
\end{footnotesize}
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On August 9, 2014, Ferguson Police Officer David Wilson shot and killed unarmed 18-year-old Michael Brown. Officer Wilson stopped Michael and his friend Dorian Johnson as they were walking in the middle of Canfield Drive. Shortly after, a struggle broke out between Michael and Officer Wilson near the patrol car. One shot was fired during the struggle. After that, Michael began to run away. Officer Wilson continued shooting and fatally wounded Michael. Michael was at least 35 feet away from the patrol car when Officer Wilson shot him. Officer Wilson shot Michael a total of six times, including twice in the head.

There are still several facts in dispute. Just days after the incident, Ferguson Police Chief Thomas Jackson released surveillance video of Michael allegedly robbing a store clerk of cigars. However, Chief Jackson also stated that Officer Wilson was unaware of the alleged robbery and his reason for stopping Michael and Dorian was unrelated to the suspected robbery. Rather, Chief Jackson claimed that Officer Wilson stopped Michael and Dorian for jaywalking. In a press conference, St. Louis County Police Chief Jon Belmar stated that Michael and Officer Wilson were struggling over the officer’s handgun immediately before the first shot fired. Several witnesses stated that Michael raised his hands and surrendered before Officer Wilson continued firing.

Shortly after the shooting, protestors nationwide organized, renewed their demand for officer accountability, and held demonstrations. On September 9, 2014, the Ferguson City Council

36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id.
45. Id.
46. Id.
47. Srikrishnan, supra note 43.
proposed an ordinance to create a civilian oversight board. The concluding section of this Note contains recommendations for Ferguson’s proposed board.

While implementing civilian oversight boards is an appropriate response to police brutality, it is problematic when local governments wait until boards become necessary as a response rather than taking the initiative to implement them as preventative. In the wake of the Michael Brown killing, Deborah Young of Ferguson, Missouri, expressed her frustration when she spoke before the Ferguson City Council about curbing police misconduct: “Mike Brown had to die for our voices to be heard.” Civilian oversight boards are not present in all major cities, including Bakersfield, California, where many residents have demanded that one be created after the David Silva killing in 2013.

Police misconduct goes beyond tragic homicide. Civilians often complain of excessive force, disrespect via racial slurs, harassment, and other grievances not suited to be solved through civil or criminal proceedings. Police officers have unique power in being able to use deadly force and other intrusive means of carrying out their duties. When a civilian is handcuffed, ordered to lay on the ground, thrown to the ground, and tased to the ground, they can feel the most atrocious infringement of their liberty. Civilians are often further enraged because they do not perceive this exercise of power as legitimate and justified. Thus, when submitting complaints, civilians are not always seeking recourse for the most egregious offenses. Instead, they may simply be searching for an explanation for the officer’s actions, an apology, and assurance that illegitimate action will cease. What do civilians do with these frustrations and what are their remedies, if any?

Civilian oversight boards are not the only appropriate spheres to receive civilian complaints and create policy change in law

51. See infra Part VI.
52. Bosman, supra note 30.
53. David Silva died while Kern County police officers were attempting to arrest him for public intoxication. After David resisted arrest, the officers released a K-9 to attack him and beat him until he became unresponsive. He suffered a heart attack and died shortly after. Mike Fagans, Timeline Surrounding David Sal Silva’s Death, THE BAKERSFIELD CALIFORNIAN (June 1, 2013), http://www.bakersfieldCalifornian.com/local/x480782606/Timeline-surrounding-David-Sal-Silvas-death.
55. Id.
56. Id.
enforcement. Police misconduct has been limited by Fourth Amendment and Fifth Amendment jurisprudence.\textsuperscript{57} Civilians are protected from searches and seizures without probable cause and are less susceptible to involuntary confessions resulting from police interrogation tactics.\textsuperscript{58} However, police officers can still circumvent these rights by attaining consent.\textsuperscript{59} Thus, there is a continued need for additional protective measures. For instance, if a civilian is aware that they have the right to refuse a consent search, then they may be more likely to assert that right. Requiring that officers give such an admonition may suffice. However, such an admonition is currently not required by law because actual knowledge of the right to refuse consent is not essential to demonstrate voluntariness.\textsuperscript{60} Additionally, police departments across the country have begun experimenting with body-mounted cameras, which would ensure transparency.\textsuperscript{61} Thus, although civilian oversight boards are not the absolute cure for stopping police misconduct, when implemented effectively, they can serve as one pivotal instrument among a greater strategy.

Critics of civilian oversight boards argue that they are unnecessary because [1] there are several other avenues in curbing police misconduct and [2] boards are ineffective.\textsuperscript{62} However, since police misconduct is such a broad and complex issue, there is no one-size-fits-all remedy. Constitutional protections invoked during criminal proceedings do not address more minor allegations and therefore are not an effective deterrent. For instance, in criminal proceedings, the remedy for an improper search and seizure is suppression of evidence.\textsuperscript{63} This remedy does not prevent police officers from acting first and dealing with the consequences later.\textsuperscript{64} Criminal proceedings have no bearing on them personally, so those consequences are relatively minor.\textsuperscript{65} Further, this type of judicial oversight in criminal proceedings does nothing to regulate illegal

\textsuperscript{61} Ian Lovett, In California, a Champion for Police Cameras, N.Y. TIMES, Aug. 22, 2013, at A12.
\textsuperscript{63} See Mapp, 367 U.S. at 648.
\textsuperscript{64} Benjamin Weiser, Police in Gun Searches Face Disbelief in Court, N.Y. TIMES (May 12, 2008), http://www.nytimes.com/2008/05/12/nyregion/12guns.html.
\textsuperscript{65} Id.
searches and seizures that do not result in a formal arrest and charge.

Civil litigation is also ineffective. The most viable civil suits spawned by police misconduct frequently involve a wrongful death or excessive force. United States Supreme Court precedent has also limited an individual's ability to use equitable relief as an instrument for policy change. In Rizzo v. Goode, the Court overturned an injunction issued by the District Court for the Eastern District of Pennsylvania ordering Philadelphia's Mayor, City Managing Director, and supervisory police officials to submit a plan for handling civilian complaints of police misconduct.66 The Court held that such an injunction was an unwarranted intrusion on official discretion because future injury was too attenuated.67 In City of Los Angeles v. Lyons, Adolph Lyons requested that the Court grant injunctive relief by ordering the Los Angeles Police Department (hereinafter “LAPD”) to terminate its chokehold policy, which caused a minimum of 16 deaths from 1975 to 1983.68 Twelve of these victims were African-American men.69 However, the Court held that Mr. Lyons lacked standing because he failed to prove that he was in immediate danger of irreparable injury.70 Arguments of past injury and a pattern of discriminatory implementation were too speculative to predict future harm.71 Such jurisprudence has created a void in curbing police misconduct.

Are internal affairs (hereinafter “IA”) investigations sufficient in both holding law enforcement accountable and serving civilian needs? There is a fundamental problem with giving internal affairs full discretionary power to hold police officers accountable. Often civilians simply do not trust the police to police themselves. As Bob Aaronson, Independent Police Auditor/Ombudsman of Davis, California, stated in a 2007 interview, “There are instances where [internal affairs bureaus] will have a tendency[,] in order to avoid the limelight or [] the harsh reality[,] . . . to find a way to avoid getting to the right result.”72 The Denver Office of the Independent Auditor made a similar finding with regard to their Sheriff's Department.73

67. Id. at 366.
69. Id.
70. Id. at 111.
71. Id.
They noted that, from January 2011 to June 2013, there were 861 grievances filed by inmates regarding excessive force, sexual harassment, and usage of racial and ethnic slurs. 74 Fifty-four of these complaints were considered "serious misconduct" and only nine were investigated. 75 Out of the 788 complaints against deputies, 125 (16%) were against the same four officers, who comprised 0.57% of their police force. 76 These figures demonstrate a likelihood that some complaints against these officers had merit and expose IA’s failure to investigate.

Failure in the police holding each other accountable may result from a "blue fraternity" in which police officers protect one another at all costs and shun those that break the "Blue Wall of Silence" by putting holistic justice first. 77 Others within the police department may perceive IA bureaus as the "rat squad" because the bureau’s effectiveness largely depends on the cooperation of other police officers. 78 There is a general disdain for police officers that cooperate with IA, which is not conducive to running an effective bureau. 79 This "blue culture" can result in officers’ failing to convey the full truth or outright lying to IA officers. For instance, former NYPD Officer Michael Dowd stated, "I had been in internal affairs investigations a couple of times, and they were very easy to breeze through. I answered a few questions. I lied through every answer, and I went back to patrol." 80

Furthermore, IA staff themselves may exhibit bias in favor of police officers when conducting interviews. 81 In a 1998 monitoring report, the Portland, Oregon Police Internal Investigations Auditing Committee noted the following issues after listening to interview tapes:

74. DENVER OFFICE OF THE INDEP. MONITOR, supra note 73, at 12.
75. Id.
76. Id. at 21.
79. Id.
[U]nnecessary leading questions, mostly in officer interviews; unstructured interviews with a somewhat casual tone, in which officers are allowed virtually uninterrupted narratives with very little close examination or follow-up questioning; . . . abbreviated officer interviews, sometimes less than ten minutes with officers accused of significant excessive or unauthorized use of force; . . . failure to routinely inquire about any potential witnesses; . . . uneven focus on complainant actions, sometimes to the neglect of officer actions.\textsuperscript{82}

IA officers may simply feed the police officers a story or allow officers to give an unchallenged version of theirs. Thus, an "impartial liaison" would be more effective in getting all of the facts on the table.\textsuperscript{83} With regard to complainant interviews, the adversarial nature of civilian-IA interaction may make civilians feel as if their complaints are futile and will not be handled appropriately.\textsuperscript{84} Accordingly, civilians may not be comfortable relaying their complaints to a department directly linked to the perceived oppressor. Additionally, civilians may also be met with hostility and face hurdles created by intake officers, such as lengthy waits before completing the process or failure to accommodate different languages.\textsuperscript{85} For these reasons, civilian oversight boards can fill the void in serving as an objective liaison.

Civilian oversight boards have had a mixed record in their effectiveness. This Note will address various reasons for the failure of some boards and present a blueprint for creating long-standing, efficient, and effective boards. This Note theorizes that a board's success depends on the board's legitimacy in formation, mayoral and police department support, and structure. Most importantly, civilian oversight boards must be fundamentally rooted in serving the community they were created for. Empowering civilians, improving community-police relations, promoting change within law enforcement agencies, and increasing police transparency must be essential goals of all boards.

\textsuperscript{82} CITIZEN ADVISORS TO THE POLICE INTERNAL INVESTIGATIONS AUDITING COMM., supra note 81.


\textsuperscript{84} Quinn, supra note 54, at 131.

II. Identifying Types of Civilian Oversight Boards and Their Respective Flaws

There are three types of civilian oversight boards, which I have labeled "independent investigatory," "pure monitoring," and "auditing boards." Many boards are multi-functioning, but can be categorized by their main function. Civilian boards can also be more broadly categorized as "external" or "internal." For the purposes of this Note, external boards function independently from Internal Affairs and are staffed by their respective government bodies. Internal boards may still consist of government appointed members, but operate solely based on work produced by IA.

A. Independent Investigatory Boards

Independent investigatory boards largely focus on the civilian complaint process. They have both an independent complaint intake and investigation process. They sometimes have the power to hold hearings, subpoena police officers for interviews and hearings, and make recommendations to the chief of police. Because the complaint process is often completely detached from IA, there is no "police policing themselves" issue.

However, issues may also arise from the adversarial tension created by these boards. For instance, Barry Donelan, President of the Oakland Police Officers' Association, expressed concern that independent investigatory boards have an inherent bias, which could cause them to "spin complaints" at the intake phase. This bias could potentially permeate into the investigation and deposition phases, running counter to a main objective of truth finding.

On the logistical side, independent investigatory boards face funding, staffing, and efficiency issues. For example, a 2007 audit of the San Francisco Office of Civil Complaints (hereinafter "OCC") by the city controller’s office revealed several institutional flaws.
"Auditors found that the [OCC] fails to perform its basic mission of timely investigation of civilian complaints against police, and they raised questions about ethical standards at the agency."\textsuperscript{91} From 2003 to 2006, the OCC failed to complete investigations and report findings 53\% of the time it attempted to meet its statutory deadline of nine months after receiving the complaint.\textsuperscript{92} Furthermore, individuals largely responsible for the delays were not held accountable and employee surveys revealed that morale was down.\textsuperscript{93}

Staffing issues can be partially solved through funding and the requirement of a specific investigator-police officer ratio. For instance, per the City Charter, the San Francisco OCC requires one investigator for every 150 police officers and allows funding for a temporary investigator when there is a deficit.\textsuperscript{94} Personnel, training and protocol issues can be solved through leadership within the board. Creating protocol manuals and formal training are a crucial solution, as stated by Joyce M. Hicks, the Executive Director of the OCC who took office shortly after the 2006 audit.\textsuperscript{95}

\section*{B. Pure Monitoring Boards}

In contrast, pure monitoring boards do not take part in the complaint process, but focus on conducting policy analysis of police protocol and practice. They are granted access to records in IA investigations and use these records to identify patterns in an effort to create systematic change. Upon spotting an issue and constructing a solution, these boards make recommendations to the chief of police. The City of Claremont Police Commission serves as a pure monitoring board.\textsuperscript{96} The Commission is designed to be interactive in order to "facilitate dialogue [between the community and the Police Department] on issues of concern regarding the Police Department" and is empowered to review police department policies, procedures, and practices.\textsuperscript{97} This includes police recruitment and training programs, customer service programs,

\textsuperscript{91} Van Derbeken, \textit{supra} note 90.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} S.F., CAL., MUN. CODE art. IV, § 4.127 (2004).
\textsuperscript{95} Episode #32: Joyce Hicks, Executive Director, San Francisco Office of Citizen Complaints, \textit{THE CRIMINAL JUSTICE CONVERSATIONS PODCAST WITH DAVID ONEK}, 5-6 (Apr. 25, 2012) [hereinafter Joyce Hicks Interview with David Onek], available at http://www.law.berkeley.edu/files/CrimJusPod_Episode32.doc.pdf.
\textsuperscript{96} CLAREMONT, CAL., MUN. CODE § 2.43 (2014).
\textsuperscript{97} Id.
crime trends and statistics, and crime prevention programs. These prospective-type boards are ideal for creating systematic change and getting to the root of police misconduct issues. However, they do not solve the issue of building community confidence that individual complaints will be handled fairly and objectively.

C. Auditing Boards

Auditing boards focus on the complaint process and ensure that the investigation remains thorough, fair, accurate, and effective. Auditing boards work closely with IA bureaus and thus have access to many of their records, such as complaint logs and investigation reports. These boards also serve a policy function by identifying and monitoring trends within the police department. Some auditing boards conduct intakes for “people who do not feel comfortable going directly to the Department” and forward those intakes to IA. Some boards audit investigations as they occur, while others simply review IA investigations upon completion. In boards that audit an investigation as it occurs, a board representative may sit in on an interview that the IA investigator is conducting and chime in with additional questions. They may also ask that additional people be interviewed and request additional evidence. According to the Executive Director of the San Francisco OCC, post-investigation auditing is limited because mistakes are tough to correct after completion. It is more efficient to correct potential mistakes as they occur. Also, some auditing boards have an appeals process for civilians discontent with IA findings.

98. CLAREMONT, CAL., MUN. CODE § 2.43.
100. Id. at 16.
101. Id. at 17-18.
104. Humphrey, supra note 103.
105. Id.
106. Joyce Hicks Interview with David Onek, supra note 95, at 15.
107. Id.
The Office of Independent Review (hereinafter “OIR”) Group is a prevalent business model auditing team used throughout California.\textsuperscript{109} It is comprised of a “group of individuals well versed and experienced in independent law enforcement oversight and review.”\textsuperscript{110} Michael Gennaco, graduate of Stanford Law School and former Chief of the Civil Rights Section at the U.S. Attorney’s Office for the Central District of California, serves as the Chief Attorney.\textsuperscript{111} OIR has contracted with dozens of California cities in both temporary projects and long-term oversight.\textsuperscript{112} It currently serves as the sole form of civilian oversight for Burbank, Fresno, Fullerton, Palo Alto, Fresno County, Los Angeles County, Orange County, and San Diego County.\textsuperscript{113} Each subdivision produces annual reports that assesses the complaint process, identifies trends, and gives policy recommendations as needed.\textsuperscript{114} OIR’s monitoring team collaborates with FTI Consulting, Inc., a global business advisory firm, which provides statistical and data analysis support.\textsuperscript{115}

Some cities and counties have abandoned the traditional civilian-oriented model and hired OIR to test out their model.\textsuperscript{116} For example, in September 2013, Fullerton’s city council dismissed a proposal for an external civilian oversight board and voted 4-1 to hire the OIR Group as an independent auditor.\textsuperscript{117} Police Chief Dan Hughes advocated for the OIR Group.\textsuperscript{118} He spoke to its benefits through annual reports to the city council and “real time reviews” of critical incident investigations.\textsuperscript{119} This was not the first time that a leader in the police department publicly expressed support for the OIR Group. In 2008, Sheriff Sandra Hutchens of the Orange County Sheriff’s Department supported implementing the proposed OIR board when the Board of Supervisors voted to begin contracting with the OIR Group.\textsuperscript{120} Hutchens remained supportive three years


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 10–19.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 7, 11–12.

\textsuperscript{115} Id. at 7.


\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Norberto Santana Jr., Jail Death Results in New Oversight Panel, O.C. REGISTER (Aug.
later when the Board of Supervisors, in a 3-2 vote, put the Office of Independent Review on a 6-month probationary period for failing to produce promised results.121

Critics of the OIR Group state that they do not provide enough emphasis on community involvement and simply become puppets of the police department.122 When the Orange County OIR was under fire in 2008, Supervisor Pat Bates stated, “It’s become very obvious to me that [OIR] has been a great resource to our Sheriff’s Department . . . almost a mentor . . . We need to have an independent third party review, and that is not the way this office is operating.”123 Further, when Fullerton Mayor Bruce Whitaker cast the lone vote against hiring the OIR Group in 2013, he explained, “I think that [the OIR Group] misses the mark at least in terms of a truly independent model of oversight. I would like to see more insight into what’s happening.”124 Community outreach and transparency are essential to a successful oversight board.125 Thus, a fundamental flaw in the OIR business model is that “independent” review is not equivalent to “civilian” review.

III. Creation of Boards and the Bearing on Board Legitimacy

Civilian oversight boards can be created in a multitude of ways, including through municipal ordinance, municipal resolution, county ordinance, local voter referendum, state statute, mayoral executive order, police chief administrative order and, more recently, city/county contracting.126 The most common route has been through municipal ordinance. This is often the most practical way of creation because an ordinance, by nature, allows for immediate creation after a tragic incident. After creation, these boards can be further legitimized and become long-standing via

122. Id.
123. Id.
voter referendum. The cities of Los Angeles and Long Beach serve as examples of boards that were initially created through ordinances and later made permanent through voter referendums.\textsuperscript{127}

A board’s legitimacy is often dependent of the way that it was created, which may affect funding and police cooperation.\textsuperscript{128} Municipal resolutions are a formal expression of the opinion of a city council adopted by vote. Ordinances provide more legitimacy because they generally constitute city council action, which has the force and effect of law. Mayoral executive orders are not ideal because their permanence can be dependent on politics. A subsequent mayor can simply repeal the previous mayor’s order. City contracting of independent oversight boards is also not conducive to stability because city council members will debate the board’s effectiveness multiple times a year in order to decide whether to dedicate part of their often tight budget to this entity.\textsuperscript{129}

Voter referendum is the best avenue to create a long-standing board. The boards of San Francisco, San Diego, Long Beach, and San Jose were all created through voter referendum and have stood for over twenty years.\textsuperscript{130} On a practical note, such boards, stamped with democratic approval, have more leverage in dealings with law enforcement. Cooperation from law enforcement is fundamental to a board’s success. This mitigates the risk of boards becoming merely symbolic and inactive.

Civilian oversight boards have also been mandated statewide, but not regarding police misconduct. Georgia’s Child Fatality Review Panel consists of civilian members appointed for the purpose of investigating the circumstances and causes surrounding child deaths.\textsuperscript{131} This panel publishes annual reports and delegates investigations to county-level boards.\textsuperscript{132} Other states have followed

\begin{footnotes}
\item[128] Jerome, supra note 126, at 42.
\item[129] Santana, supra note 120.
\item[132] Id. at 8.
\end{footnotes}
suit, but not on their own accord. According to the 1996 amendments made to the federal Child Abuse Prevention and Treatment Act (CAPTA), each state receiving CAPTA funds is required to establish a Citizen Review Panel. Though unprecedented, civilian oversight boards regarding police misconduct could be mandated statewide as well. However, the above example is likely an anomaly given that the boards were required by federal statute.

New York state leaders have debated about whether to implement a statewide civilian review board. In April 2010, New York Assembly Member Micah Kellner introduced a bill that would create a board to oversee New York state police and peace officers, including state troopers, Port Authority police, parks police, animal control officers, and tax enforcers. Kellner advocated for this board by referring to the success of the NYC Complaint Review Board in mending NYPD-community relations. Kellner’s bill failed, but New York State Senator José M. Serrano reintroduced it in February 2013, in response to an alleged incident between a resident and the Roosevelt Island Public Safety Department.

IV. Judging Effectiveness

It is important to assess board effectiveness when deciding whether to create new boards or extend current ones. What factors should be used to judge effectiveness? Assessment of independent investigatory boards could focus on sustained complaint rates and the amount of complaints received each year. However, sustain rates may not be the best measure because they are inherently low. The most egregious and clear-cut offenses are often remedied in other settings, such as criminal and civil suits. Less egregious complaints often result in pitting the civilian’s word against a police officer’s. Regardless of the standard of proof, it is tough to sustain a complaint based on “he said, she said” alone. Additionally, many complaints can be resolved through increasingly popular mediation.

135. Id.
programs in which both parties get together to exchange their sides of the story.\textsuperscript{138} Lastly, the amount of complaints received is not a reliable indicator of a board’s success. The amount of complaints received depends on several factors, such as the public’s knowledge of and accessibility to the complaint process, increased awareness of proper police conduct, and policy changes in police practice. Thus, judging the effectiveness of civilian oversight boards should not depend on raw numbers.

Instead, the analysis should focus on more subjective factors. These factors should correspond with board goals.\textsuperscript{139} Accordingly, we must ask: [1] Has each board created a healthy dialogue between law enforcement and the community? [2] Is the complaint process accessible to civilians and are they comfortable with the process? [3] Is the complaint process, whether conducted by internal affairs or by independent investigatory boards, thorough, effective, timely, and unbiased? [4] Are there opportunities for civilian influence on policy-oriented matters regarding police practices? [5] How transparent are police practices? [6] How transparent are IA practices? [7] Does law enforcement cooperate with the board? These are fundamental questions in which data is difficult to gather and graph. To answer such questions, boards could routinely collect opinion data from complainants and police officers through questionnaires. In contrast to simply relying on infrequent anecdotes, surveying can provide a more reliable barometer.\textsuperscript{140}

Also, given the high availability and access to many of the boards’ reports, analyzing report quality, thoroughness, and recommendations can also help track board effectiveness.\textsuperscript{141} Board reports often identify systemic issues in law enforcement policies or practices, and track that department’s progress in resolving them in subsequent reports. For example, in its 1998 report, the Portland Police Internal Investigations Auditing Committee found issues in IA investigation quality due to IA investigators’ favorable bias

\begin{thebibliography}{100}
\bibitem*{139} Jerome, supra note 126, at 45.
\end{thebibliography}
toward police officers. In a subsequent report, the Committee noted that simply having a prepared set of objective questions enhanced IA investigation quality. San Jose's Office of the Independent Police Auditor also reports annually and has a clear track record of successfully advocating for policy change. From 1993 to 2009, this office made 109 policy recommendations and approximately 78% of them were implemented by the San Jose Police Department. Thus, although it is difficult to make broad generalizations about the degree of success in implementing civilian oversight boards, it is clear that they can succeed in advocating for progressive policy and ensure quality IA investigations.

V. Legitimizing Oversight Boards by Granting Fundamental Powers

Granting powers such as disciplinary power and subpoena power to oversight boards is a highly contested issue because such powers have already been designated to other government officials. Advocates for granting meaningful power stress that this is necessary to prevent oversight boards from becoming "toothless tigers." On the surface, toothless tigers appear to have the power to remedy civilian complaints. However, absent the proper tools, they lack authority, making them symbolic and passive. In contrast, oversight boards equipped with subpoena and/or disciplinary power are further legitimized and have more leverage when requesting law enforcement compliance.

A. Subpoena Power

Subpoena power is essential for independent investigatory board effectiveness and can also be important for auditing boards that hear appeals. Absent the power to compel officers to testify, the thoroughness of an investigation suffers because the process

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142. CITY OF PORTLAND CITIZEN ADVISORS TO THE POLICE INTERNAL INVESTIGATIONS AUDITING COMM., supra note 81.
145. Id.
hinges upon each side voluntarily and truthfully sharing their side of the story. For example, from 2011 to 2013, the Springfield (IL) Police Community Review Commission heard two appeals of IA decisions and the police officer in question refused to attend either of the hearings. As of 2013, Portland’s Independent Police Review division also lacks subpoena power and has not been able to gain consistent compliance from officers, especially high-ranking ones, for interview requests. Such acts of defiance go unchecked when oversight boards have no legitimate authority.

Furthermore, subpoena power is necessary for getting officers to testify against other officers. As noted by the Police Commission overseeing the LAPD, “Perhaps the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten code of silence [in which] an officer does not provide adverse information against their fellow officer.” In describing the cycle that perpetuates perjury and misconduct, the New York City Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department stated:

The pervasiveness of the code of silence is bolstered by the grave consequences for violating [the code]: Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis.

At a public hearing for the above commission, Bernard Cawley, a former NYPD officer, spoke about this “Blue Shield of Silence”: “Cops don’t tell on cops. And if they did tell on them... his career’s ruined. He’s going to be labeled as a rat. So if he’s got fifteen more years to go on the job, he’s going to be miserable because it follows you wherever you go.” In February 2013, former LAPD officer Christopher Dorner, mentioned the Blue Shield of Silence as a root of his rampage against the police department. Civilian oversight

150. REPORT OF THE INDEP. COMM’N ON THE L.A. POLICE DEPT., supra note 85, at xx.
151. REPORT OF N.Y. COMM’N TO INVESTIGATE POLICE CORRUPTION, supra note 77, at 53.
152. Id.
153. The Board of Rights fired Dorner, holding that he lied about an incident in which his training officer kicked a suspect in the head. Dorner vowed to continue his
boards need subpoena power to have any chance of curbing this cultural hindrance to promoting justice. In addition to ordering that officers appear, board member presence during questioning could help ensure objectivity.

In order to comply with police union law, subpoena power must be granted by statute. Those that oppose granting subpoena power to oversight boards argue that granting such power would result in obstructing both IA investigations and District Attorney investigative and prosecutorial duties. Critics further argue that the potential for abusing subpoena power, given the lack of standards in controlling its use, could magnify this obstruction. Both the California Supreme Court and Michigan Court of Appeals have dismissed this argument as speculative and held that sound discretion in using this subpoena power is presumed until there is evidence of abuse and obstruction. Such jurisprudence is essential to streamlining the board’s investigatory process and preventing their decay into “toothless tigers.”

B. Discipline Power

Police unions protest granting oversight boards the power to discipline with more fervor because of the potential of affecting an officer’s job status (e.g., sanction, termination, probation violation) and the general intrusiveness into the police force. Delegating the power to discipline intrudes on a basic tenant of law enforcement affairs. The power to discipline solely belongs to the police command structure. The intrusive aspect is amplified by an “Us versus Them” mentality within the “blue culture.” Loyalty and

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158. A different avenue in ensuring officer compliance with interview requests includes making cooperation mandatory as per their employment contract. See SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 72 (2000).
159. Baker, supra note 146.
161. Id.
162. REPORT OF N.Y. COMM’N TO INVESTIGATE POLICE CORRUPTION, supra note 77, at 58.
insularity within law enforcement perpetuates a divide in which, "[f]ar too many officers see the public as a source of trouble rather than as the people they are sworn to serve." Tension is at its highest when the power dynamic between the police and the community is flipped and the police are subject to the disciplinary power of an entity symbolic of the community.

Advocates for granting boards the power to discipline argue that, absent this power, boards merely serve an advisory role and give recommendations. The chief of police or city manager makes the ultimate, unchallengeable decision, which does not have to align with the board's recommendation. If the chief of police or city manager consistently declines to follow the recommendations, then this truly transforms oversight boards into "toothless tigers."

Recent relations between the Las Vegas Metropolitan Police Use of Force Review Board and the Clark County Sheriff's Department are demonstrative of the conflict that arises from this power dynamic. Four members of the Board resigned in protest after Sheriff Doug Gillespie refused to comply with the Board's recommendation that he fire Officer Jacquar Roston. Gillespie found the officer's apology sufficient for shooting a man because the officer mistook a metallic sticker on his hat for a gun. Resigning Co-Chair of the Board Robert Martinez stated, "I can't be part of this process when I know, going in, that ultimately, ... the fix is in. The deck is stacked against the board and will always be stacked against the board. No matter what the recommendation is of the board, the sheriff, he gets to overturn it." Other resigning Board members stated, in response to Gillespie's decision, "It's offensive. Why are we here?" and "I don't want to waste my time, my energy and my emotions and have it turn out badly."

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163. REPORT OF N.Y. COMM’N TO INVESTIGATE POLICE CORRUPTION, supra note 77, at 58.
164. Baker, supra note 146.
165. Bobb, supra note 88, at 163.
167. Id.
168. Id.
In opposition, Police Protective Association Executive Director, Chris Collins, stated,

I think the board does a good job looking at use of force. I think, ultimately, the board has to be reminded that their findings are recommendations to the sheriff. It's not something that is set in stone. The sheriff has to make the ultimate decision on discipline or termination with the agency.171

It is as simple as that. Regardless of the quality of their work and the merit in their recommendations, the decision is ultimately out of the Board’s hands and the Sheriff has no obligation to follow their advice. Members of boards without any form of discipline power may be left with the difficult decision: Either stay, knowing that the fruits of your labor can be rendered valueless, or walk away.

However, there is a middle ground within this power struggle. Cities can mandate that a police chief provide written explanations to oversight boards when he or she decides not to follow the board’s recommendations. This suggestion was proposed in amending the Portland City Charter in October 2013.172 Portland Police Chief Mike Reese opposed this amendment in a meeting with City Council.173 He stated that forcing him to comply with this written explanation requirement would raise privacy concerns given that he may take personal, mitigating factors into consideration when making a decision.174 This may result in a “chilling effect,” in which officers might be reluctant to discuss personal matters during the disciplinary process due to fear of having them released to the public.175 This requirement is also redundant because the police chief is already obligated to brief the mayor, who then must approve or disapprove of his decision.176

Oversight boards could also manage the police chief’s power through a discipline matrix, which would ensure consistency and

173. Id.
174. Id.
175. Id.
176. Id.
Discipline matrices set forth particular disciplinary action depending on objective factors, such as the severity of the offense and whether the officer has been disciplined before. The police chief’s discretion is limited to the ranges of discipline within this matrix. Critics of this idea argue that such a system limits a police chief’s duty to handle each case on an individual basis and consider mitigating circumstances, such as past work record and sincerity in remedying the grievance.

C. Access to Records

Access to law enforcement records is essential to an oversight board’s ability to review complaints and conduct policy analysis. However, oversight boards are often denied access to such records per municipal, state, or federal law, or a police labor union agreement. Also, as discussed in Part V.B. of this Note, officers do not welcome intrusion into their personal affairs and often prefer that their personal records be kept from the public. Confidentiality can still be preserved when oversight boards are given access to these documents, so long as they are required to not release the substance of those records to the public (i.e., redacting released documents and not including specific information about officers in oversight board reports).

The California Fourth District Court of Appeal ruled on this confidentiality issue in 2003. Individual officers of the San Diego City Police Department and their police officers’ association filed a petition for a writ of mandate to prevent the city manager from releasing a narrative report produced by the San Diego Citizens Review Board, which described a police killing of a civilian. The court held that the city manager and Review Board were statutorily prohibited from releasing this information because it was considered confidential per the California Penal Code and could only be released under certain circumstances under the Evidence Code. The court noted that the legislature intended for the evidence exception to be limited to criminal and civil proceedings; thus,

177. Korn, supra note 149.
178. Id.
179. Id.
180. Id.
182. Id. at 896.
183. Id. at 897–98.
public disclosure of that information is otherwise prohibited. 184 This is an appropriate limit on spreading confidential personnel records, in their entirety, to the public. However, the limit on general public access should not be construed as a blanket prohibition of oversight board access. Some access is necessary for the complaint process to function properly.

In addition to this limited scope, municipal and county codes can be adopted to legitimize oversight board access to records and foster cooperation with law enforcement. Absent such legitimacy, the polarizing “Us versus Them” mentality, on both sides, can result in tension, uncooperativeness, and ineffectiveness. For example, Joyce M. Hicks of the San Francisco OCC noted a high degree of cooperation from the San Francisco Police Department (hereinafter “SFPD”), which resulted from granting the Office authority and making the jurisdictional lines clear. 185 As per the City Charter, the OCC must receive “prompt and full cooperation and assistance” from the Police Department in carrying out OCC objectives. 186 Despite this requirement, when the OCC was initially created, its investigators could not consistently, nor in a timely manner, get the documents they requested. 187 In response, the city’s police commission adopted a resolution which stated precisely how many days the SFPD had to produce requested documents. 188 Additionally, if the SFPD did not produce the documents within the time frame, then they would have to provide an explanation to the police commission. 189 Given these successes, according to Hicks, oversight boards should seek legislative backing in gaining police cooperation regarding records requests. 190

VI. Recommendations

A. Discipline Power

The power to discipline should be left in the hands of the police chief. This power is essential to anyone that sits at the forefront of any organization in which they lead subordinates. Police chiefs are already answerable to the mayor, which is sufficient to ensure that

185. Korn, supra note 149.
187. Korn, supra note 149.
188. Id.
189. Id.
190. Id.
they do not abuse their authority. However, oversight boards should be notified of police chief disciplinary decisions with sufficient detail, so that where there is disagreement, they can engage in a dialogue with the mayor or police commission. For instance, according to Joyce Hicks, "director of the [San Francisco] Office of Citizen Complaints, she has done just that and succeeded in getting police officers fired after the chief recommended less severe discipline." Furthermore, since elected officials, mayors, and police chiefs are answerable to the public, exposing a track record of perceived unjust disciplinary decisions can sufficiently hold them accountable. The dynamics explained above should prevent police chiefs from grossly deviating from oversight board recommendations, which makes infringing upon their disciplinary authority unnecessary.

B. Access to Records

As stated earlier, an oversight board's power to access police records is essential to their function. Cities and counties must still account for and respect police officer privacy. Local governments should grant access, but limit it appropriately to account for those privacy concerns. In addition, law enforcement should be required to cooperate in order to alleviate the polarizing tension of civilian oversight. Thus, in order to properly give oversight boards the power to access police records, cities should pass local laws requiring police cooperation, while also accounting for privacy concerns.

C. California-Specific Recommendations

Given that about 50% of all law enforcement departments in the country consist of ten or fewer sworn officers, it would be impractical for every department to have its own oversight board. This would be a waste of administrative and economic resources because such small departments do not generate enough complaints in a given year. However, in California, there is still a clear void in civilian oversight. Although many of California's most populous cities have civilian oversight boards, some cities have yet to create one. As noted in Part I, Bakersfield, the 9th largest city in California, still lacks a board, a void exposed by the death of David Silva. If

191. Korn, supra note 149.
passed, a state ballot initiative mandating oversight boards for every county or based on city population size could ensure widespread oversight. Across the country, there are two local police officers for every 1,000 citizens.\textsuperscript{193} California could mandate oversight boards for cities with populations of at least 200,000 because the presence of 400 or more officers may generate enough complaints to warrant the associated costs. However, most California cities of over 200,000 already have some form of oversight, so mandating county boards would be more encompassing.

Notably, San Bernardino County has no form of civilian oversight. This is especially alarming given the population and amount of crime throughout the county.\textsuperscript{194} The prevalence and gravity of police misconduct is compounded in high crime areas with large minority populations where there is an "Us versus Them" mentality in police-community relations.\textsuperscript{195} Given budget constraints, it would be most practical to institute a county-level board. At a minimum, the most populous cities within San Bernardino County should contribute to the $60,000 per year needed to fund an ombudsman to oversee IA.

\textbf{D. Ferguson, Missouri}

In light of the Michael Brown killing and resulting city unrest, the Ferguson City Council proposed a pure monitoring board.\textsuperscript{196} Proposed Municipal Code Section 33-26 (a) enumerates the board’s powers, duties and responsibilities:

The citizen review board shall act in an advisory capacity to the Mayor, City Council, City Manager, and Chief of Police on policy matters relating to the operations of the department. Policy matters shall be defined to include manpower levels and salaries, budgets, community relations,

\textsuperscript{193} U.S. DEPT. OF JUSTICE, supra note 192.
\textsuperscript{195} REPORT OF N.Y. COMM’N TO INVESTIGATE POLICE CORRUPTION, supra note 77, at 58.
training programs and law enforcement programs.\textsuperscript{197}

As proposed, the board would have no investigative powers and could only give recommendations to the Chief of Police.\textsuperscript{198} The Chief of Police would be under no obligation to implement the recommendations.\textsuperscript{199} Additionally, the proposed municipal code does not grant the board access to police records.\textsuperscript{200} This omission could stifle the board’s ability to identify systemic issues and make informed recommendations. Lastly, the proposed code section is completely devoid of outreach and transparency measures.\textsuperscript{201} It is unclear whether the board meetings would be open to the public and allow public input.\textsuperscript{202} While the city council’s proposal is a starting point, it is the bare minimum. An auditing board, with access to records and a focus on public involvement, could be most conducive to healing the city of Ferguson.

\textbf{Conclusions}

\textbf{A. Independent Investigatory Boards Are Easily Weakened}

Independent investigatory boards are bound to fail if they do not have the requisite support from their local government. Absent this support, independent boards are less likely to have the fundamental powers necessary to overcome police-oversight board tension. Additionally, such boards are less likely to be adequately funded, which affects administrative quality. Patrick J. Lynch, President of the New York City Patrolmen’s Benevolent Association, bluntly described his frustrations with New York City’s Civilian Complaint Review Board: “Our problem with the C.C.R.B. has always been first, their predisposition that police officers are always wrong, second, their inexperienced investigators who conduct faulty investigations that arrive at improper conclusions, and now those wrong conclusions will be prosecuted at these kangaroo trials.”\textsuperscript{203} This statement is illustrative of the polarized tension created by implementing independent investigatory boards and structural flaws resulting from building a complex complaint process from the ground up.

\begin{footnotesize}
\begin{enumerate}
    \item \textsuperscript{197} Lussenhog, \textit{supra} note 169.
    \item \textsuperscript{198} Id.
    \item \textsuperscript{199} Id.
    \item \textsuperscript{200} Id.
    \item \textsuperscript{201} Id.
    \item \textsuperscript{202} Id.
    \item \textsuperscript{203} Baker, \textit{supra} note 146.
\end{enumerate}
\end{footnotesize}
Effective administration cannot be built without the proper funding, resources, and attention to quality management. Although the San Francisco OCC is recognized as one of the most successful independent investigatory boards, in its 2013 Third Quarter Statistical Report, it noted that budget and staffing constraints have remained a roadblock to efficient and timely case resolution.\(^{204}\)

Additionally, independent investigatory boards often have issues that arise from not having legitimized power. As stated previously, boards should not have any formal disciplining power. This power is most appropriate in the hands of police chiefs who, given their accountability to their respective mayors and the public, are discouraged from grossly deviating from discipline recommendations. Although independent investigatory boards need subpoena power and access to records, they often face an uphill battle in attaining those powers. This is in large part due to the adversarial nature of police-oversight board relations. Absent these powers, independent investigatory boards are dependent on law enforcement's willingness to cooperate. "Blue culture" and an "Us versus Them" mentality can stifle the investigatory process.

B. Contrasting Independent Investigatory Boards with Auditing Boards

Due to the dynamics of independent investigatory boards discussed above, the auditing model has a greater likelihood of success. The auditing model does not require a group of civilians to build a review process from the ground up; rather, they manage a review process already in place. These boards are less susceptible to funding and staffing issues. Auditing boards can be most effective by working side by side with IA investigators to ensure quality control. The issues that investigators tackle are time sensitive and thus, errors are harder to correct if caught after a completed investigation. Additionally, authority and cooperation are less of an issue for auditing boards given that their work can be better described as working with law enforcement rather than against.

Lastly, gauging the effectiveness of independent investigatory boards is complex, whereas the potential benefit of auditing boards is clear.\(^{205}\) Oversight board reports reveal enhancement of IA investigation quality and police practices through policy changes.

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\(^{205}\) See infra Part IV.
C. Pure Monitoring Boards as a Last Resort

Pure monitoring boards are most appropriate for cities with limited resources because a multi-functioning board requires proper staffing. However, pure monitoring boards represent the minimum threshold in oversight and can be appropriate as a foundational beginning. A truly successful oversight board must be multi-functioning, by focusing on both broad policy issues and the intricacies of the complaint process.

D. Focus on Community Outreach and Transparency

Regardless of the type of board adopted, community outreach and transparency must be a main focus. This is the quintessential, but often forgotten, task. Oversight boards should focus on serving the community they were designed to represent. Accordingly, boards should make the complaint process comfortable, clear and accessible in order to build community confidence that their grievances will be heard. Boards should also hold periodic, public meetings during which civilians can express their concerns about their police department. This type of dialogue can be effective in identifying problem areas within the respective police department. Communication can be most easily bolstered through the Internet. This is the perfect avenue to advertise public meetings, explain the complaint process clearly and publish reports with their findings. This community-oriented outreach is essential to mending the police-community relationship.

For this reason, contracting with a single ombudsman or adopting the business model is not the ideal form of oversight. A single ombudsman cannot feasibly monitor an entire IA bureau while still remaining highly accessible to the community because outreach is a great time commitment. Additionally, in order to focus on outreach, an ombudsman would have to ask the city for more hours, which means more money. The business model is not conducive to meeting community-oriented goals because their goals are driven by their expertise. Their expertise is in auditing IA investigations and statistics in order to perform policy analysis, not in community leadership.


207. Greenwald, supra note 72.