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CONSENT CALENDAR
April 15, 2025

To: Honorable Mayor and Members of the City Council

From: Police Accountability Board (PAB)

Submitted by: John "Chip" Moore, Chair of the Police Accountability Board

Hansel A. Aguilar, Director of Police Accountability

Subject: Berkeley Police Department Texting Offences: An Independent Investigation by the Police Accountability Board

RECOMMENDATION

The Police Accountability Board formally recommends to the City Council that it:

1. Pass an ordinance or otherwise affirm the Police Accountability Board's ability to access documents and records in furtherance of its central accountability function, consistent with Charter Amendment Section 125.
2. Adopt a robust resolution ensuring full and meaningful accountability for sworn officers—whether on-duty or off-duty—who engage in misconduct of any kind, but especially actions or expressions of racial or other types of bias.
3. Direct the City Manager to work with the Berkeley Police Department, Police Accountability Board, and the Office of the Director of Police Accountability to create a public repository to fulfill the vision of California Penal Code Section 832.7(b)(1), allowing for transparency in cases of sustained allegations of officer racism or other discriminatory conduct or expression.
4. Call on California state legislators to extend the prohibition on arrest quotas, which are currently limited to the California Vehicle Code (Section 41600 – 41603).

POLICY COMMITTEE RECOMMENDATION

On February 25, 2025, the Public Safety Policy Committee adopted the following action: M/S/C (Kesarwani/O'Keefe) to send item to City Council with a negative recommendation. Vote: All Ayes.

SUMMARY

In accordance with City Charter Section 125(17)(a), the City of Berkeley Police Accountability Board's Subcommittee on Policy and Practices conducted an examination of policies, practices, and procedures within the Berkeley Police Department (BPD) concerning the Downtown Task Force (DTF) and Bike Unit allegations.

A Special Meeting of the PAB was convened on November 15, 2022, where the Board voted to establish a subcommittee to review all policies and practices related to the allegations made by former BPD Officer Corey Shedoudy, which were made public on November 10, 2022. The subcommittee, initially chaired by former Board Member Cheryl Owens and later by Board Member Kitty Calavita following Owens' resignation, also included PAB Chair John (Chip) Moore. The allegations involved racist text messages, bias against the unhoused, and pressure to meet arrest quotas, with the Sergeant of the DTF implicated.

Despite the PAB's authority under Section 125(3)(a) of the City Charter to access departmental records without redaction or limitation, the subcommittee encountered numerous obstacles in obtaining the necessary materials. This review revealed several areas where BPD policies and practices did not meet best practices, policy, or legal standards. Specifically, the findings included:

- Expectations to achieve certain arrest numbers.
- Exchange of racially charged and discriminatory text messages among DTF officers.
- Use of personal cellphones for discussing work-related matters.
- Essentially unlimited overtime for DTF officers.
- Vague or absent policies in critical areas that could lead to legal violations or undermine fair policing.
- Insufficient knowledge of BPD policies and State law among some DTF members.

The Board's preliminary recommendations for improving BPD policies and practices include:

- Establishing a new policy prohibiting formal or informal arrest quotas.
- Ensuring fair enforcement of stay-away orders in accordance with State law.
- Increasing training on BPD policies and State law.
- Revising policies related to Fair and Impartial Policing, Standards of Conduct, Early Warning System, Employee Speech, Expression and Social Networking, Personal Communication Devices, and Overtime Compensation Requests.

Additionally, the PAB recommends that the City Council:

- Pass an ordinance in line with Charter Amendment Section 125(3)(a)(7) to enable the PAB to self-initiate investigations of potential misconduct and access internal records for such investigations.
- Adopt a resolution to ensure comprehensive accountability for officers who engage in misconduct, consistent with the City's 2024 State and Federal Legislative Agenda.
- Direct the City Manager to collaborate with the BPD, PAB, and Office of the Director of Police Accountability to establish a public repository, as envisioned by California Penal Code Section 832.7(b)(1), to ensure transparency regarding sustained findings of discriminatory conduct.
- Advocate for state legislators to extend the prohibition on arrest quotas, currently limited to the California Vehicle Code (Section 41600–41603), to encompass all California law enforcement activities.

This report aims to not only highlight deficiencies in BPD policies and practices but also to offer concrete recommendations for addressing these issues. Achieving these goals will require the collective efforts of the PAB, BPD leadership, the City Manager, and the City Council. Through this report, the PAB reaffirms its commitment to collaboration, justice, fairness, trust, and community safety.

In support of these objectives, the ODPA submits a complementary report to provide additional information related to the PAB's findings, in accordance with Chapter VI, Section C.1. of the City of Berkeley's Commissioner's Manual.

The PAB initially submitted this report to the City Council for presentation at the October 1, 2024 Regular Meeting but was deferred to the Public Safety Committee[1]. During the PAB meeting on September 25, 2024, the PAB voted to request the withdrawal of the item[2], a request that was granted by the Public Safety Committee.

FISCAL IMPACTS OF RECOMMENDATION

Implementing the PAB's recommendations will incur costs related to staff time, technology requirements, and maintenance of such technology.

CURRENT SITUATION AND ITS EFFECTS

On November 10, 2022, Corey Shedoudy, a former member of the Berkeley Police Department's (BPD) Downtown Task Force and Bike Unit (DTF), alleged that the DTF had arrest quotas and used questionable legal tactics, such as "stop and frisk," probationary searches without reasonable suspicion, and a broad interpretation of stay-

[1] September 26, 2024 Agenda & Rules Committee Special Meeting Minutes: https://berkeleyca.gov/sites/default/files/legislative-body-meeting-minutes/09-16%20Minutes%20-%20Agenda%20Committee.pdf

[2] The motion carried with 6 ayes in favor, 0 noes, and 2 PAB members absent. Police Accountability Board Regular Meeting Minutes for September 25, 2024: [link]

away orders from UC Berkeley. To support his claims, Officer Shedoudy provided a series of text messages from the DTF that contained derogatory comments about homeless individuals and people of color.

In response to these allegations, the PAB began a policy review on November 15, 2022, exercising its authority under Section 125(17)(a) of the Berkeley City Charter. A subcommittee was formed to examine the policies and practices related to the allegations. In December 2022, the City of Berkeley retained the law firm Swanson & McNamara to investigate the claims. During this investigation, the text messages provided by Mr. Shedoudy were authenticated.

BACKGROUND

The purpose of the PAB is to promote public trust through independent, objective civilian oversight of the Berkeley Police Department, provide community participation in setting and reviewing Police Department policies, practices, and procedures, and offer a means for prompt, impartial, and fair investigations of complaints brought by members of the public against sworn employees of the Berkeley Police Department.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no identifiable environmental effects or opportunities associated with this report.

RATIONALE FOR RECOMMENDATION

Accepting the recommendations from the Police Accountability Board will improve public trust by enhancing transparency and accountability within the Berkeley Police Department. Implementing these recommendations will strengthen oversight in the city, allowing the Board to fulfill its intended purpose effectively.

CONTACT PERSON

Hansel A. Aguilar, Director of Police Accountability

Office of the Director of Police Accountability, (510) 981-4950

Attachments:

1: PAB Report “Berkeley Police Department Texting Offences: An Independent Investigation by the Police Accountability Board”

2: ODPA Companion Report “Companion Report to Berkeley Police Department Texting Allegations An Independent Investigation by the Police Accountability Board”

Berkeley Police Department Memorandum

From: Chief Jennifer Louis Date: 2/18/2025

To: Berkeley City Council Public Safety Policy Committee

Subject: Berkeley Police Department Response Regarding the Police Accountability Board and Office of the Director of Police Accountability 2024 Texting Offenses Reports

The Berkeley Police Department (BPD) has reviewed the recent reports and their accompanying recommendations from the Police Accountability Board (PAB) and the Office of the Director of Police Accountability (ODPA) responding to the independent investigation completed by Swanson & McNamara into text exchanges among BPD officers on the bike team. It is important to note that neither the PAB nor ODPA reports dispute the findings of the independent investigation; rather, they offer recommendations based on their review of the report.

The Department remains committed to robust oversight and accountability in the performance of our core services. BPD must therefore carefully assess all recommendations to ensure they are warranted and appropriate and their benefits justify any cost and potential disruption to the provision of public safety services. We appreciate the opportunity to clarify our positions and explain how current practices address many of the concerns raised.

PAB Recommendations to the Department

The PAB report calls for revisions to several key policies as well as increased training on laws and policies. The ODPA companion report does not make recommendations directly to the police department.

Policy Updates

PAB Recommendation:

- Revise key policies including:
    a. Fair and Impartial Policing (Policy 401)
    b. Personal Communication Devices (Policy 701)
    c. Employee Speech, Expression, and Social Networking (Policy 1029)
    d. Early Warning System (Policy 1041)
    e. Standards of Conduct (Policy 321)
    f. Overtime Compensation (Policy 1019)
    g. Adopt a standalone policy prohibiting formal or informal arrest quotas.

BPD Response:

BPD is actively collaborating with the PAB on a number of policy reviews initiated by the PAB. Additionally, the department is preparing to implement a next-generation Early Intervention System (EIS) platform to strengthen our existing EIS process and further enhance oversight. Over the course of the last several years, a number of the above policies have been updated, as BPD worked to complete Council recommendations related to fair and impartial policing, City Auditor recommendations regarding overtime, and our process to convert departmental General Orders to Lexipol Policies.

The Charter empowers the PAB to initiate reviews and propose specific policy amendments, and we welcome any detailed proposals. We remain committed to continuous improvement, and making thoughtful, intentional,

and productive policy updates is a critical responsibility for the BPD that requires significant staff time and is undertaken only when it aligns with our departmental mission as well as our core commitment to public safety and operational efficiency. We currently have no additional substantive policy changes planned from the list provided.

Training and Oversight

PAB Recommendation:

- Increase training on state laws, stay-away orders, and internal policies. Implement clearer accountability mechanisms for policy enforcement.

BPD Response:

The department's Policy and Training Unit ensures that all officers understand state laws and internal policies through comprehensive and ongoing training programs. Our training needs are continuously driven by legal mandates, timely legal updates, data analysis, audits, and early intervention efforts. These mechanisms ensure that we are providing training exactly where it is needed. Currently, review of the independent investigation as well as our internal assessments show that our existing training adequately addresses these standards and no additional training measures regarding stay-away orders are warranted at this time.

Additional Considerations

A range of additional recommendations from the PAB and ODPA are directed to the City Council, City Manager and the community to further manage our law enforcement practices. The Department would like to provide the Public Safety Policy Committee additional background to assist as helpful with a deeper understanding of the key issues and needs.

Key themes emerging from these proposals include:

- **Expanded Access and Transparency:**
  - The reports articulate proposals to expand the PAB's authority to access unredacted internal records (under Charter Section 125) and to create a public database for sustained misconduct findings. It is important to note that there is an ongoing dialogue between the City and the Berkeley Police Officer's Association regarding the scope of PAB access as part of the process to establish PAB's Permanent Regulations for handling Investigations and Complaints. Currently, we continue to rely on Charter Provisions, existing PAB's Temporary Regulations as well as public record procedures, all which balance transparency with considerations for community member and officer privacy rights.
- **Accountability and Legislative Adjustments:**
  - A number of recommendations address accountability for officer misconduct—including both on- and off-duty behavior—and call for resolutions or legislative changes (such as extending the prohibition of arrest quotas to all law enforcement activities). Our current policies are designed to meet these accountability goals, and any proposed amendments would need to be weighed against broader policy priorities and fiscal implications.
- **Operational Enhancements and Oversight Mechanisms:**
  - Several proposals suggest operational improvements such as real-time audits of body-worn camera footage, revised protocols for handling complaints against the police chief, and the

Berkeley Police Department Memorandum

development of a comprehensive communications policy during investigations. Our established oversight processes already provide multiple layers of review and safeguard public communications. These suggestions would require serious trade-offs regarding funding, administrative processes, and the balance of oversight responsibilities between existing bodies (such as the City Manager's Office and the Chief of Police).

- **External Assessment and Accreditation:**
  - The reports express interest in evaluating the potential benefits of external assessment tools—including law enforcement accreditation and standardized performance metrics—to supplement our robust internal oversight systems. While external evaluations may offer additional insights, they also involve significant administrative requirements and must be considered in the context of Berkeley's unique operational, administrative and oversight environment.
- **Additional Proposals and Considerations:**
  - Other recommendations touch on topics such as randomized audits of city-issued devices, the formulation of an alcohol rehabilitation leave policy, and Charter amendments to expand investigative authority or secure independent legal counsel for oversight agencies. Each of these proposals carries distinct operational and fiscal trade-offs that should be properly weighed.

Our department remains committed to effective oversight, accountability, and continuous improvement. We believe these efforts must be rooted in our core departmental priorities and established practices to enhance public safety and operational efficiency. To that end, many of the proposals in these reports will require further stakeholder engagement, clear funding sources, and alignment with existing practices to ensure they don't interrupt our ability to deliver our core services at the high standard set by Council, the community, and ourselves.

Conclusion

We remain committed to working collaboratively with the PAB, ODPA, and all stakeholders to ensure that our policies and practices continue to support public safety and fair, effective law enforcement. Our department will continue to engage in dialogue as these issues evolve.

Thank you for your attention to this response.

Cc:

Paul Buddenhagen, City Manager

Hansel Aguilar, Director of Police Accountability

Josh Cayetano, Police Accountability Board Chair

Mark Numainville, City Clerk

BERKELEY POLICE DEPARTMENT TEXTING OFFENCES

An Independent Investigation by the Police Accountability Board

Prepared by:

Police Accountability Board
City of Berkeley, CA

Approved by the PAB on
July 10, 2024

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PREFACE

On November 10, 2022, Officer Corey Shedoudy, a former member of the Berkeley Police Department's (BPD) Downtown Task Force and Bike Unit (DTF)[1], claimed the DTF maintained arrest quotas and employed questionable legal tactics including "stop and frisk, probation searches without reasonable suspicion of a crime, and a broad interpretation of stay-away orders from UC Berkeley."[2]

The allegations and the explicitness of those texts jolted the Berkeley community and its political leaders. Subsequently, the City hired an outside law firm to investigate the authenticity of the texts and their implications. The texts were ultimately authenticated.

The community shock produced by these egregious sentiments and conduct by sworn BPD officers was compounded by the realization that this behavior was only publicly known because a terminated member of the Department exposed it more than two years after the fact. The Police Accountability Board (PAB) and the Office of the Director of Police Accountability (ODPA) recognize and respect the hurt and suffering these expressions of apparent racism and disdain for the unhoused elicited in the community, particularly among those who are directly affected by such discriminatory attitudes and behaviors.

We are deeply troubled by these events. The PAB is designed to be a bridge between the community, the BPD, and the City leadership. Most importantly, however, it was established to ensure accountability, trust, and transparency. According to Section 125(1) of the Berkeley City Charter, the purpose of the PAB "is to promote public trust through independent, objective, civilian oversight of the Berkeley Police Department…".[3]

The goal of this report is to fulfill that obligation to the Berkeley community. The PAB lacks the authority to independently initiate investigations into alleged misconduct by individual DTF members or to recommend discipline without a complaint being filed with the ODPA within 180 days of the incident.[4] Instead, this report is mostly forward-looking in the hopes that policy and practices reforms, coupled with rigorous oversight, can restore trust and help prevent future misconduct.

Restoring trust and helping prevent misconduct through robust oversight is not only the morally right thing to do; it is the fiscally responsible thing as well. According to

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[1] The Downtown Task Force began operations in October 2019. In July 2020, it transitioned into a Bike Unit. The term "Downtown Task Force" or "DTF" will be used in this report to designate the unit from its beginning in October 2019.

[2] Email send by Former Officer Shedoudy to the Berkeley City Council: https://static1.squarespace.com/static/5edeeebc3032af28b09b6644/t/63725d28d35f087529c42dda/1668439336808/Shedoudy+email+11-10-22.png

[3] Berkeley City Charter Section 125(1): https://berkeley.municipal.codes/Charter/125(1)

[4] Interim Regulations for Handling Complaints Against Sworn Officers of the Police Department, Section II.3.: https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Regs_.Approved.2021-10-05.pdf

documents provided by the City Attorney's office, over the last decade the City of Berkeley has had to respond to 471 legal claims related to BPD activities, costing the City $1,978,953, with more than $1,300,000 of this incurred in the last five years. The two most costly categories of liability were "excessive force" ($558,151) and "false arrest" ($338,551).

Reforms will involve not only changes in BPD policy and practice, but City Council action, robust accountability demanded from the BPD leadership, and ongoing efforts by the PAB to ensure full-bodied enforcement of all policies. Changes in law-on-the-books in the form of policy reforms will amount to nothing in the absence of changes in law-in-action, as policing ultimately takes place on the ground. Deterring the kind of behavior that was alleged by former Officer Shedoudy, and that uniformly offended the Berkeley community and eroded public trust, is a daunting challenge. It is achievable only if all hands are on deck.

EXECUTIVE SUMMARY

In accordance with City Charter Section 125(17)(a)[5], the City of Berkeley Police Accountability Board's Subcommittee on Policy and Practices relating to the Downtown Task Force and Bike Unit Allegations conducted an examination of policies, practices, and procedures within the Berkeley Police Department concerning matters related to that unit.

A Special Meeting of the PAB was called on November 15, 2022, at which the Board voted to form a subcommittee to do a policy review of all policies and practices relating to Mr. Shedoudy's allegations[6]. The subcommittee was comprised of former Board Member Cheryl Owens, PAB Chair John (Chip) Moore, and Board Member Kitty Calavita, and was initially chaired by Board Member Owens. When Board Member Owens resigned from the Board, the subcommittee was Chaired by Board Member Calavita.[7] The impetus for the review was the set of allegations brought forth by former Berkeley Police Department (BPD) Officer Corey Shedoudy and made public on November 10, 2022. Mr. Shedoudy alleged that text messages expressing racist attitudes, bias against the unhoused, and pressure to meet arrest quotas, had been sent among members of the DTF, with the Sergeant of the DTF playing a central role.

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[5]Berkeley City Charter Section 125(17)(a): https://berkeley.municipal.codes/Charter/125(17)(a)

[6] Meeting Minutes for the PAB's Regular meeting on November 15, 2022: https://berkeleyca.gov/sites/default/files/legislative-body-meeting-minutes/cc.2022-11-15%20SpecMtg.approved.minutes%20%281%29.pdf

[7] On July 7, 2023, the ODPA received a policy complaint from a member of the public (DPA Case #2023-PR-0004) regarding the allegations of the DTF's arrest quotas and bias against people of color and the unhoused. At their regular meeting on September 27, 2023, the PAB voted to refer that policy complaint to this subcommittee since its work was well underway and responds (to the extent possible) to the issues raised in the complaint.

The PAB faced multiple challenges in accessing the materials necessary for its review, notwithstanding Section 125(3)(a) of the City Charter, which gives the PAB the "powers and duties...to access records of City Departments"[8], including "without redaction or limitation" records relating to policies and practices, disciplinary records, and internal investigative records [9] . The PAB Subcommittee spent many months of critical investigative time seeking—in some cases successfully, in other cases unsuccessfully—to overcome barriers to access that had ostensibly been removed by these sections of the Charter Amendment.

This review identifies key areas where the BPD fell short of best practices, existing policy and/or legal requirements. Specifically, the Board found:

- There were expectations to reach certain arrest numbers;
- BPD officers assigned to the DTF exchanged racially charged and discriminatory text messages;
- These BPD officers routinely used personal cellphones to discuss work-related matters;
- Overtime for DTF officers was essentially unlimited;
- Some BPD policies were vague or non-existent in subject areas that could prevent violations of law or compromise fair and impartial policing;
- There was insufficient knowledge of specific BPD policies and State law among some DTF members;

The Board's preliminary recommendations regarding BPD policies and practices include:

- Establishing a new freestanding policy prohibiting formal or informal arrest quotas;
- Ensuring that stay-away orders are enforced fairly and consistent with State law;
- Increasing training on BPD policies and State law; and
- Making changes to BPD policies regarding Fair and Impartial Policing (#401)[10]; Standards of Conduct (#321)[11]; the Early Warning System (#1041)[12]; Employee

[8] Berkeley City Charter Section 125(3)(a): https://berkeley.municipal.codes/Charter/125(3)(a)(5)
[9] Berkeley City Charter Section 125(20)(a): https://berkeley.municipal.codes/Charter/125(20)(a)
[10] BPD Policy 401 "Fair and Impartial Policing": https://berkeleyca.gov/sites/default/files/2022-02/PAB-ODPA.Interim.Regs_.Approved.2021-10-05.pdf#page=321
[11] BPD Policy 321 "Standard of Conduct": https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=189
[12] BPD Policy 1041 "Early Warning System": https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=903

Speech, Expression and Social Networking (#1029)[13]; Personal Communication Devices (#701)[14]; and Overtime Compensation Requests (#1019).[15]

The PAB further recommends that City Council:

- Pass an ordinance, consistent with Charter Amendment Section 125 (3)(a)(7)[16], to allow the PAB to self-initiate investigations of potential misconduct and to access internal records in furtherance of those investigations. While policy reviews are important, it is at least as important to provide oversight of their implementation and practices on the ground.
- Adopt a robust resolution to ensure a full and meaningful accountability of sworn officers who engage in misconduct, whether on-duty or off-duty, consistent with the City's 2024 State and Federal Legislative Agenda to "support efforts to increase peace officer accountability…".[17]
- Direct the City Manager to work with the BPD, PAB and ODPA to create a public repository to fulfill the vision of California Penal Code Section 832.7(b)(1)[18], including but not limited to 832.7(b)(1)(D) which states that an exception to peace officer confidentiality is required for "any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status."
- Encourage state legislators to extend the prohibition on arrest quotas, both formal and informal, in the Penal Code, which is currently limited to the California Vehicle Code (Section 41600-41603)[19], to include all California law enforcement activity.

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[13] BPD Policy 1029 "Employee Speech, Expression and Social Networking": https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=860

[14] BPD Policy 701 "Personal Communication Devices": https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=584

[15] BPD Policy 1019 "Overtime Compensation Request": https://berkeleyca.gov/sites/default/files/documents/RELEASE_20240301_T161429_Berkeley%20PD%20Policy%20Manual.pdf#page=827

[16] Berkeley City Charter 125(3)(a)(7): https://berkeley.municipal.codes/Charter/125(3)(a)(7)

[17] City of Berkeley's 2024 State and Federal Legislative Platform. February 13, 2024

[18] California Penal Code Section 832.7: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN

[19] California Vehicle Code Section 41600 – 41603: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=

Our intent is not only to identify specific shortcomings in BPD policies and practices but to provide concrete steps toward rectifying them. This will require collective efforts by the PAB, the BPD and its leadership, the City Manager, and City Council. Through this report, the PAB reaffirms its commitment to the principles of collaboration, justice, fairness, trust, and community safety.

BACKGROUND

On November 10, 2022, former BPD Officer Corey Shedoudy who had been a member of the DTF but was terminated for misconduct, wrote to the Berkeley City Council alleging that text messages expressing racist attitudes, bias against the unhoused, and pressure to meet arrest quotas, had been sent among members of the DTF, with Sergeant Darren Kacalek playing a central role. The allegations included screenshots of the alleged texts.

On November 14, 2022, Secure Justice Executive Director Brian Hofer urged the California Attorney General to investigate the BPD arrest quota allegation.[20] Shedoudy's claims continued to attract extensive media and public attention. The Los Angeles Times, San Fransisco Chronicle, Berkeleyside, East Bay Times, and other media outlets all devoted space to the allegations.[21]

On November 17, 2022, the Center for Policing Equity, which had been hired by the City in 2015 to study potential racial disparities in BPD stops (a report presented to the City in 2018), issued a blunt 3-page statement in response to Shedoudy's allegations. It began, "The Center for Policing Equity is appalled by the views, actions, and frank disregard for public safety revealed in a series of leaked group chats among officers

[20] Article: "Secure Justice Calls for Attorney General Investigation into BPD Arrest Quota Policy": https://secure-justice.org/blog/secure-justice-calls-for-attorney-general-investigation-into-bpd-arrest-quota-policy

[21] Article: Berkeley Police Department in turmoil over leaked texts about arrest quotas - Los Angeles Times (latimes.com): https://www.latimes.com/california/story/2022-11-17/berkeley-police-department-in-turmoil-over-leaked-texts-about-arrest-quotas ; Article: Head of Berkeley police union on leave following text message scandal, claims of arrest quotas (sfchronicle.com): https://www.sfchronicle.com/eastbay/article/Report-Head-of-Berkeley-police-union-on-leave-17590377.php ; Article: Leaked texts from Berkeley police union leader show 'disturbing' comments (berkeleyside.org): https://www.berkeleyside.org/2022/11/14/berkeley-police-text-messages-darren-kacalek-bpa ; Article: Berkeley Police Department, Interim Chief will be investigated after ex-police officer leaked texts alleging racist, illegal behavior (eastbaytimes.com): https://www.eastbaytimes.com/2022/11/16/berkeley-police-department-interim-chief-will-be-investigated-after-ex-police-officer-leaked-texts-alleging-racist-illegal-behavior/:; Article: Berkeley police officers' 'anti-homeless' text messages probed | KRON4https://www.kron4.com/news/bay-area/berkeley-police-officers-anti-homeless-text-messages-probed/; Article: Leaked Text Messages Prompt Push to Delay New Police Chief in Berkeley – NBC Bay Area: https://www.nbcbayarea.com/news/local/east-bay/berkeley-police-text-messages-jennifer-louis/3078376/; Article: Fired Berkeley cop leaks texts alleging bias, quotas (berkeleyscanner.com): https://www.berkeleyscanner.com/2022/11/15/policing/fired-berkeley-cop-leaked-texts-corey-shedoudy/

serving with the Berkeley, California Police Department (BPD)."[22] The statement went on to characterize the texts as including "vile dehumanization" of the unhoused and "openly racist" views. It concluded, "The burden is now on the City of Berkeley and BPD to act with appropriate urgency in addressing these revelations, the institutional culture informing them, and their dire implications for Berkeley's residents."[23]

The City Council was poised to vote on appointing Interim BPD Chief Jen Louis as permanent Chief on November 15, 2022, but the vote was postponed in the context of the allegations, including a claim that then Captain Louis knew of, and ignored, the alleged misconduct. The Mayor and Council Members noted that the appointment should be put on hold pending an investigation into the allegations, and the City Manager withdrew the item.[24]

In December 2022, the law firm of Swanson & McNamara was hired by the City of Berkeley[25] to investigate. That investigation took the place of an investigation by the Internal Affairs Bureau of the BPD to dispel the perception of a conflict of interest in the context of the possibly wide-ranging nature of the inquiry.

The allegations that Swanson & McNamara was tasked with investigating included the following claims made by Mr. Shedoudy:

1. Allegations of an "unethical and illegal practice of arrest quotas of downtown unhoused ordered by [name] to DTF/Bike Force," which purportedly commenced when Chief Louis held the position of BPD Police Captain and persisted after her appointment as Interim Chief.
2. Assertions that the DTF/Bike Force was instructed to make 100 arrests per month.
3. Claims of meeting the alleged quota through questionable legal tactics, including stop and frisk, probation searches without reasonable suspicion, and "a very loose interpretation of stay-away orders from UC Berkeley".
4. Criticisms of Captain Louis's perceived inaction.

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[22] Statement on Leaked Text Messages out of Berkeley Police Department: https://policingequity.org/newsroom/official-statements/statement-on-leaked-text-messages-out-of-berkeley-police-department

[23] Center for Policing Equity, 2022. https://policingequity.org/newsroom/official-statements/statement-on-leaked-text-messages-out-of-berkeley-police-department.

[24] On May 9, 2023, prior to conclusion of the investigations into the DTF texting allegations, City Manager Dee Williams-Ridley once again forwarded to City Council her selection of Interim Chief Louis as permanent Chief, and Council voted to appoint her.

[25] See Appendix 1: City of Berkeley Contract for services with Swanson & McNamara LLP, Vendor Contract #32300109 https://records.cityofberkeley.info/PublicAccess/api/Document/AU3fuyqXQXXZ%C3%81TG8am4tuCPyplZzCFLJZsbxFqBxmJ3aQZTBcxS%C3%89E7ECp9r6A30gZuhAImseUFcNLLtKRrEId7g%3D/

5. Allegations of "illegal arrest quotas, racism, evidence suppression, lying, and quid pro quos" supported by various forms of evidence, such as text messages, emails, sworn testimony transcripts, public arrest records, and photographs.

To investigate these claims, the Swanson team submitted Mr. Shedoudy's phone to a third-party vendor for data extraction, including text communications among DTF and/or Bike Unit members from October 1, 2019, to approximately March 1, 2023. The authenticity of each message was confirmed, except for one located on page 3 of Shedoudy's allegations letter, which could not be found on the phone.

The Swanson team also reviewed data on arrests made by DTF and Bike Unit officers from October 1, 2019 through November 22, 2020. This timeframe corresponded with Shedoudy's tenure in the DTF and Bike Unit, and involved review of 481 randomly selected arrest reports, accounting for over 50% of the total.

Additionally, internal Department message board posts concerning DTF activities were gathered and reviewed by Swanson's team, covering the period from November 6, 2019, to March 24, 2020. The investigation also included interviews with former Officer Shedoudy and members of the DTF, as well as with Chief Louis.

The Swanson & McNamara investigative report was completed in June 2023. Those findings have not been made public. A summary of the findings, however, revealed that the text messages expressing racist attitudes, animosity towards the unhoused, and pressure to achieve a certain number of arrests, were authenticated by forensic analysis of former Officer Shedoudy's phone.

While the Swanson & McNamara report was deemed confidential consistent with California Penal Code Section 832.7, the Berkeley Scanner[26] quoted City spokesperson Matthai Chakko that "the investigation found that the department does not have a practice of racial bias," that "the department does not have any arrest quotas," and that the department follows all state laws and the constitution. Berkeleyside also published an article summarizing the City spokesperson's report: "According to city spokesperson Matthai Chakko," the article read, "Swanson and McNamara's investigation found that: the department does not have a practice of racial bias; the department does not have any arrest quotas; the department follows state law and constitutional law…; and the department has existing policies that prohibit discrimination and harassment of protected classes."[27]

This summary of the Swanson findings drew conclusions about the department as a whole and its official policies that went beyond any findings of the investigator whose

[26] Article: Berkeley police bike team cleared of claims made by fired cop (berkeleyscanner.com): https://www.berkeleyscanner.com/2023/07/20/policing/berkeley-police-bike-team-cleared-systemic-problems/

[27] Article: Berkeley police texts probe found no quotas or racial bias, city says (berkeleyside.org): https://www.berkeleyside.org/2023/07/20/berkeley-police-text-scandal-investigation

task and method were to focus on specific practices of the Downtown Task Force and Bike Unit in a limited period of time. The findings of the Swanson team eroded public trust because they were not made public—other than the authenticity of the text messages—and because these overly general statements by the City spokesperson were made in piecemeal fashion to the press.

A Berkeleyside article about this City messaging quoted Mayor Jesse Arreguin's public statement: "Regardless of the underlying findings and outcomes, the investigator verified the accuracy of the text messages. What is clear from a plain reading of the texts is that the behavior was unprofessional and does not meet the standards to which we should hold our City employees…. This episode further demonstrates the need to implement reforms."[28]

Concurrent with, but independent of, the Swanson & McNamara investigation, the PAB launched a policy and practices review. According to the City Attorney's interpretation of the Charter Amendment relating to PAB powers and duties, we were required to limit our investigation to an inquiry into relevant policies and practices and to recommend reforms as appropriate. The Swanson team's authentication of the text messages and the allegations themselves have, among other issues, directed the PAB's attention to the need for an additional policy prohibiting arrest quotas--implicit or explicit--and the strengthening of many existing policies and practices. These recommendations are guided by a commitment to public safety and fair and impartial policing, and the need for a set of policies and Department culture that reflect those values.

While our investigation was necessarily limited to policy and practice recommendations, the PAB recognizes that policy is effective only to the extent that it is understood and enforced. A recent study published in *Nature Human Behavior* found that when officers in police organizations are not held accountable for policy violations and misconduct, the lack of serious accountability results in the propagation of misconduct in officers around them.[29] The study reported that even when shuffling the officer to a different unit, their peers are more likely to engage in misconduct themselves. The takeaway from that study is not only that policy reforms must be stringently enforced to be effective, but that unenforced policies breed infectious misconduct.

The PAB thus offers these policy reforms and at the same time commits itself to oversight of their enforcement. The PAB further makes recommendations for action by

[28] Article: Berkeley officials slam 'drips of information' in BPD text investigation (berkeleyside.org): https://www.berkeleyside.org/2023/07/21/berkeley-bike-squad-investigation-criticized

[29] "Causal Peer Effects in Police Misconduct," Quispe-Torreblanca, Edika and Neil Stewart. *Nature Human Behavior* 3(8): 797-807; "Police Misconduct May Spread like a Contagion, New Study Finds," Catherine Matacic*, Science*, May 27, 2019. https://www.science.org/content/article/police-misconduct-may-spread-contagion-new-study-suggests.

City Council in furtherance of accountability, transparency, and the PAB's ability to monitor implementation which is where policies are materially "enacted".

DATA SOURCES

This review is based on both quantitative and qualitative data and records. The primary data sources were:

- the authenticated text messages submitted by former Officer Shedoudy;
- the Swanson Report, including the audiotaped interviews with BPD members;
- stop and arrest data of the DTF, by race and across time;
- a comparison of DTF stop and arrest data to that of the BPD as a whole;
- the rate of DTF arrests for violations of court orders, such as "stay-away orders";
- the disposition patterns of the DTF and for the BPD as a whole;
- BPD policies relating to arrest quotas, stay-away orders, fair and impartial policing, standards of conduct, off-duty conduct, employee speech, personal communication devices, overtime compensation, and the Early Warning System.

These data[30] provide an important window into the practices and culture of the DTF and guide our recommendations for reforms. While the BPD Transparency Hub allows the public—which in this case includes the PAB—to access raw data on stops and arrests, it is labor-intensive to analyze systematically these data in a way that is useful to full oversight. The ODPA staff and PAB Subcommittee Members spent many hours scrutinizing these data, and processing and organizing them into a form that was usable for our purposes.

LIMITATIONS OF THE DATA

While the PAB utilized a substantial amount of data in its review, some of these data were already in the public domain. The PAB and the ODPA made concerted efforts to access other records that we believed fell within the purview of the policy and practices review provisions outlined in the City Charter. We were not initially allowed access to the Swanson Report, nor to the taped interviews with DTF officers. The ODPA spent many hours and valuable time attempting to access them. The ODPA also sought access to all records in possession of BPD's Internal Affairs Bureau regarding any disciplinary matters relating to former officer Shedoudy, Sergeant Kacelek and other members of the BPD Downtown Task Force and Bike Unit, and any complaints by members of the public filed with the BPD involving the Downtown Task Force. Despite concerted and repeated efforts, and despite the confidentiality oath taken by ODPA staff and PAB Members, these

[30] After much discussion with the BPD, in September 2023 the PAB obtained access to body-worn camera footage for the period under review. The videos contain thousands of hours of footage and given the time and staffing constraints the PAB was unable to analyze all this footage in time for this report. For future inquiries and investigations, the ODPA recommends acquisition of a program such as TRULEO which does computerized analyses of vast video footage.

records were initially withheld from the ODPA and the PAB. Many months later, the ODPA and Subcommittee Members Moore and Calavita were allowed to read the Swanson Report but without the ability to take notes or make copies.

Ultimately, the PAB decided to use its subpoena power and issued a subpoena for the outstanding records. The PAB delegated the issuance of the subpoena to the ODPA, who served it to the department on March 12, 2024. This included a request for "Text messages (beyond those publicly available) and or certification/affidavit from officers that no additional records exist" as well as records "between members of the task force and City Manager Dee Williams-Ridley." Subsequently, Chief Louis informed the ODPA that the BPD did not hold any records beyond those that were publicly produced.

The ODPA and the PAB Chair continued to seek full PAB access to the Swanson Report and audiotaped interviews. Almost a year after the Swanson Report was completed, the ODPA finally received the Report and audiotaped interviews, and PAB Members were given access. We independently spent many hours over several weeks reviewing the Report and interviews.

California Penal Code Section 832.7(a)[31] preclude us from quoting directly from these interviews or attaching officers' identities to individual responses. Instead, these interviews will be used more generally as background information and collectively as collaborating evidence.

Given the already substantial delay in receiving the records we requested, the PAB has decided to issue this report now, with a potential addendum if additional relevant records are secured.

This lack of full access means that key questions could not be answered in this PAB analysis and accompanying recommendations. These unanswered questions include, but are not limited to, the following:

- Were these racially inappropriate sentiments and other biased expressions previously exhibited by these or other officers?
- Did the BPD have knowledge of such expressions or conduct, and if so, what actions were, or were not, taken to intervene?
- How have possible allegations of a similar nature been handled in the past?

The obstacles encountered in accessing internal records underscore the importance of transparency and cooperation between the City and the PAB. The PAB's review of the Swanson team's audiotaped recordings with DTF officers has deepened our conviction that for the PAB to fulfill its Charter-mandated function of providing police accountability, it must routinely have access to documents and records describing actual BPD practices.

[31] California Penal Code Section 832.7:
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN

BPD cooperation with the City's oversight body is critical to ensuring public safety and socially just policing. It is also the fiscally responsible management approach.

FINDINGS

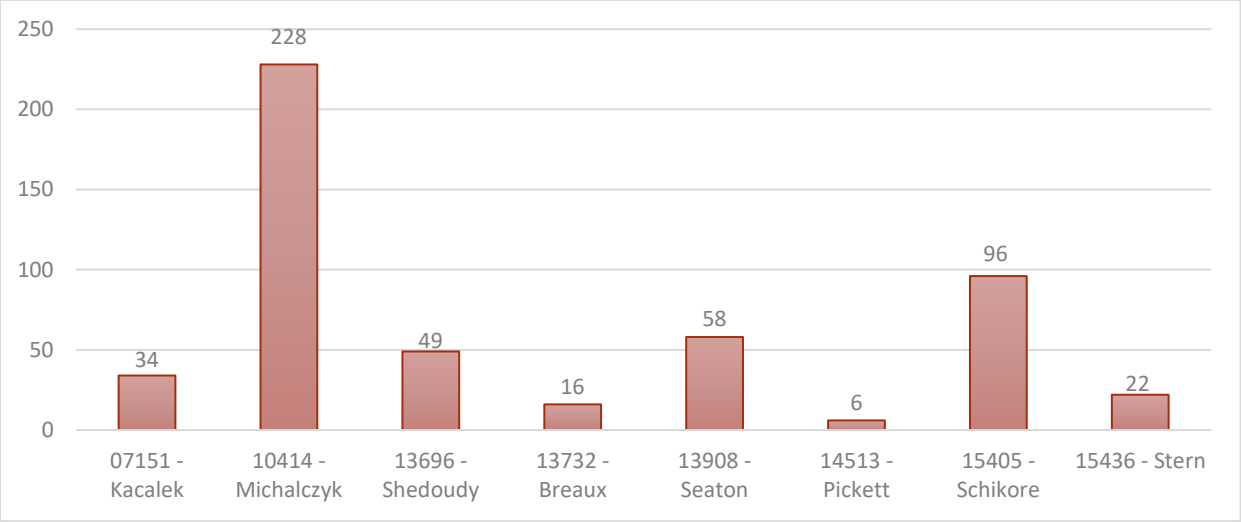
Authenticated Text Messages

Through the Swanson & McNamara investigation, Mr. Shedoudy's provided text messages were authenticated and are appended as Appendix 2. Mr. Shedoudy submitted his phone to a third-party vendor for extraction of pertinent communications, encompassing text exchanges among DTF members from October 1, 2019, to approximately March 1, 2023.

Statistical Analyses

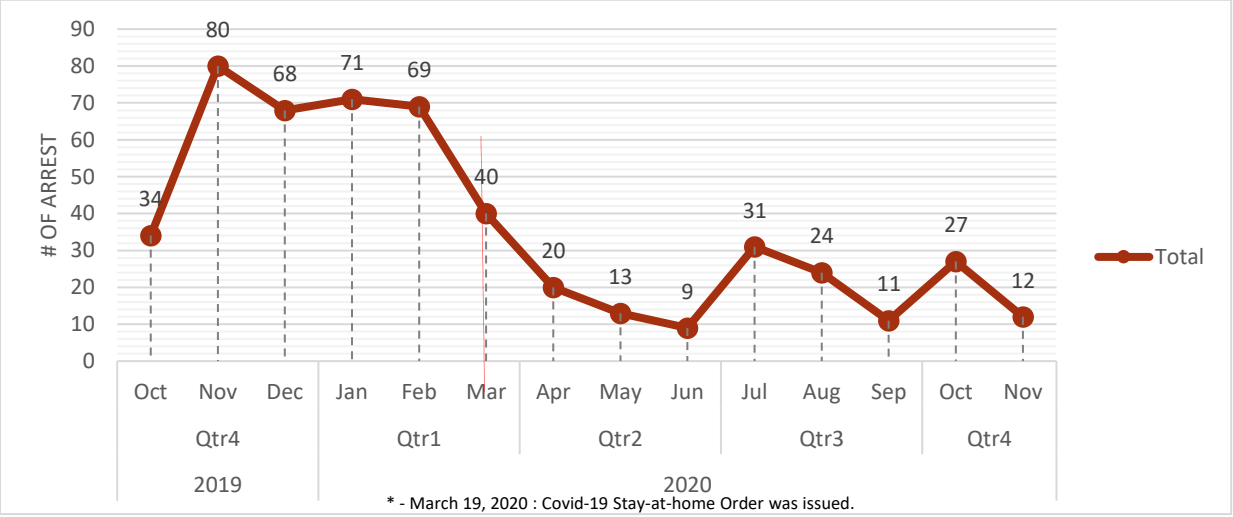
The average number of arrests per DTF officer in the period from October 1, 2019 to November 22, 2020—the period during which these text messages were sent--far exceeded that of the average number of arrests for other BPD officers. The eight officers in the DTF averaged 64 arrests that year, compared to the overall BPD average of 17. In addition, the number of arrests per DTF officer varied greatly from 6 arrests by one member to 228 by another.

FIGURE 1. NUMBER OF ARREST BY OFFICER OF THE DOWNTOWN TASK FORCE AND BIKE UNIT



Similarly, the number of DTF arrests varied substantially by month, peaking in November 2019 as DTF members were being pressured to reach 100 ("81 arrests! We can do 19 by Friday for sure!" "I was thinking whoever gets the least arrests today does the waxing.").

FIGURE 2. DOWNTOWN TASK FORCE ARREST NUMBERS BY MONTH

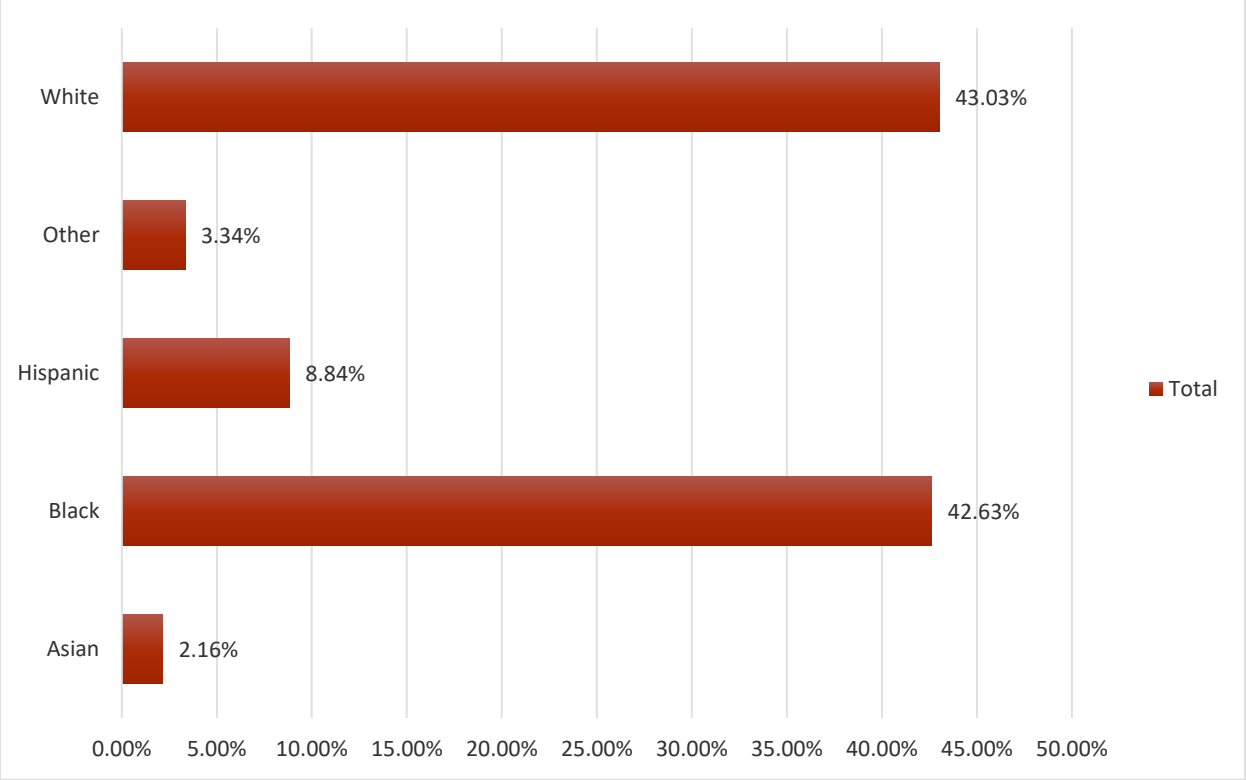


These arrest numbers, together with the text messages, leave little doubt that pressure—more or less explicit, perhaps informal, seemingly jocular--was exerted to maximize arrest figures, sometimes the specific number of 100. The spike in arrests was so dramatic during some periods that, according to the Swanson team and some of the interviewed officers, jail staff complained they couldn't keep up with their booking and detention.

Approximately an equal proportion of these arrests involved Black individuals (42.63%) and White individuals (43.03%), while Latino/a individuals accounted for 8.84% of the total. According to the 2020 census[32], the number of White individuals residing in Council District 4 which encompasses the downtown is approximately four times the number of Black residents in the area, suggesting that the arrest rate for Black people was almost four times as high as for White people. However, it is difficult to be precise about the racial disparity since the census may undercount the unhoused who were often the focus of DTF activity.

[32] United States Census Bureau 2020 Census Data for Berkeley, California: https://www.census.gov/quickfacts/fact/table/berkeleycitycalifornia/SBO030217

FIGURE 3. RACE OF INDIVIDUALS ARRESTED BY THE DOWNTOWN TASK FORCE/BIKE UNIT (OCT.2019 TO NOV.2020)

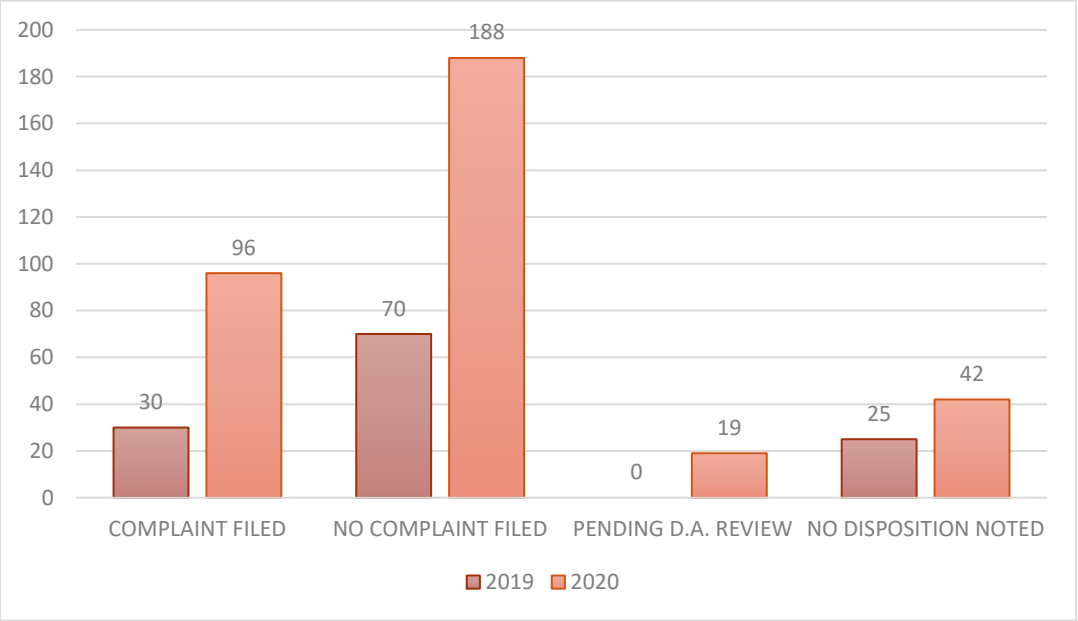


Additionally, 20.63% of the 509 arrests made by the DTF during this period were for contempt of court (California Penal Code 166[33]), typically considered a misdemeanor. Of these, 96 out of 105 contempt of court arrests also included a probation violation. Given the relatively large size of the unhoused population and its proximity to the UC campus and downtown businesses, it is likely that a significant portion of these arrests were at least in part for violations of stay-away orders. This is supported by audiotaped interviews with DTF officers, which indicate that stay-away orders are central to their enforcement actions. In some cases, officers even requested that judges impose stay-away orders, facilitating subsequent arrests. Without closely reviewing individual incident reports and probationary conditions imposed on arrested individuals, it is difficult to determine how many of these violations were specifically for stay-away orders as distinct from other probation violations.

A considerable number of DTF arrests were dismissed outright with no complaint filed by the Alameda County District Attorney, with dismissed cases rising from 70 in 2019 to 188 in 2020.

[33] California Penal Code Section 166: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=166.

FIGURE 4. DOWNTOWN TASK FORCE ARREST SENT TO ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE (OCT. 1, 2019 – NOV. 22, 2020)



Finally, it is notable that as documented in the City Auditor's 2022 report on BPD overtime, in 2020 the BPD outspent its overtime budget by more than $5 million[34]. While much of this was due to contracts with outside entities, some was also the result of the "chain reaction" of compensatory time. As the Auditor explained, when an officer does overtime, they may receive either overtime pay or compensatory time off. When they choose the latter, another officer fills in with overtime, who then may choose compensatory time, and so on, eventually magnifying many times over the effect of the original overtime.

The text messages revealed by Shedoudy suggest that overtime work was liberally authorized. Sgt. Kacalek enthused that if his officers "kick ass" and "arrest people" they "will never [be] jam[med] up about overtime." The DTF interviews corroborate the essentially open-ended, unlimited access to overtime.

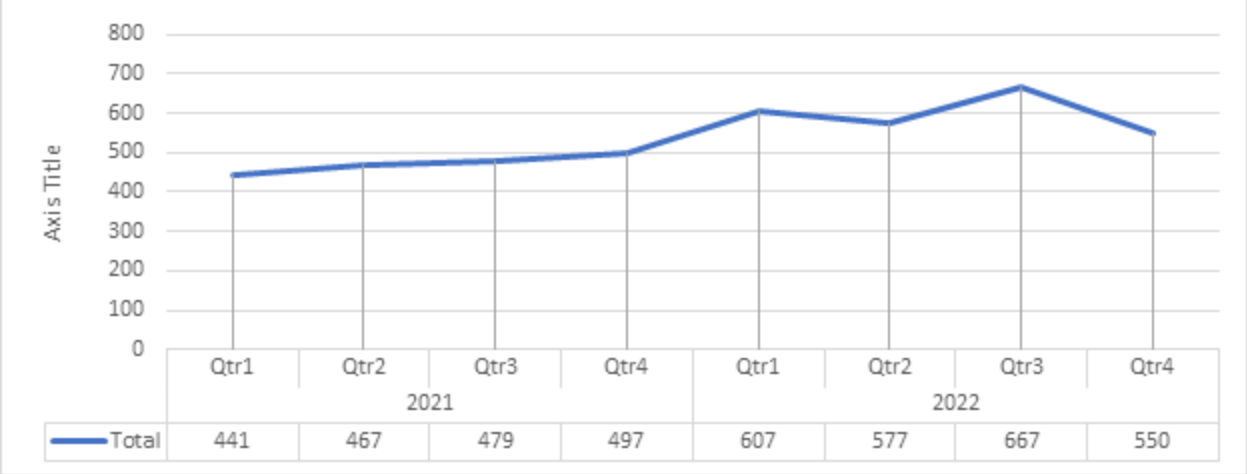
The data presented above represent a moment in time. Because this report is forward-looking and is focused on policy and practices, it is important to examine the subsequent state of DTF operations. Seven of the original officers[35] were on the Downtown Task Force/Bike Unit for all eight quarters from January 2021 to December 2022; Sgt. Kacalek was on DTF duty for five of those quarters.

[34] City Auditor Report "Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities" https://berkeleyca.gov/sites/default/files/2022-04/Berkeley Police - Improvements Needed to Manage Overtime and Security Work for Outside Entities.pdf

[35] These were officers Breaux, Michalczyk, Pickett, Schikore, Seaton, and Stern, all of whom were also on the earlier DTF.

Once again, the number of arrests by these seven officers ranges substantially from sixteen for one officer to 265 for another. Further, the 585 arrests by these eight officers constitute a significant portion of the 4,285 arrests made by the BPD during this period.

FIGURE 5. ARREST MADE BY THE BPD (JAN. 2021 - DEC. 2022)



Racial disparities in arrests by the DTF increased substantially in this period, with Black individuals constituting 46.9% of arrests, while White individuals made up 29.2% of arrests, and Latino/a people were 15.3% of those arrested.

Policy and Practices Deficiencies and Recommendations

These qualitative and quantitative findings strongly suggest that policy changes are necessary. Among the policies the PAB recommends strengthening are policies on:

- fair and impartial policing (Policy 401);
- the use of personal communication devices such as cellphones (Policy 701);
- employee speech, expression and social networking (Policy 1029);
- the early warning system (Policy 1041);
- standards of conduct (Policy 321); and
- overtime compensation requests (Policy 1019).

In addition, the PAB recommends:

- adding a stand-alone policy prohibiting implicit or explicit arrest quotas that go beyond the California Vehicle Code (Section 41600-41603) on vehicle stops[36] and
- consideration of an official standard for the enforcement of stay-away orders.

[36] California Vehicle Code. Section 41600-41603. Chapter 7. Arrest Quotas: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=VEH&division=17.&title=&part=&chapter=7.&article=

Before proceeding to these policy reviews, it is important to emphasize that policy changes are meaningless if they are not enforced or if BPD officers are not sufficiently informed on policy matters. In our review of the evidence and audiotaped interviews, it was clear that DTF officers in some cases engaged in practices that were not consistent with policy and in other cases expressed confusion as to what those policies were.

We turn now to specific concerns and preliminary recommendations for reform of existing policies. Following that, we offer recommendations for a new policy prohibiting all arrest quotas; consideration of a standard for enforcement of stay-away orders; and additional training. The PAB presents these preliminary policy recommendations with the intention of collaborating with the BPD to refine and enhance the necessary reforms, ensuring they effectively address the needs of the Berkeley community.

Fair and Impartial Policing, Policy 401

BPD data have consistently shown that Black and Latino/a motorists, cyclists and pedestrians are far more likely to be stopped, arrested and searched than are White people. The 2018 Center for Policing Equity (CPE)[37] report commissioned by the City found that Black motorists were 6.5 times more likely to be stopped by Berkeley police than White motorists and that Black pedestrians were 4.5 times more likely to be stopped.

Subsequent to this CPE report, Mayor Arreguin convened a Working Group on Fair and Impartial Policing. It met for almost two years and submitted a package of recommendations to City Council on February 23, 2021. The recommendations, which were passed largely intact, were wide-ranging and significant and included, among many other proposals, recommendations for a requirement that intensive training focused on implicit bias be administered annually, and for reforms of the Early Warning System.

Data in the BPD Transparency Hub reveal that the disparities reported by the CPE remain entrenched. According to the 2024 PAB report on the Implementation of Fair and Impartial Policing directives[38], for the period from April 2021 to October 2023, Black motorists were 5.8 times more likely to be stopped by the BPD than White motorists; 10 times more likely to be searched; and 10 times more likely to be arrested. Black pedestrians were 8 times more likely to be stopped than their White counterparts. Overall, Black residents of Berkeley were 6.55 times more likely to be stopped by BPD than White Berkeley residents.

As noted earlier, it is challenging to calculate with precision the racial disparities in arrests in the downtown area. What we do know, however, is that the racial disparity in

[37] Report, "The Science of Justice: Berkeley Police Department National Justice Database City Report May 2018": https://rentboard.berkeleyca.gov/sites/default/files/documents/Berkeley-CPE-Report-May-2018.pdf

[38] Police Accountability Board Report "Fair and Impartial Policing Implementation": https://berkeleyca.gov/sites/default/files/documents/2024%20PAB%20Report_FIP%20Implementation_Final.pdf

arrests has increased substantially from 2019-2020 when approximately equal numbers of Black people and Whites were arrested by the DTF, to 2021-2022 when the percentage of arrestees who were White had fallen to 29.2% and Blacks and Latinos made up more than 62%.

We know too that the text messages from 2019-2020 reveal open racial animus among at least some officers. As Sgt. Kacalek joked derisively when watching a blurry video of a distillery, "Shedoudy's Obama phone fucked up the video" (presumably ridiculing a program that provided free cell phones to eligible low-income households).

In a subsequent text, Sgt. Kacalek wrote about a media report of a particular incident and the alleged perpetrator: "Interesting how he listed him as 'Dennis Daniels, male, 51 years old, no address'. I guess he isn't black or no one could decipher his race and he isn't homeless or even unhoused, just no address. #Iwantthecoldhardtruth."

The disdain extended to the unhoused people Sgt. Kacalek patrolled: "Stern [DTF patrol officer] is gonna come back with a new strain that wipes out the homeless pop. We will just ride by the bodies!"

Despite these inappropriate expressions of racial animus and disdain for the unhoused it appears that no DTF officers reported the inappropriate conduct and expressions until the terminated officer Shedoudy disclosed the text messages to City Council. DTF members interviewed by the Swanson team pushed back against the notion that such messages were inappropriate, viewing them instead as intended as humor and not to be taken seriously—suggesting a jarring disconnect between the public reaction to the racist undertone of these texts and their matter-of-fact reception by DTF members.

In light of these quantitative and qualitative findings, the PAB recommends the following additions to the Fair and Impartial Policing Policy (#401):

- A provision explicitly clarifying that the policy refers to both conduct and speech or expression and
- A provision that mandates annual intensive implicit bias training as called for in the Council directive in the Fair and Impartial Policing reforms of 2021[39]

See Attachment 1 for the current Fair and Impartial Policing Policy, with recommended changes highlighted in red.

Personal Communication Devices, Policy 701

The cellphones used by the DTF to send these text messages were officers' personal devices. While the department issues personal communication devices (in this case, cellphones) to all sworn members and encourages their use for work-related issues

[39] Report and Recommendations from Mayor's Fair and Impartial Policing Working Group: https://berkeleyca.gov/sites/default/files/documents/2021-02-23%20Special%20Item%2001%20Report%20and%20Recommendations.pdf

when radio communication is not feasible, the policy allows wide discretion. As was the case in the Swanson & McNamara investigation, the fact that the messages in question were sent on officers' own personal devices—not those issued by the Department--complicated considerably investigators' access. Furthermore, some of the interviewed DTF members were not aware of *any* policy on this issue. The PAB therefore recommends:

- strengthening Policy 701 to stipulate that PCDs are to be used *only* when radio communication is not feasible;
- that members using a PCD be required to use department-issued PCDs, absent exigent circumstances;
- adding a provision making it clear that the prohibition on inappropriate use of a PCD, whether on duty or off-duty on work-related issues, includes any expression that damages the mission, function, reputation or professionalism of the BPD; and
- providing additional training on the use of PCD's.

See Attachment 2 for the current Personal Communication Devices with recommended changes highlighted in red.

Employee Speech, Expression, and Social Networking, Policy 1029

The text messages that were exchanged among members of the DTF expressed racial animus and disdain for the unhoused. In this, they appear to have violated the BPD policy on employee speech and expression. Specifically, the policy prohibits any speech "pursuant to an official duty that tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees." The meaning of this policy appears to be clear; however, in the context of DTF members' interpretation of the messages in question as jesting, the PAB recommends not only the implicit bias training referred to above, but also:

- adding further specificity to leave no doubt about its meaning, explicitly including reference to its application whether the speech is transmitted through a personal or department-issued electronic device and whether the member is on or off-duty.

See Attachment 3 with the current Employee Speech, Expression, and Social Networking Policy, with recommended changes highlighted in red.

Early Warning System, Policy 1041

An Early Warning System (EWS), sometimes referred to as an Early Intervention and Risk Management System, was a central component of the directives of the City Council, following the recommendation of the Mayor's Working Group on Fair and Impartial Policing. As the Working Group stated in its recommendation to Council in February 2021, an effective system involves "identifying officer outliers in stops, searches, and use of force…and examining the reasons for racial disparities." "Outliers" is a term of art that refers to those whose performance on certain indicators is outside the Department

average. The system does not focus on discipline but rather on identifying behavior that may be problematic as early as possible. Such programs include monitoring, mentoring, training and, where appropriate, counseling.

In addition to enhancing public safety and officer welfare and safeguarding against bias, effective systems are a financially responsible approach. According to a report by the *Washington Post*, twenty-five cities paid out more than $3.2 billion in settlements for police misconduct between 2010 and 2020, with claims for officers charged in more than one misconduct case accounting for $1.5 billion.[40] Over the past decade, the City of Berkeley has paid $1,242,860.97 across 471 claims in such settlements, with a total incurred cost of almost $2 million, including the cost of processing these claims.

The current EWS in Berkeley does not have an effective way of systematically identifying outliers on indicators such as numbers of stops, arrests and searches. While random audits of a few officers on a quarterly basis have been instituted, the small number randomly singled out is unlikely to have an effective impact or to identify significant outliers, nor is it consistent with the directive from Council based on the Mayor's Working Group on Fair and Impartial Policing.

As criminologist Carol Archbold, who specializes in police accountability, said in the context of the *Nature Human Behavior* report on the contagiousness of misconduct, early intervention systems can be effective: "The spread [of misconduct] can be stopped if it's tracked, and if something is done about it."[41]

If an effective Early Warning System had been in effect, it is probable that, based on the statistics cited above—particularly the spike in arrests during certain periods—some members of the DTF would have been audited as outliers and the scrutiny could have minimized the damage.

In April 2023, City Council referred $100,000 to the June 2023 budget to hire a consultant for the design and help with implementing a new Early Intervention and Risk Management System. It will take some time before that project is complete and a new system put in place. In the interim, the PAB recommends:

- quarterly audits of officers with unusually high numbers of stops, arrests, and/or searches, for people of color and the unhoused, instead of the current random audits of several officers

See attachment 4 for the current Early Warning System Policy 1041, with recommended changes outlined in red.

[40] "The Hidden Billion Dollar Cost of Repeated Police Misconduct," *The Washington Post*, March 9, 2022.
[41] "Study Finds Misconduct Spreads among Police Officers Like Contagion," Nova KQED, May 27, 2019. https://www.pbs.org/wgbh/nova/article/police-misconduct-peer-effects.

Standards of Conduct, Policy 321

As Mayor Arreguin stated in his press release following the statements of City Spokesperson Chakko, "What is clear from a plain reading of the texts is that the behavior was unprofessional and does not meet the standards to which we should hold our City employees…. This episode further demonstrates the need to implement reforms."

These authenticated texts reveal conduct that was clearly at odds with the official policy and underscore the need for explicit statements regarding the duty of all officers to report inappropriate conduct or violations of policy. It is of great concern that some DTF officers were not even aware of any mechanism for reporting observed misconduct.

The PAB is pleased that the Chief has adopted the Active Bystander for Law Enforcement (ABLE) program for which training will soon commence. That program will train officers to intervene when they witness their peers engaging in inappropriate conduct.

In addition to this important ABLE program, the reforms we recommend to this Standards of Conduct policy will:

- make it clear that any behavior or expressions that bring disrepute to the Department—whether an officer is on or off-duty—will not be tolerated, and
- Members have an obligation to report any such behavior or expressions by any other member, consistent with Policy 1010.9 concerning 'Employee Responsibility' to file a personnel complaint if misconduct by a BPD colleague is observed.

See Attachment 5 for the current Standards of Conduct Policy with recommendations highlighted in red.

Overtime Compensation Requests, Policy 1019

The police overtime issue is a longstanding concern. A 1998 report by the National Institute of Justice declared, "There is a sense both inside and outside the law enforcement community that overtime is overused, misused, and only halfheartedly controlled."[42]

On March 23, 2022, the Berkeley City Auditor submitted a report entitled "Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities."[43] The report found that "BPD does not adhere to their overtime policies and controls." In fiscal year 2020, 21% of officers worked more than their weekly overtime limit

[42] Bayley, David and Robert Worden. 1998. "Police Overtime: An Examination of Key Issues." National Institute of Justice, U.S. Department of Justice. Washington DC.

[43] Berkeley City Auditor, "Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities," March 3, 2022. The report won an excellence award from the Association of Local Government Auditors.

of 44 hours at least once, risking their own health and safety and the safety of others. One officer exceeded the limit in eleven weeks during 2020. Further, the Auditor's report stated that the BPD did not "have an effective system to enforce their policy and manage overtime."

The Auditor's report further noted that "overtime was the biggest reason" why the BPD consistently spent more than their budget allocation. In order to align the overtime budget with actual outlays, in 2021 the City's overtime budget allocation was raised to $5.3 million and another $1 million was put in reserve.

The Auditor noted that there are many legitimate reasons for the police use of overtime—for example, a call that comes in at the end of a shift or the need to cover for absences or vacancies. However, excessive overtime imposes significant physical, mental, and fiscal risks. She also noted that compensatory time for overtime worked sets off a "chain reaction" of overtime expenses, and that while such comp time is limited by policy it was unclear "whether this policy is being enforced" (p. 16). On June 25, 2024, Chief Louis gave Council an update on implementation of the Auditor's twelve recommendations. She reported that five had been implemented and that the others were in process. However, we note that none of these recommendations deal squarely with the issue of the broad discretion related to overtime.

The Auditor advanced twelve recommendations—importantly, including improved security contracts with the outside entities that make up a large percentage of overtime hours. The Auditor's final report included responses from the Department indicating that many of the recommendations are in the process of being implemented. Among these BPD responses was a "proposed implementation plan" to "review existing policy and ensure that any policy updates or clarification are completed."

BPD policy on overtime requests and the verification of overtime worked relies on broad discretion and appears open to misuse. This wide discretion and potential for misuse are apparent in this text from Sgt. Kacalek: "I was at Kevin Reece's birthday party just now and Dave was there and we briefly talked about DTF. He said just kick ass, arrest people, have fun, and get results and I will never jam you about overtime." Indeed, the audiotaped interviews of DTF members suggest that DTF officers worked overtime at will.

While some supervisory discretion is inevitable and necessary, the current policy leaves wide gaps through which such misuse can proliferate. For example, Section 1019.1.1 of the Overtime Compensation Requests policy states, "All requests to work overtime shall be approved in advance by a supervisor." However, this clear mandate is followed by the broad exemption that "if circumstances do not permit prior approval," approval can be sought after the fact when the overtime is completed.

The PAB does not offer specific policy reforms here. Instead, we recommend that the review of existing policies referred to in the BPD response to the Auditor be robust

and foreground the need to narrow this broad discretion. Importantly, for example, among other provisions it might:

- stipulate what circumstances, or types of circumstances, would comprise the need to bypass the otherwise straightforward directive that “all requests shall be approved in advance…” and
- consider excessive overtime as a factor triggering an Early Warning System audit.

While discretion and flexibility are inevitable, the conditions under which discretion is applied need to be described. The current policy perhaps unintentionally sends a message of virtually unlimited flexibility--a flexibility that some DTF officers interpreted as open-ended. See Attachment 6 for the current Overtime Compensation Policy.

Prohibition on Arrest Quotas

The legislative issue of police arrest quotas, though often obscured and scattered across many states, has its origins in Berkeley—a city renowned for its progressive and forward-thinking stance in shaping societal norms and legal frameworks (Ossei-Owusu, 2021).

Significant legislative activity on arrest quotas emerged in the 1970s, with Black Democratic Assemblyman John Miller introducing California's bill in 1975. Miller, often described as a "progressive independent in local politics," demonstrated a keen political acumen, underpinning his support for quota bans with inclusive rhetoric (Id.). His district, which encompassed the diverse cities of Oakland and Berkeley, provided a unique perspective, one that resonated with concerns for both police officers and the public.

Miller articulated the inherent injustice in quotas, deeming them "unfair, undemocratic, and unjust."[44] He was troubled by the notion that an officer's failure to meet quotas could lead to demotion, while simultaneously expressing concerns for "the average California driver," who might find themselves disbelieved by a "rubber stamp traffic court system."[45]

California's statute, based on a convergence of bipartisan concerns, remains relevant today, specifically in the City of Berkeley. It serves as a historical testament to the enduring pursuit of justice and fair play, core tenets that guide our efforts to maintain police accountability, foster public trust, and safeguard civil rights.

While most people assume that a ban on police arrest quotas is already enshrined in the California Penal Code, it is limited to the California Vehicle Code. This is an oversight that needs to be corrected, both locally and at the State level.

The brief summary of the Swanson report provided to the public by the City of Berkeley appears to absolve the DTF of establishing formal arrest quotas. However, the

[44] See Ossei-Owusu, 2021 citing *Measure to Outlaw CHP’s Ticket Quotas*, *supra* note 69, at 1.
[45] Id.

Swanson report stipulates that while no formal arrest quotas were established, there was an expectation that a certain number of arrests was to be aimed for. The text messages quoted above are replete with explicit and implicit references to “Operation 100” in which DTF patrol officers were encouraged by Sgt. Kacalek to achieve at least 100 arrests per month. “How’s Operation 100 going?”, he asks. And, “81 arrests! We can do 19 by Friday for sure!” And, by way of a (presumably) teasing reminder, “I was thinking whoever gets the least arrests today does the waxing.” DTF members who were interviewed consistently eschewed the term “quota”, but they acknowledged an expectation of high arrest numbers as an indication that they were being proactive and doing their job.

A spike in arrests attests to the seriousness of the Operation 100 expectation and its implicit quota.

Given the legislative history of arrest quotas, their (incorrectly) assumed ban in California, and their potential impact on our most marginalized community members, the PAB recommends that the BPD, in collaboration with the PAB develop a new, freestanding policy prohibiting all arrest quotas whether they refer to vehicles, cyclists, or pedestrians, whether formal, informal, or implicit, and whether they are enforced with formal disciplinary measures or solely incentives/disincentives. A sample arrest quota prohibition is attached in Appendix 3.

Stay-away Orders

Violation of a stay-away order is considered a contempt of court misdemeanor under California Penal Code 166(c)(1). While the DTF text messages do not explicitly reference stay-away orders, BPD data indicate that over 20% of DTF arrests during this period were for violations of court orders. Among these cases, 91.4% were linked in part to violations of probation. Without a detailed review of individual incident reports, it is difficult to ascertain how many arrests stemmed primarily from a violation of a stay-away order.

Currently, BPD lacks a specific policy regarding stay-away orders. Some interviewed officers assert that enforcement allows no discretion, while others maintain that some discretion exists. Given the significant impact of stay-away orders on UC Berkeley property and downtown businesses, and officers' ability to request these orders post-arrest from a judge, the PAB strongly recommends that BPD establish a comprehensive stay-away order policy and provide training consistent with state law.

The current resources of the PAB do not allow for a detailed examination of the circumstances surrounding stay-away arrest. However, we recommend that BPD investigate the frequency and context of these arrests, and assess whether the district attorney's high dismissal rate (as noted earlier for DTF cases) is disproportionately related to stay-away orders.

RECOMMENDATIONS FOR CITY COUNCIL ACTION

1. **Pass an ordinance or otherwise affirm the Police Accountability Board's ability to access documents and records in furtherance of its central "accountability" function, consistent with Charter Amendment Section 125.**

The policy reforms recommended above are an important first step in ensuring that the kind of inappropriate conduct and expression revealed in the DTF text messages do not recur. However, policy reforms are only a first step. No policy is effective if it is not fully implemented and enforced. Real law—real policy—takes place on the ground where it is literally "enacted" every day through practice.

The PAB "policy and practices review" of the texting incidents of concern here are a case in point. The content of the audiotaped interviews of DTF Members which were accessed by the PAB only after persistent and lengthy efforts have underscored how critical such authority is if the PAB is to fulfill its function of Police Department accountability and transparency. Without such access, our oversight would be largely limited to formal policies, with no meaningful "practices" oversight.

The Charter Amendment creating the PAB established as one of its primary purposes the promotion of "public trust through independent, objective, civilian oversight of the Berkeley Police Department," including "setting and reviewing Police Department, policies, **practices**, and procedures…" (Section 125 (1); emphasis added)[46].

If the Police Accountability Board is to fulfill its Charter-mandated function of police oversight and accountability, it must have the ability to access the internal records of the BPD that track its actual practices. This would include, but not be limited to, Internal Affairs Bureau records of internal and external complaints and their processing, Early Warning System records, body-worn camera footage, and police reports.

It should be noted further that the inability of this oversight body to provide oversight of daily BPD practices limits its ability to prevent or forestall the kinds of misconduct that went undisclosed for more than two years before being exposed by an individual who was no longer part of the police force.

This restriction on the PAB oversight function plays out in other incidents of interest as well, including serious allegations of significant misconduct—incidents that we as the police oversight body sometimes only learn about from press reports months or years after the fact. We fully understand that the PAB is not authorized to recommend discipline outside of individual complaints. What is important is *patterns of practice* that may be revealed in a PAB investigation and that are integral to the PAB exercising its Charter-mandated oversight of not only BPD policy, but practices.

[46] Berkeley City Charter Section 125(1): https://berkeley.municipal.codes/Charter/125(1)

To this end, the PAB recommends that City Council pass an ordinance or otherwise ensure that the PAB has the authority to access BPD records that attest to how formal policies are being implemented and enforced, both through BPD procedures and in daily practice on the ground. This recommendation addresses the core of our Charter-mandated function of oversight, accountability, and the promotion of trust.

In 2023, City Council passed its priority list for legislative activity at the state and federal levels, a list which authorizes its lobbyists to act on its behalf to champion legislation consistent with Berkeley's values and interests. That list included a directive to "support efforts to increase peace officer accountability…". "Peace officer accountability" was once again a lobbying priority for Berkeley in 2024.

An ordinance to ensure that the PAB may self-initiate investigations of alleged incidents of serious misconduct will allow it to fulfill its Charter-mandated function of oversight. This would be consistent with the City's lobbying efforts to "support efforts to increase peace officer accountability."

2. **Adopt a robust resolution ensuring full and meaningful accountability for sworn officers—whether on-duty or off-duty--who engage in misconduct of any kind but especially actions or expressions of racial or other types of bias**.

Disciplinary actions imposed on sworn officers who engage in policy violations are not revealed to the public, consistent with California Penal Code 832.7. This lack of disclosure, combined with the inevitable rumor mill that works to fill the gap, has threatened to erode public trust. The erosion of trust has been furthered by revelations in the press that one recent incident resulted in a seeming exoneration by the BPD Internal Affairs Bureau, despite what Mayor Arreguin called his "shock and outrage" at the alleged incident.[47] Council could help ensure accountability by adopting a resolution underscoring its support for robust and meaningful accountability for officers, whether on or off-duty, who engage in misconduct of any kind, but with a special emphasis on racial or other types of bias.

3. **Direct the City Manager to work with the BPD, PAB and ODPA to create a public repository to fulfill the vision of California Penal Code Section 832.7[48] (b)(1) to allow for transparency in cases of sustained allegations of officer racism or other discriminatory conduct or expressions.**

[47] See "'Don't give me that Black crap': Video from 2017 shows embattled Berkeley sergeant" (berkeleyscanner.com. September 13, 2023): https://www.berkeleyscanner.com/2023/09/14/policing/berkeley-police-sergeant-dave-marble-lawsuit-video/

[48] California Penal Code Section 832.7: https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=832.7.&lawCode=PEN

The Penal Code that protects peace officers' personnel records from public disclosure (Section 832.7) has been amended several times. These amendments now exempt the following records from protection:

1. Discharge of a Firearm: Any incident where a peace officer discharges a firearm at a person (Section 832.7(b)(A)(i)).
2. Use of Force: Any use of force resulting in death or great bodily injury (Section 832.7(b)(A)(ii)).
3. Sexual Assault: Any sustained finding that a peace officer engaged in sexual assault (Section 832.7(b)(B)(i)).
4. Dishonesty: Any sustained finding of dishonesty by a peace officer made by any law enforcement or oversight agency (Section 832.7(b)(C)).

The most recent amendment further allows the disclosure of records related to "any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in conduct including, but not limited to, verbal statements, writings, online posts, recordings, and gestures, involving prejudice or discrimination against a person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status" (Section 832.7(b)(D)).

The Berkeley City Council should direct the City Manager to collaborate with the Berkeley Police Department (BPD), the Police Accountability Board (PAB), and the Office of the Director of Police Accountability (ODPA) to implement these amendments. Specifically, they should:

1. Create a public repository that proactively publishes relevant findings within 30 days of their conclusion, regardless of Public Records Act (PRA) requests; and
2. Ensure full transparency in cases of sustained allegations and other incidents eligible for public disclosure.

This action will fulfill the vision of the amendments to California Penal Code Section 832.7 as outlined in Senate Bill 16 (SB 16)[49], Senate Bill 1421 (SB 1421)[50], and Assembly Bill 748 (AB 748)[51].

[49] Senate Bill 16, Skinner. Peace officers: release of records: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB16

[50] Senate Bill 1421, Skinner. Peace officers: release of records: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1421

[51] Assembly Bill 748, Ting. Peace officers: video and audio recordings: disclosure: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB748

4. **Call on California state legislators to extend the prohibition on arrest quotas, which are currently limited to the California Vehicle Code (Section 41600-41603).**

Most people assume that a ban on police arrest quotas is already enshrined in California law, but it is limited to vehicle stops. This is an oversight that needs to be corrected, both locally and at the State level. Given the legislative history of arrest quotas, their (incorrectly) assumed ban in California's Penal Code, and their potential impact on our most marginalized community members, the PAB recommends that Council call on the legislature to correct that oversight by extending the prohibition on arrest quotas, whether they be implicit or explicit, in the Penal Code.

Whatever the findings of the Swanson & McNamara team, the DTF text messages as well as the spikes in arrests during that month, drew the PAB's attention to arrest quotas and, eventually, to the absence of their general prohibition in the Penal Code. Once again, Berkeley could take the lead on spearheading a remedy for this apparent oversight.

SUMMARY

The Police Accountability Board is charged by the City Charter with oversight of the Berkeley Police Department's policies, practices, and procedures, in the interest of promoting accountability, transparency and public trust.

This report was triggered by a series of text messages sent among sworn officers of the BPD's Downtown Task Force and Bike Unit, and its goal is to fulfill—to the extent possible under current restrictions--its Charter-mandated oversight functions. The report is forward-looking, providing recommendations for policy and practice changes that may help prevent such harmful incidents in the future.

We draw our recommended policy reforms from implications of the text messages themselves, publicly available statistical data, the Swanson & McNamara Report, and DTF officers' audiotaped interviews.

The policies focused on in this report are Fair and Impartial Policing (#401); Personal Communication Devices (#701); Employee Speech, Expression, and Networking (#1029); Standards of Conduct (#321); the Early Warning System (#1041); and Overtime Compensation Requests (#1019). In addition, the PAB recommends a freestanding prohibition on all arrest quotas, implicit or explicit, and a clear policy on the enforcement of stay-away orders.

These policy reforms are one important step. However, policy reforms are only meaningful to the extent that they are fully understood, implemented, and robustly enforced. The PAB thus recommends, as a key priority, that City Council enact an ordinance or other mechanism to ensure that this oversight body—which has sworn an

oath of confidentiality--has the authority to access internal BPD records in the interest of preventing such damaging practices in the future.

Less significant perhaps, but of great symbolic value, the PAB recommends that Council pass a resolution affirming its strong support for full and meaningful accountability for officers who have engaged in misconduct whether they are on or off-duty.

The PAB also recommends that the Council call on the State Legislature to 1) add an exemption in cases of sustained racism or other bias, to 832.7 which protects police records from public disclosure; and 2) rectify an oversight with regard a prohibition on arrest quotas--which is currently limited to the California Vehicle Code—by extending that prohibition in the California Penal Code. By doing so, the City of Berkeley can exhibit its leadership on these important social justice issues.

The text messages that were sent among officers of the Downtown Task Force were harmful to the community and arguably demoralizing to the many BPD officers who find such sentiments repugnant. This report is necessarily forward-looking and aims to provide an environment in which transparency, accountability, and justice can flourish. This cannot be accomplished through policy changes alone. It requires collective efforts by the PAB, BPD and its leadership, the City Manager, and City Council. The PAB looks forward to this collaboration.

ATTACHMENTS

ATTACHMENT 1. Fair and Impartial Policing: POLICY 401 (with recommended changes in red).

401.1 PURPOSE AND SCOPE

This policy is intended to reaffirm the commitment of the Berkeley Police Department to fair and impartial policing; to clarify the circumstances in which dispatchers and officers can consider race, ethnicity and other demographics; and to reinforce procedures that serve to assure the public that we are providing service and enforcing laws in an equitable way, including identifying, intercepting, and documenting profiling by proxy.

California Penal Code Section 13519.4(e) prohibits racial profiling by law enforcement officers. This policy explicitly prohibits racial profiling and other biased policing. This policy describes the limited circumstances in which members can consider race, ethnicity, national origin, gender, age, religion, sexual orientation/identity or socio-economic status in making law enforcement decisions.

401.1.1 DEFINITIONS

Definitions related to this policy include:

Bias-based policing - Any police-initiated action that relies on the race, ethnicity or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being engaged in criminal activity.

401.2 POLICY

Investigative detentions, traffic stops, arrests, searches and property seizures by officers will be based on a standard of reasonable suspicion or probable cause. Officers must be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause.

Officers shall not consider race, ethnicity, national origin, gender, age, religion, sexual orientation/ identity or socio-economic status in establishing either reasonable suspicion or probable cause, or when carrying out other law enforcement activities except when officers are:

1. Seeking specific person(s) who have been described in part by any of the above listed characteristics, or
2. The person(s) are being sought for a specific law enforcement purpose.

Discrimination or harassment based on a trait or class described above is considered a "serious allegation" of misconduct.

401.3 RESPONSIBILITY TO REPORT AND TAKE CORRECTIVE ACTION

Employees who become aware of another employee engaging in biased policing—including both conduct and speech or expression—shall report it and shall adhere to reporting procedures set forth in the Personnel Complaints Policy.

A supervisor or command officer who becomes aware of biased policing shall adhere to notification and administrative procedures set forth in the Personnel Complaints Policy.

All reports of biased policing shall be investigated in accordance with the Personnel Complaints Policy.

401.4 PROFILING BY PROXY

Bias, racism or profiling by proxy occurs in a call for service when an individual call the police and makes false or ill-informed claims about persons they dislike or are biased against. Dispatchers and Officers have a role in mitigating bias-based calls for service (CFS), and proper handling of these calls is important to maintain and build trust between the police and the community.

Call takers have a responsibility to do an initial screen and triage of all calls to ensure they are accurately entered as the correct CFS with the appropriate priority attached. Call takers should ask questions and explore whether there are concrete, observable behaviors that form the basis of the suspicious activity or crime the RP is reporting. Calls for service (CFS) should focus on behaviors of involved parties, not appearance. Reports of suspicious activity require the reporting party (RP) to articulate something criminal or reasonably suspicious about a person's behavior.

If a Call Taker believes an RP is making a bias-based call for service, they should:

1. Create a call for service,
2. Enter the details provided by the RP in the call narrative
3. In the Nature of Call field enter: "Supervisor review required" which will ensure that the call is not ready for dispatch, and
4. Notify the on-duty supervisor. Supervisor will review the merits of the call for service and either approve for dispatching or notify a Watch Commander (or designee)
5. Watch Commander will determine if a response will be provided and/or follow-up up with the RP for more information.

401.5 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

The Chief of Police or the authorized designee shall ensure that all data required by the California Department of Justice (DOJ) regarding complaints of racial bias against officers is collected and reported annually to the DOJ (Penal Code § 13012; Penal Code § 13020).

401.5.1 DEMOGRAPHIC DATA PROCEDURES

All sworn officers shall provide demographic statistical data once for each individual as listed below:

1. All vehicle and bicycle detentions.
2. All pedestrian detentions
3. Anytime anyone is detained, regardless of the cause
4. Anytime anyone is searched regardless of the cause.

Officers shall provide demographic statistical data pursuant to the requirements of the RIPA statute, AB 953.

401.6 ADMINISTRATION

Each year, the Operations Division Captain shall review the efforts of the Department to prevent racial or biased based profiling and submit an overview, including public concerns and complaints, to the Chief of Police.

The annual report should not contain any identifying information about any specific complaint, member of the public or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors should review the annual report and discuss the results with those they are assigned to supervise.

401.7 TRAINING

Training on racial or bias-based profiling and review of this policy should be conducted as directed by the Personnel and Training Bureau.

All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of racial or bias-based profiling.

Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.

Each sworn member of this department who received initial racial or bias-based profiling training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial, identity and cultural trends (Penal Code § 13519.4(i)).

All sworn members of the Department will be required to receive annual intensive implicit bias training.

ATTACHMENT 2. Personal Communication Devices: POLICY 701 (with recommended changes in red)

701.1 PURPOSE AND SCOPE

The purpose of this policy is to establish guidelines for the use of mobile telephones and communication devices, whether issued or funded by the Department or personally owned, while on-duty or when used for authorized work-related purposes.

This policy generically refers to all such devices as Personal Communication Devices (PCDs) but is intended to include all mobile telephones, personal digital assistants (PDAs), wireless capable tablets and similar wireless two-way communications and/or portable Internet access devices. PCD use includes, but is not limited to, placing and receiving calls, text messaging, blogging and microblogging, emailing, using video or camera features, playing games and accessing sites or services on the Internet.

701.2 POLICY

The Berkeley Police Department allows members to utilize department-issued or funded PCDs and to possess personally owned PCDs in the workplace, subject to certain limitations. PCDs shall only be used in the workplace on work-related matters when radio communication is not feasible. Further, personally owned PCDs shall only be used on non-work-related issues, absent exigent circumstances. Any department-issued PCD used while on-duty, or used off-duty in any manner reasonably related to the business of the Department, will be subject to monitoring and inspection consistent with the standards set forth in this policy.

The inappropriate use of a PCD while on-duty may impair officer safety. Additionally, members are advised and cautioned that the use of a personally owned PCD either on-duty or after duty hours for business-related purposes may subject the member and the member's PCD records to civil or criminal discovery or disclosure under applicable public records laws. Inappropriate use of a PCD, whether on duty or off-duty on work-related issues, includes but is not limited to any expression or speech that compromises or damages the mission, function, reputation or professionalism of the BPD.

Members who have questions regarding the application of this policy or the guidelines contained herein are encouraged to seek clarification from supervisory personnel.

701.3 PRIVACY EXPECTATION

Members forfeit any expectation of privacy with regard to any communication accessed, transmitted, received, or reviewed on any PCD issued or funded by the Department and

shall have no expectation of privacy in their location should the device be equipped with location-detection capabilities. This includes records of all keystrokes or web-browsing history made on the PCD. The fact that access to a database, service, or website requires a username or password will not create an expectation of privacy if it is accessed through department PCDs or networks (see the Information Technology Use Policy for additional guidance).

Members have no expectation of privacy regarding any communications while using a personally owned PCD for department-related business or when the use reasonably implicates work-related misconduct.

701.3.1 CALIFORNIA ELECTRONIC COMMUNICATIONS PRIVACY ACT (CALECPA)

No member is authorized to be the sole possessor of a department-issued PCD. Department-issued PCDs can be retrieved, reassigned, accessed or used by any member as directed by a supervisor without notice. Member use of a department-issued PCD and use of a personal PCD at work or for work-related business constitutes specific consent for access for department purposes. Prior to conducting an administrative search of a PCD, supervisors should consult legal counsel to ensure access is consistent with CalECPA (Penal Code § 1546; Penal Code § 1546.1).

701.4 DEPARTMENT-ISSUED PCD

Depending on a member's assignment and the needs of the position, the Department may, at its discretion, issue or fund a PCD. Department-issued or funded PCDs are provided as a convenience to facilitate on-duty performance only. Such devices and the associated telephone number shall remain the sole property of the Department and may be subject to inspection or monitoring (including all related records and content) at any time without notice and without cause.

701.4.1 CITY OF BERKELEY AR 2.15 - CITY ISSUED COMMUNICATION EQUIPMENT POLICY

Pursuant to City of Berkeley Administrative Regulation 2.15, text messages held on Department-issued or funded PCDs are to be maintained on the communication device for no less than 30 days from the date sent or received. PCDs that have text features enabled will be set to retain text message history for 30 days. Employees are not permitted to alter the text message history setting or to manually delete saved text messages.

701.5 PERSONALLY OWNED PCD

Members may carry a personally owned PCD while on-duty, subject to the following conditions and limitations:

a. Permission to carry a personally owned PCD may be revoked if it is used contrary to provisions of this policy.
b. The Department accepts no responsibility for loss of or damage to a personally owned PCD.
c. The PCD and any associated services shall be purchased, used and maintained solely at the member's expense.
d. The device shall not be utilized to record or disclose any business-related information, including photographs, video or the recording or transmittal of any information or material obtained or made accessible as a result of employment with the Department, without the express authorization of the Chief of Police or the authorized designee.
e. All work-related documents, emails, photographs, recordings or other public records created or received on a member's personally owned PCD should be transferred to the Berkeley Police Department and deleted from the member's PCD as soon as reasonably practicable but no later than the end of the member's shift.

Except with prior express authorization from their supervisor, members are not obligated or required to carry, access, monitor or respond to electronic communications using a personally owned PCD while off-duty. If a member is in an authorized status that allows for appropriate compensation consistent with policy or existing memorandum of understanding or collective bargaining agreements, or if the member has prior express authorization from his/her supervisor, the member may engage in business-related communications. Should members engage in such approved off-duty communications or work, members entitled to compensation shall promptly document the time worked and communicate the information to their supervisors to ensure appropriate compensation. Members who independently document off-duty department-related business activities in any manner shall promptly provide the Department with a copy of such records to ensure accurate record keeping.

701.6 USE OF PCD

The following protocols shall apply to all PCDs that are carried while on-duty or used to conduct department business:

a. Members may use a PCD to communicate with other personnel only in situations where the use of radio communications is either impracticable or not feasible. PCDs should not be used as a substitute for, as a way to avoid, or in lieu of regular radio communications.
b. Members are prohibited from taking pictures, audio or video recordings or making copies of any such picture or recording media unless it is directly related to official department business. Disclosure of any such information to any third party through any means, requires the express authorization of the Chief of Police or the authorized designee.
c. Members will not access social networking sites for any purpose that is not official department business. This restriction does not apply to a personally owned PCD used during authorized break times.
d. Using PCDs to harass, threaten, coerce or otherwise engage in inappropriate conduct with any third party is prohibited. Any member having knowledge of such conduct shall promptly notify a supervisor.

701.7 SUPERVISOR RESPONSIBILITIES

The responsibilities of supervisors include, but are not limited to:

a. Ensuring that members under their command are provided appropriate training on the use of PCDs consistent with this policy.
b. Monitoring, to the extent practicable, department-issued PCD use in the workplace and taking prompt corrective action if a member is observed or reported to be improperly using a department-issued PCD.
    1. An investigation into improper conduct should be promptly initiated when circumstances warrant.
    2. Before conducting any administrative search of a member's personally owned device, supervisors should consult with the Chief of Police or the authorized designee.

701.8 USE WHILE DRIVING

The use of a PCD while driving can adversely affect safety, cause unnecessary distractions and present a negative image to the public. Officers operating emergency vehicles should restrict the use of these devices to matters of an urgent nature and should, where practicable, stop the vehicle at an appropriate location to use the PCD.

Members who are operating department vehicles that are not authorized emergency vehicles shall not use a PCD while driving unless the device is specifically designed and

configured to allow hands-free use. In an emergency, a wireless phone may be used to place an emergency call to the Department or other emergency services agency (Vehicle Code § 23123; Vehicle Code § 23123.5). Hands-free use should be restricted to business-related calls or calls of an urgent nature.

701.9 OFFICIAL USE

Members are reminded that PCDs are not secure devices and conversations may be intercepted or overheard. Caution should be exercised while utilizing PCDs to ensure that sensitive information is not inadvertently transmitt

ATTACHMENT 3. Employee Speech, Expression and Social Networking: POLICY 1029 (with recommended changes in red)

1029.1 PURPOSE AND SCOPE

This policy is intended to address issues associated with employee use of social networking sites and to provide guidelines for the regulation and balancing of employee speech and expression with the needs of the Department.

Nothing in this policy is intended to prohibit or infringe upon any communication, speech or expression that is protected or privileged under law. This includes speech and expression protected under state or federal constitutions as well as labor or other applicable laws. For example, this policy does not limit an employee from speaking as a private citizen, including acting as an authorized member of a recognized bargaining unit or officer associations, about matters of public concern, such as misconduct or corruption.

Employees are encouraged to consult with their supervisor regarding any questions arising from the application or potential application of this policy.

1029.1.1 APPLICABILITY

This policy applies to all forms of communication including, but not limited to, film, video, print media, public or private speech, use of all Internet services, including the World Wide Web, email, file transfer, remote computer access, news services, social networking, social media, instant messaging, blogs, forums, video and other file-sharing sites.

1029.2 POLICY

Public employees occupy a trusted position in the community, and thus, their statements have the potential to contravene the policies and performance of this department. Due to the nature of the work and influence associated with the law enforcement profession, it is necessary that employees of this department be subject to certain reasonable limitations on their speech and expression. To achieve its mission and efficiently provide service to the public, the Berkeley Police Department will carefully balance the individual employee's rights against the Department's needs and interests when exercising a reasonable degree of control over its employees' speech and expression.

1029.3 SAFETY

Employees should consider carefully the implications of their speech or any other form of expression when using the Internet. Speech and expression that may negatively affect

the safety of the Berkeley Police Department employees, such as posting personal information in a public forum, can result in compromising an employee's home address or family ties. Employees should therefore not disseminate or post any information on any forum or medium that could reasonably be anticipated to compromise the safety of any employee, an employee's family or associates. Examples of the type of information that could reasonably be expected to compromise safety include:

- Disclosing a photograph and name or address of an officer who is working undercover.
- Disclosing the address of a fellow officer.
- Otherwise disclosing where another officer can be located off-duty.

1029.4 PROHIBITED SPEECH, EXPRESSION AND CONDUCT

To meet the department's safety, performance and public-trust needs, the following are prohibited unless the speech is otherwise protected (for example, an employee speaking as a private citizen, including acting as an authorized member of a recognized bargaining unit or officer associations, on a matter of public concern). These prohibitions pertain whether the device is department-issued or personal and whether the member is on or off duty:

a. Speech or expression related to an official duty that tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees.
b. Speech or expression that, while not made pursuant to an official duty, is significantly linked to, or related to, the Berkeley Police Department and tends to compromise or damage the mission, function, reputation or professionalism of the Berkeley Police Department or its employees. Examples may include:
    1. Statements that indicate disregard for Berkeley policies, the law or the state or U.S. Constitution.
    2. Expression that demonstrates support for criminal activity.
    3. Participating in sexually explicit photographs or videos for compensation or distribution.
    4. Expressions or speech that may reasonably be interpreted as exhibiting animus toward any racial group, gender identity, nationality, religion, disability, or housing status.
c. Speech or expression that could reasonably be foreseen as having a negative impact on the credibility of the employee as a witness. For example, posting statements or expressions to a website that glorify or endorse dishonesty, unlawful discrimination or illegal behavior.
d. Speech or expression of any form that could reasonably be foreseen as having a negative impact on the safety of the employees of the Department. For example,

a statement on a blog that provides specific details as to how and when prisoner transportations are made could reasonably be foreseen as potentially jeopardizing employees by informing criminals of details that could facilitate an escape or attempted escape.

e. Speech or expression that is contrary to the canons of the Law Enforcement Code of Ethics as adopted by the Berkeley Police Department.
f. Use or disclosure, through whatever means, of any information, photograph, video or other recording obtained or accessible as a result of employment with the Department for financial or personal gain, or any disclosure of such materials without the express authorization of the Chief of Police or the authorized designee.
g. Posting, transmitting or disseminating any photographs, video or audio recordings, likenesses or images of department logos, emblems, uniforms, badges, patches, marked vehicles, equipment or other material that specifically identifies the Berkeley Police Department on any personal or social networking or other website or web page, without the express authorization of the Chief of Police.
h. Accessing websites for non-authorized purposes, or use of any personal communication device, game device or media device, whether personally or department-owned, for personal purposes while on-duty, except in the following circumstances:
    1. When brief personal communication may be warranted by the circumstances (e.g., to inform family of extended hours).
    2. During authorized breaks, in which case such usage should be limited as much as practicable to areas out of sight and sound of the public and shall not be disruptive to the work environment.

Employees should take reasonable and prompt action to remove any content, including content posted by others, that is in violation of this policy from any web page or website maintained by the employee (e.g., social or personal website).

1029.4.1 UNAUTHORIZED ENDORSEMENTS AND ADVERTISEMENTS

While employees are not restricted from engaging in the following activities as private citizens or as authorized members of a recognized bargaining unit or officer associations, employees may not represent the Berkeley Police Department or identify themselves in any way that could be reasonably perceived as representing the Berkeley Police Department in order to do any of the following, unless specifically authorized by the Chief of Police (Government Code § 3206; Government Code § 3302):

a. Endorse, support, oppose or contradict any political campaign or initiative.
b. Endorse, support, oppose or contradict any social issue, cause or religion.
c. Endorse, support or oppose any product, service, company or other commercial entity.

d. Appear in any commercial, social or nonprofit publication or any motion picture, film, video, public broadcast or on any website.

Additionally, when it can reasonably be construed that an employee, acting in his/her individual capacity or through an outside group or organization (e.g., bargaining group or officer associations), is affiliated with this department, the employee shall give a specific disclaiming statement that any such speech or expression is not representative of the Berkeley Police Department.

Employees retain their right to vote as they choose, to support candidates of their choice and to express their opinions as private citizens, including as authorized members of a recognized bargaining unit or officer associations, on political subjects and candidates at all times while off duty.

However, employees may not use their official authority or influence to interfere with or affect the result of an election or a nomination for office. Employees are also prohibited from directly or indirectly using their official authority to coerce, command or advise another employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes (5 USC § 1502).

1029.5 PRIVACY EXPECTATION

Employees forfeit any expectation of privacy with regard to e-mails, texts or anything published or maintained through file-sharing software or any Internet site (e.g., Facebook, MySpace) that is accessed, transmitted, received or reviewed on any department technology system.

The Department reserves the right to access, audit and disclose for whatever reason any message, including attachments, and any information accessed, transmitted, received or reviewed over any technology that is issued or maintained by the Department. This includes the department e-mail system, computer network or any information placed into storage on any department system or device.

It also includes records of all key strokes or web-browsing history made at any department computer or over any department network.

The fact that access to a database, service or website requires a user name or password will not create an expectation of privacy if it is accessed through a department computer or network. However, the Department may not require an employee to disclose a personal user name or password or open a personal social website, except when access is reasonably believed to be relevant to the investigation of allegations of work related misconduct (Labor Code § 980).

1029.6 CONSIDERATIONS

In determining whether to grant authorization of any speech or conduct that is prohibited under this policy, the factors that the Chief of Police or authorized designee should consider include:

a. Whether the speech or conduct would negatively affect the efficiency of delivering public services.
b. Whether the speech or conduct would be contrary to the good order of the Department or the efficiency or morale of its members.
c. Whether the speech or conduct would reflect unfavorably upon the Department.
d. Whether the speech or conduct would negatively affect the member's appearance of impartiality in the performance of his/her duties.
e. Whether similar speech or conduct has been previously authorized.
f. Whether the speech or conduct may be protected and outweighs any interest of the Department.

1029.7 TRAINING

Subject to available resources, the Department should provide training regarding employee speech and the use of social networking to all members of the Department.

ATTACHMENT 4. EARLY WARNING SYSTEM: POLICY 1041 (recommended changes in red)

1041.1 PURPOSE

The purpose of this Order is to establish policy and procedures for an informal performance review and intervention program, the "Early Warning System" (EWS). The program monitors employee performance that may be inconsistent with professional police conduct and cooperatively engages employees to resolve areas of concern. The goal of EWS is early identification of employee performance issues and correction of these issues through constructive counseling sessions rather than the formal disciplinary process.

1041.2 POLICY

All employees shall participate in the EWS program and comply with the guidelines set forth in this Order.

Participation in the EWS program shall not be deemed punitive, nor is it a formal disciplinary process.

a. Notwithstanding the initiation of the EWS process, the Department retains its right and responsibilities with regard to investigation of policy violation and enforcement of employee discipline.

1041.3 PROCEDURES

Employee behavior or performance that is subject to EWS review includes, but is not limited to:

a. Racial, housing status, or other demographic disparities on stop, arrest, and/or search data that are higher than the department average;
b. Poor attendance and/or abusive use of leave;
c. Multiple formal sustained or not sustained complaints;
d. Multiple informal complaint inquiries;
e. Multiple use of force incidents;
f. Multiple obstructing/resisting arrest incidents;
g. Multiple vehicle collisions; and,
h. Substandard conduct/performance concerns observed by a superior officer.

The Racial and Identify Protection Act (RIPA) data will be available to supervisors in the form of an electronic data dashboard. This will provide supervisors and commanders with

the ability to review stop data created by officers assigned under their span of control. The individual stop data for individual officers should be considered a personnel record as it may provide supervisory guidance for specific officer stop data, if necessary. The public release of any RIPA data will remain anonymized as previously agreed upon Meet and Confer with the Berkeley Police Association and provisions of Government Code 3300 et.al.

Supervisors, commanders and managers shall monitor the activity of their subordinate employees to identify actual or perceived unprofessional behavior and/or substandard performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police via the Chain of Command.

Personnel assigned to the Internal Affairs Bureau (IAB) shall monitor all formal and informal allegations of employee misconduct received by their office for behavior or performance that is subject to EWS review, and if identified, communicate such information to the Chief of Police.

Personnel assigned to the Support Services Division Report Review Detail shall forward to the Chief of Police copies of all reports pertaining to:

a. Obstruction/resisting arrests cases (i.e., Penal Code §§148, 69, etc.)

Administrative reports regarding use of force shall be forwarded to the Chief of Police as directed in Policy 300.

Quarterly audits will be conducted of employees whose behavior or performance includes any of the factors included in (a) through (h) above.

1041.4 MANAGEMENT OF PROGRAM RECORDS

The Office of the Chief of Police shall be responsible for aggregation and administrative management of information, data and records associated with the EWS program.

a. The administrative assistant assigned to the Office of the Chief of Police shall be responsible for preparing a quarterly report summarizing information and activities associated with the EWS program for use in administrative review.

Information, data and records associated with the EWS program are used for personnel purposes. Accordingly, they are confidential personnel files and not public records.

Documents, data and records shall be maintained by the Office of the Chief of Police for a period of two (2) years.

Access to EWS records shall be restricted to the supervisor, commander and/or manager involved in the monitoring of a particular employee, subject to the approval of the Chief of Police.

a. An individual employee may be granted access to EWS records that pertain to him/her.

1041.5 ADMINISTRATIVE REVIEW BOARD

The Chief of Police will convene a quarterly Review Board comprised of all Division Commanders to review program records to determine if initiation of the EWS Program is recommended.

Upon consideration of the Review Board's recommendation, the Chief of Police may direct an employee to participate in the EWS program.

1041.6 INITIATION OF EWS PROGRAM

Upon the direction of the Chief of Police, an informal counseling meeting will be held that may include:

a. The subject employee;
b. The employee's supervisor;
c. An Internal Affairs Bureau sergeant;
d. The employee's Lieutenant; and,
e. The employee's Division Commander, who shall preside over the meeting.

Unless impractical, the counseling meeting shall be held during the employee's regularly scheduled working hours.

a. If the meeting cannot be scheduled during the employee's regularly scheduled working hours, personnel participating while off-duty shall be compensated with compensatory time (minimum time as may be authorized by the employee's MOU) or, with Division Commander approval, allowed to flex an equal amount of time within that same work week.

The subject employee may have one fellow employee accompany him/her to the counseling meeting.

a. The accompanying employee's presence is allowed to offer general support to the subject employee, not to be an active participant in the counseling meeting.

As in general supervisor counseling meetings, the employee shall be informed of the behavioral and/or performance concern(s) at issue, and he/she shall be allowed an opportunity to offer a response.

The subject employee may be given information regarding the City of Berkeley Employee Assistance Program.

No formal document will be generated referencing this meeting, and the meeting shall not be deemed a punitive or disciplinary proceeding against the employee. There shall be no permanent record of the meeting.

ATTACHMENT 5. STANDARDS OF CONDUCT: Policy 321 (with recommended changes in red)

321.1 PURPOSE AND SCOPE

This policy establishes standards of conduct that are consistent with the values and mission of the Berkeley Police Department and are expected of all department members. The standards contained in this policy are not intended to be an exhaustive list of requirements and prohibitions but they do identify many of the important matters concerning conduct. In addition to the provisions of this policy, members are subject to all other provisions contained in this manual, as well as any additional guidance on conduct that may be disseminated by this department or a member's supervisors.

321.2 POLICY

The continued employment or appointment of every member of the Berkeley Police Department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure to meet the guidelines set forth in this policy, whether on- or off-duty, may be cause for disciplinary action.

321.3 DIRECTIVES AND ORDERS

Members shall comply with lawful directives and orders from any department supervisor or person in a position of authority, absent a reasonable and bona fide justification.

321.3.1 UNLAWFUL OR CONFLICTING ORDERS

Supervisors shall not knowingly issue orders or directives that, if carried out, would result in a violation of any law or department policy. Supervisors should not issue orders that conflict with any previous order without making reasonable clarification that the new order is intended to countermand the earlier order.

No member is required to obey any order that appears to be in direct conflict with any federal law, state law, local ordinance, or policy. Following a known unlawful order is not a defense and does not relieve the member from criminal or civil prosecution or administrative discipline. If the legality of an order is in doubt, the affected member shall ask the issuing supervisor to clarify the order or shall confer with a higher authority. The responsibility for refusal to obey rests with the member, who shall subsequently be required to justify the refusal.

Unless it would jeopardize the safety of any individual, members who are presented with a lawful order that is in conflict with a previous lawful order, department policy or other directive shall respectfully inform the issuing supervisor of the conflict. The issuing supervisor is responsible for either resolving the conflict or clarifying that the lawful order is intended to countermand the previous lawful order or directive, in which case the member is obliged to comply. Members who are compelled to follow a conflicting lawful order after having given the issuing supervisor the opportunity to correct the conflict, will not be held accountable for disobedience of the lawful order or directive that was initially issued.

The person countermanding the original order shall notify, in writing, the person issuing the original order, indicating the action taken and the reason.

321.3.2 SUPERVISOR RESPONSIBILITIES

Supervisors and managers are required to follow all policies and procedures and may be subject to discipline for:

a. Failure to be reasonably aware of the performance of their subordinates or to provide appropriate guidance and control.
b. Failure to promptly and fully report any known misconduct of a member to his/her immediate supervisor or to document such misconduct appropriately or as required by policy.
c. Directing a subordinate to violate a policy or directive, acquiesce to such a violation, or are indifferent to any such violation by a subordinate.
d. The unequal or disparate exercise of authority on the part of a supervisor toward any member for malicious or other improper purpose.

321.4 GENERAL STANDARDS

Members shall conduct themselves, whether on- or off-duty, in accordance with the United States and California Constitutions and all applicable laws, ordinances, policies, and rules enacted or established pursuant to legal authority.

Members shall familiarize themselves with policies and procedures and are responsible for compliance with each. Members should seek clarification and guidance from supervisors in the event of any perceived ambiguity or uncertainty.

Employees shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentive and respectful and shall exercise patience and discretion in the performance of their duties.

Discipline may be initiated for any good cause. It is not mandatory that a specific policy or rule violation be cited to sustain discipline. This policy is not intended to cover every possible type of misconduct.

321.5 CAUSES FOR DISCIPLINE

The following are illustrative of causes for disciplinary action. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for violation of other rules, standards, ethics and specific action or inaction that is detrimental to efficient department service.

321.5.1 LAWS, RULES AND ORDERS

a. Violation of, or ordering or instructing a subordinate to violate any policy, procedure, rule, order, directive, requirement or failure to follow instructions contained in department or City manuals.
b. Disobedience of any legal directive or order issued by any department member of a higher rank.
c. Violation of federal, state, local or administrative laws, rules, policies, or regulations.

321.5.2 ETHICS

a. Using or disclosing one's status as a member of the Berkeley Police Department, whether on duty or off-duty, in any way that could reasonably be perceived as an attempt to gain influence or authority for non-department business or activity.
b. The wrongful or unlawful exercise of authority on the part of any member for malicious purpose, personal gain, willful deceit or any other improper purpose.
c. The receipt or acceptance of a reward, fee or gift from any person for service incident to the performance of the member's duties (lawful subpoena fees and authorized work permits excepted).
d. Acceptance of fees, gifts or money contrary to the rules of this department and/or laws of the state.
e. Offer or acceptance of a bribe or gratuity.
f. Misappropriation or misuse of public funds, property, personnel or services.

321.5.3 DISCRIMINATION, OPPRESSION, OR FAVORITISM

Discriminating against, oppressing, or providing favoritism to any person because of actual or perceived characteristics such as race, ethnicity, national origin, religion, sex,

sexual orientation, gender identity or expression, age, disability, economic status, cultural group, veteran status, marital status, housing status, and any other classification or status protected by law, or intentionally denying or impeding another in the exercise or enjoyment of any right, privilege, power, or immunity, is unlawful.

321.5.4 RELATIONSHIPS

a. Unwelcome solicitation of a personal or sexual relationship while on-duty or through the use of one's official capacity, whether on duty of off-duty.
b. Engaging in on-duty sexual activity including, but not limited to, sexual intercourse, excessive displays of public affection or other sexual contact.
c. Establishing or maintaining an inappropriate personal or financial relationship, as a result of an investigation, with a known victim, witness, suspect or defendant while a case is being investigated or prosecuted, or as a direct result of any official contact.
d. Associating with or joining a criminal gang, organized crime and/or criminal syndicate when the member knows or reasonably should know of the criminal nature of the organization. This includes any organization involved in a definable criminal activity or enterprise, except as specifically directed and authorized by this department.
e. Associating on a personal, rather than official basis with persons who demonstrate recurring involvement in serious violations of state or federal laws after the member knows, or reasonably should know of such criminal activities, except as specifically directed and authorized by this department.
f. Participation in a law enforcement gang as defined by Penal Code § 13670. Participation is grounds for termination (Penal Code § 13670).

321.5.5 ATTENDANCE

a. Leaving the job to which the member is assigned during duty hours without reasonable excuse and proper permission and approval.
b. Unexcused or unauthorized absence or tardiness.
c. Excessive absenteeism or abuse of leave privileges.
d. Failure to report to work or to place of assignment at time specified and fully prepared to perform duties without reasonable excuse.
e. Failure to sign in/out for duty on the timesheet, unless specifically authorized by a supervisor.

321.5.6 UNAUTHORIZED ACCESS, DISCLOSURE OR USE

a. Unauthorized and inappropriate intentional release of confidential or protected information, materials, data, forms or reports obtained as a result of the member's position with this department.
    1. Members of this department shall not disclose the name, address or image of any victim of human trafficking except as authorized by law (Penal Code § 293). (b)
b. Disclosing to any unauthorized person any active investigation information.
c. The use of any information, photograph, video or other recording obtained or accessed as a result of employment or appointment to this department for personal or financial gain or without the express authorization of the Chief of Police or the authorized designee.
d. Loaning, selling, allowing unauthorized use, giving away or appropriating any Berkeley Police Department badge, uniform, identification card or department property for personal use, personal gain or any other improper or unauthorized use or purpose.
e. Using department resources in association with any portion of an independent civil action. These resources include, but are not limited to, personnel, vehicles, equipment and non-subpoenaed records.

321.5.7 EFFICIENCY

a. Neglect of duty.
b. Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or the instructions of supervisors without a reasonable and bona fide excuse.
c. Concealing, attempting to conceal, removing or destroying defective or incompetent work.
d. Unauthorized sleeping during on-duty time or assignments.
e. Failure to notify the Department within 72 hours of any change in name, residence address or contact telephone number(s).

321.5.8 PERFORMANCE

a. Failure to disclose or misrepresenting material facts, or making any false or misleading statement on any application, examination form, or other official document, report or form, or during the course of any work-related investigation.
b. The falsification of any work-related records, making misleading entries or statements with the intent to deceive or the willful and unauthorized removal,

alteration, destruction and/or mutilation of any department record, public record, book, paper or document.

c. Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any department-related business.
d. Being untruthful or knowingly making false, misleading or malicious statements that are reasonably calculated to harm the reputation, authority or official standing of this department or its members.
e. Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this department or subverts the good order, efficiency and discipline of this department or that would tend to discredit any of its members.
f. Unlawful gambling or unlawful betting at any time or any place. Legal gambling or betting under any of the following conditions:
    1. While on department premises.
    2. At any work site, while
    3. on-duty or while in uniform, or while using any department equipment or system.
    4. Gambling activity undertaken as part of an officer official duties and with the express knowledge and permission of a direct supervisor is exempt from this prohibition.
g. Entering any place of amusement while on duty, except when necessary in the performance of duty or periodic inspection.
h. Improper political activity including:
    1. Unauthorized attendance while on-duty at official legislative or political sessions.
    2. Solicitations, speeches or distribution of campaign literature for or against any political candidate or position while on-duty or, on department property except as expressly authorized by City policy, the memorandum of understanding, or the Chief of Police.
i. Engaging in political activities during assigned working hours except as expressly authorized by City policy, the memorandum of understanding, or the Chief of Police.
j. Joining or participating in any employee organization except an employee organization which is composed solely of peace officers which concerns itself solely and exclusively with the wages, hours, working conditions, welfare and advancement of academic and vocational training in furtherance of the police profession and which is not subordinate to any other organization.

k. Failure to secure the permission of a Commanding Officer before placing any material on a Departmental bulletin board.
l. Using departmental business cards for anything other than official business.
m. Any act on- or off-duty that brings discredit to this department.

321.5.9 CONDUCT

a. Failure of any member to promptly and fully report activities on his/her part or the part of any other member where such activities resulted in contact with any other law enforcement agency that may result in criminal prosecution or discipline under this policy.
b. Failure of any member to report conduct or expressions of any other member that are in violation of Department policy, state law, or the Constitution.
c. Unreasonable and unwarranted force to a person encountered or a person under arrest.
d. Exceeding lawful peace officer powers by unreasonable, unlawful or excessive conduct.
e. Unauthorized or unlawful fighting, threatening or attempting to inflict unlawful bodily harm on another.
f. Engaging in horseplay that reasonably could result in injury or property damage.
g. Engaging in discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this department or the City.
h. Use of obscene, indecent, profane or derogatory language while on-duty or in uniform, or while off-duty in a way that brings discredit on the Department.
i. Engaging in criminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.
j. Unauthorized possession of, loss of, or damage to department property or the property of others, or endangering it through carelessness or maliciousness.
k. Attempted or actual theft of department property; misappropriation or misuse of public funds, property, personnel or the services or property of others; unauthorized removal or possession of department property or the property of another person.
l. Activity that is incompatible with a member's conditions of employment or appointment as established by law or that violates a provision of any memorandum of understanding or contract to include fraud in securing the appointment or hire.
m. Initiating any civil action for recovery of any damages or injuries incurred in the course and scope of employment or appointment without first notifying the Chief of Police of such action.

n. Incurring unauthorized expense - Employees shall not knowingly and intentionally incur any unauthorized Departmental expense or liability without approval of a superior officer or supervisor when necessary under emergency conditions.
o. Failure to provide information to citizens - Employees shall comply whenever possible with requests by citizens for public information. If necessary, they shall direct such persons to the nearest location where information may be obtained.
p. Failure to Identify - Employees on official business shall identify themselves as Berkeley Police employees or officers. When requested, employees shall promptly state their name, rank and badge number, except when disclosure of identity could compromise safety and/or an investigation (i.e., riot situations, undercover operations, etc.).
q. Failure to maintain communication, when on duty or officially on call - Employees who are on duty or officially on call shall be directly available by normal communication or shall keep their office, supervisor, or commanding officer informed of the means by which they may be reached when not immediately available.
r. Any other on-- or off--duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

321.5.10 SAFETY

a. Failure to observe or violating department safety standards or safe working practices.
b. Failure to maintain current licenses or certifications required for the assignment or position (e.g., driver license, first aid).
c. Failure to maintain good physical condition sufficient to adequately and safely perform law enforcement duties.
d. Unsafe firearm or other dangerous weapon handling to include loading or unloading firearms in an unsafe manner, either on- or off- duty.
e. Carrying, while on the premises of the work place, any firearm or other lethal weapon that is not authorized by the member's appointing authority.
f. Unsafe or improper driving habits or actions in the course of employment or appointment.
g. Any personal action contributing to a preventable traffic collision in the course of employment or appointment.
h. Concealing or knowingly failing to report any on-the-job or work-related accident or injury as soon as practicable but within 24 hours.

321.5.11 INTOXICANTS

a. Reporting for work:
    1. Reporting for work or being at work while intoxicated or when the member's ability to perform assigned duties is impaired due to the use of alcohol, medication or drugs, whether legal, prescribed or illegal.

b. Possession:
    1. Possession or use of alcohol at any work site or while on-duty, except as authorized in the performance of an official assignment. A member who is authorized to consume alcohol is not permitted to do so to such a degree that it may impair on-duty performance.
    2. Unauthorized possession, use of, or attempting to bring a controlled substance, illegal drug or non-prescribed medication to any work site.

c. Intoxicants on-duty:
    1. Use of Intoxicants. Except as necessary in the performance of an official assignment, having the odor of an alcoholic beverage on the person, clothing, or breath, being under the influence of alcohol or other intoxicants, or the consumption of alcohol or other intoxicants while on duty is strictly prohibited.
    2. A Command Officer must give prior approval for any use of alcohol in the performance of an official assignment.

d. Prescription medication:
    1. Employees may use prescription medications, except medical marijuana, while on duty pursuant to the specific instructions of a physician who has advised the employee that the prescribed medication in the amount actually ingested does not adversely affect the employee's ability to safely perform their duties, including tasks that require physical coordination, mental alertness and sound judgment, such as, operating office equipment and driving a vehicle, or, in the case of sworn officers, making detentions/arrests and handling weapons.

e. Use of marijuana:
    1. Possession of marijuana, including medical marijuana, or being under the influence of marijuana on or off-duty is prohibited and may lead to disciplinary action.

f. Intoxicants in uniform:
    1. No employee off duty and in uniform, or in any part of uniform dress, shall:
        i. Consume any alcoholic beverage or other intoxicant in public view or in any place accessible to the public;
        ii. Be in public with the odor of an alcoholic beverage on the person, clothing, or breath; or
        iii. Be under the influence of alcohol or other intoxicants.

g. Intoxicants off-duty:
    1. No off-duty employee shall consume any alcoholic beverage or other intoxicant to an extent which renders one unfit to report for one's next regular tour of duty (including having the odor of an alcoholic beverage on the person), which results in the of violation of any law, or which results in the commission of an obnoxious or offensive act which might tend to discredit the Department.

ATTACHMENT 6. Overtime Compensation Requests: Policy 1019

The PAB does not recommend specific changes here; however, the policy should stipulate the circumstances, or types of circumstances, that would necessitate bypassing the otherwise straightforward directive in Section 1019.1.1 of this policy that "all requests to work overtime should be approved in advance." Additionally, excessive overtime should be included as a factor that triggers an early system audit.

1019.1 PURPOSE AND SCOPE

It is the policy of the Department to compensate non-exempt salaried employees who work authorized overtime either by payment of wages as agreed and in effect through the Memorandum of Understanding (MOU), or by the allowance of accrual of compensatory time off. In order to qualify for either, the employee must complete and submit an Extraordinary Duty Report as soon as practical after overtime is worked.

1019.1.1 DEPARTMENT POLICY

Because of the nature of police work, and the specific needs of the Department, a degree of flexibility concerning overtime policies must be maintained.

Non-exempt employees are not authorized to volunteer work time to the Department. All requests to work overtime shall be approved in advance by a supervisor. If circumstances do not permit prior approval, then approval shall be sought as soon as practical during the overtime shift and in no case later than the end of shift in which the overtime is worked.

Short periods of work at the end of the normal duty day (e.g., less than one hour in duration) may be handled unofficially between the supervisor and the employee by flexing a subsequent shift schedule to compensate for the time worked rather than by submitting requests for overtime payments. If the supervisor authorizes or directs the employee to complete a form for such a period, the employee shall comply.

The individual employee may request compensatory time (aka "comp time") in lieu of receiving overtime payment.

1019.2 TYPES OF OVERTIME AND COMPENSATION

Time spent in a pay status but not actually worked (e.g., sick leave, vacation leave, comp time, holiday leave, etc.) shall be considered "time worked" in computing the basic forty-hour week. However, employees shall be eligible to work in an overtime capacity while

actually on such absence, but only in accordance with the provisions of the current MOU between the City of Berkeley and the employee's working group.

When a City recognized holiday falls within the workweek, the employee's basic workweek is reduced by eight hours for each holiday.

If an employee commences or terminates employment with the City within the workweek or is on suspension or leave of absence without pay during the workweek, the employee is not eligible for overtime benefits until hours worked exceed forty hours during that week.

With the exception of court overtime situations, an employee's name and overtime worked shall be reflected on a time sheet.

Unless specifically stated otherwise, all overtime is awarded at time and a half.

a. Non-sworn personnel receive double time after 12 hours in any 24-hour period.
b. Sworn personnel receive holiday overtime at the straight time rate;
c. Non-sworn personnel receive double time for Christmas and Thanksgiving.
d. An explosives technician shall receive double time for time spent (from call to completion) in dealing with explosives, whether on or off duty.
e. Special Response Team members shall receive an additional 5% pay when involved in an active SRT incident, either on or off duty.
f. Field Training Officers shall receive an additional 10% differential when actually working as a Field Training Officer.
g. The Field Training Program Sergeant shall receive a 5% salary differential while occupying that position.
h. The Homicide Sergeant shall receive a 4% salary differential. Homicide detectives shall receive a 3% salary differential.

Those holding the classification of Captain are excluded from overtime benefits.

1019.3 REQUEST FOR OVERTIME COMPENSATION

1019.3.1 EMPLOYEES RESPONSIBILITY

Employees shall complete the Extraordinary Duty Reports immediately after working the overtime and turn them in to their immediate supervisor or the Watch Commander. Employees submitting Extraordinary Duty Reports for on-call pay when off duty shall submit the forms to their supervisor the first day after returning for work.

1019.3.2 SUPERVISORS RESPONSIBILITY

The supervisor who verifies the overtime earned shall verify that the overtime was worked before approving the request.

After approval, the Extraordinary Duty Report shall be forwarded to the employee's Division Captain for final approval.

1019.3.3 DIVISION CAPTAIN RESPONSIBILITY

The Division Captain, after approving payment, shall then forward the report to the Payroll Clerk for review.

1019.4 ACCOUNTING FOR OVERTIME WORKED

Employees are to record the actual time worked in an overtime status. In some cases, the Memorandum of Understanding provides that a minimum number of hours will be paid, (e.g., four hours for Court). The supervisor will enter the actual time worked.

1019.4.1 ACCOUNTING FOR PORTIONS OF AN HOUR

When accounting for less than a full hour, time worked shall be rounded up to the nearest quarter of an hour as indicated by the following chart:

TIME WORKED	INDICATE ON CARD
1 to 15 minutes	.25
16 to 30 minutes	.50
31 to 45 minutes	.75
46 to 60 minutes	1 hour

1019.4.2 VARIATION IN TIME REPORTED

Where two or more employees are assigned to the same activity, case, or court trial and the amount of time for which payment is requested varies from that reported by the other officer, the Watch Commander or other approving supervisor may require each employee to include the reason for the variation on the Extraordinary Duty Report.

1019.5 RECOVERY / COMPENSATORY OVERTIME (COMP TIME)

Recovery / Compensatory overtime (comp time) is overtime credited with time rather than pay.

To obtain comp time credit the employee shall promptly submit a completed Extraordinary Duty Report for approval by both the employee's supervisor and commanding officer.

It is City and Police Department policy that employees not be permitted to accumulate excessive comp time.

a. Sworn employees are allowed to accrue up to 120 hours of comp time.
b. Non-sworn employees are allowed to accrue up to 90 hours of comp time.

Employees may be allowed comp time off only when that amount of time has been previously accumulated.

An employee who wishes to use accumulated comp time shall make such request on an Absence Report submitted to his/her supervisor, who shall determine if the absence would hinder the unit's operation and either approve or deny the request. Within the Operations Division, the final decision rests with the Patrol Staffing Lieutenant.

1019.6 OVERTIME / SHIFT EXTENSION

Overtime shall be defined as time worked by an employee in excess of 40 hours per week. For paid overtime to be credited, an employee is required to submit an Extraordinary Duty Report immediately following the overtime assignment.

An Extraordinary Duty Report requires approval from the employee's supervisor and commanding officer, both of whom must check the report for accuracy, ensuring that the "reason" and the paid overtime budget designations are properly stated.

a. Completed Extraordinary Duty Reports must be routed to the Division Captain for final approval.
b. Completed reports must be routed to the Payroll Clerk no later than 1400 hours on the Monday before the payday in order to be included in that pay period.

1019.7 HOLIDAY OVERTIME

Holiday overtime is earned in lieu of taking the time off during the same week of a holiday or when an employee works any part of a recognized City of Berkeley holiday or has that day as a regularly scheduled day off.

Holiday overtime is awarded at time for time for sworn employees; for non-sworn employees it is awarded at time and a half, however on Thanksgiving and Christmas it is awarded at double time.

Holiday overtime may be received as either paid overtime or compensatory overtime (if the maximum accrual of compensatory overtime has not been reached).

a. Sworn employees have the option of either pay or compensatory overtime.

b. Non-sworn employees require Division Captain approval for compensatory overtime.

In lieu of pay or comp time, an employee may be allowed an alternative day off during the same calendar week as the holiday with supervisor approval.

When a holiday occurs during an employee's vacation leave, the holiday shall not be charged as vacation leave and the employee's leave may be extended accordingly, with supervisor approval.

The choice of comp time or holiday pay shall be computed by the Payroll Clerk from information provided on the timesheets.

1019.8 COURT OVERTIME

Court overtime is defined as that overtime worked in connection with an assigned appearance before any criminal or civil court, Police Review Commission meeting or Board of Inquiry, BPD Board of Review, and any other specially approved appearance on behalf of another City department or commission.

Unless otherwise approved by a Commanding Officer, all court overtime shall be paid.

A sworn employee who makes an off-duty court appearance shall receive a minimum of four hours overtime unless his or her scheduled duty reporting time, regular shift or overtime shift is less than four hours after the scheduled court appearance in which case the employee will receive overtime in the lesser amount.

Non-sworn employees shall receive a minimum of three hours overtime unless their scheduled duty reporting time is less than three hours after the scheduled court appearance in which case the non-sworn employee will receive overtime in the lesser amount.

Overtime spent conferring with the prosecuting attorney will be considered as court overtime and part of the court session only if the employee's presence is required in court shortly after the conference.

For off duty, out of town court appearances, travel constitutes court overtime and is determined by the round-trip time from the Public Safety Building.

An employee required to attend two or more court sessions on the same day is eligible for overtime compensation during the period between the sessions if subpoenaed on his/her day off (limited to a maximum of two hours between each session) but is not eligible for session break compensation if court appearance falls on a regular duty day.

To receive court overtime credit an employee shall submit an Extraordinary Duty Report.

a. The subpoena should be attached and case number indicated if either or both are available.
b. The overtime report is to be completed by the employee and should specify the amount of time required for "testifying/conferring" or "time waiting" or indicate that they were “not needed”.
c. The employee's supervisor shall review the report for accuracy and complete the lower boxed area, indicating the court paid overtime budget code, the activity code and the proper project designation.

1019.9 COURT OVERTIME - TELEPHONE STANDBY

a. Sworn employees who are placed on telephone standby for court will be given comp time (in accordance with the current MOU between the City of Berkeley and the Berkeley Police Association) as follows:
    1. Duty Day: One-hour minimum comp time and hour for hour thereafter.
    2. Day Off: Two-hour minimum comp time and hour for hour thereafter.
b. To receive compensatory overtime credit for telephone standby an officer shall submit an Extraordinary Duty Report.
    1. The subpoena should be attached and case number indicated if either or both are available.
    2. The report is to be completed by the officer and shall specify the case number and the name of the Deputy District Attorney placing him/her on telephone standby.

1019.10 TRAINING OVERTIME

Training overtime is earned when an employee is assigned to attend a class, conference or seminar during off duty hours. Training overtime shall be reported on an Extraordinary Duty Report. To receive credit for the time spent training, a Training Time Credit Record shall be completed and routed to Personnel and Training.

Employees attending schools or classes away from the PSB will normally be credited with an eight-hour day even though the number of hours may vary due to the nature of the instruction, see also the Attendance at Conferences and Meetings Policy.

1019.11 EMERGENCY / EMERGENCY ON-CALL OVERTIME

An employee shall be paid or given comp time off for being placed on emergency on-call status as follows:

a. An employee who is placed on emergency on-call status on his or her regularly scheduled work day shall be paid for a minimum of one hour and at a one quarter (¼) time rate.
b. An employee who is placed on emergency on-call status on his or her regularly scheduled day off shall be paid for a minimum of two hours and at a one quarter (¼) time rate.
c. Emergency Overtime - An employee is guaranteed at least three hours overtime when called to emergency overtime duty from his or her residence. If the employee's regular reporting time is less distant than the guaranteed overtime the employee will receive overtime in that lesser amount.

APPENDIX

Appendix 1. City of Berkeley Contract for services with Swanson & McNamara LLP, Vendor Contract #32300109

Contract Number: 32300109

Contractor Name: Swanson & McNamara

Contract Link:
https://records.cityofberkeley.info/PublicAccess/api/Document/AU3fuyqXQXXZ%C3%81TG8am4tuCPyplZzCFLJZsbxFqBxmJ3aQZTBcxS%C3%89E7ECp9r6A30gZuhAImseUFcNLLtKRrEId7g%3D/

CONTRACT

THIS CONTRACT is entered into on November 28, 2022, between the CITY OF BERKELEY ("City"), a Charter City organized and existing under the laws of the State of California, and Swanson & McNamara LLP ("Attorneys"), who agree as follows:

WHEREAS, the City of Berkeley requires the services for legal advice and consultation with the City Attorney's office concerning issues arising out of text messages allegedly sent by Sgt. Darren Kacalek, including but not limited to whether such messages were sent, who was aware of the messages and what action they took in response, whether there existed an "arrest quota" as described in the purported text messages, if so who was aware of the arrest quota and involved in its implementation, and to recommend to the appropriate authority whether and what discipline should be imposed as a result of our findings, and

WHEREAS, Attorneys are willing to be retained by the City in connection with said legal issues; and

NOW, THEREFORE, in consideration of the mutual promises contained herein, City and Attorneys agree as follows:

1. **SCOPE OF SERVICES**

Attorneys designated herein will consult and provide legal advice and shall use the best professional skill and ability therein to the end that the most favorable results may be attained on behalf of City. The advice will be provided by Edward Swanson as lead counsel with the assistance of other associates.

2. **PAYMENT**

a. The City agrees to pay the designated attorneys at the following rates:

Edward W. Swanson	$750.00 per hour
Mary McNamara	$750.00 per hour
August Gugelmann	$650.00 per hour
Britt Evangelist	$600.00 per hour
Audrey Barron	$575.00 per hour
Carly Bittman	$550.00 per hour
Paralegal	$120.00 per hour

b. Attorneys shall furnish monthly statements to the City Attorney of City showing the number of hours devoted to said matter/s and all expenses paid during said period. Said statements shall conform as closely as practicable to the format attached hereto as Exhibit A. City shall pay Attorneys the amounts shown thereon upon approval thereof by the City Attorney of the City as soon as possible after receipt of such statements. Payment for services by non-designated attorneys will be denied, unless approved in advance by the City Attorney or his delegate.

c. The entire fees and expenses pursuant to this Contract shall not exceed the amount of $50,000 without amendment hereto. Attorneys shall not earn fees for services or incur expenses in excess of the aforesaid amount prior to executing with the City a written amendment to this contract increasing the amount payable hereunder. Attorneys shall notify the City as soon as practicable that a contract amendment increasing the amount payable may be necessary.

3. **TERM**

a. This Contract shall begin on the date it is executed by all parties and continue until Attorneys' services are no longer required by the City.

b. The City may terminate this Contract at any time upon five (5) days written notice to the other party. In the event of such termination, Attorneys will be paid a fee for services performed prior to the time of termination as specified in Paragraph 2 of this Contract, except that in no event will the amount paid exceed the full amount in Paragraph 2, as amended from time to time.

c. A written notice is deemed served when a party sends the notice in an envelope addressed to the other party to this Contract and deposits it with the U.S. Postal Service, registered mail, postage prepaid. For purposes of this Contract, all notices to City shall be addressed as follows:

City Attorney
City of Berkeley
2180 Milvia Street, 4th Fl.
Berkeley, CA 94704

For purposes of this Contract, all notices to Attorneys shall be addressed as follows:

Edward W. Swanson
Swanson & McNamara LLP
300 Montgomery Street, Suite 1100
San Francisco, CA 94104

4. **INDEMNIFICATION**

Attorneys, for itself and its heirs, successors and assigns, agree to release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from and against any and all claims, demands, liability, damages, lawsuits or other actions arising out of the negligent acts or willful misconduct in the performance of this Contract by Attorneys or its officers, employees, partners, directors, subcontractors or agents.

5. **CONFORMITY WITH LAW AND SAFETY**

a. Attorneys shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the scope of services, including all provisions of the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health Regulations, and all other applicable federal, state, municipal and local safety regulations. All services performed by Attorneys must be in accordance with these laws, ordinances, codes and regulations. Attorneys shall release, defend, indemnify and hold harmless City, its officers, agents, volunteers and employees from any and all damages, liability, fines, penalties and consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.

b. If a death, serious personal injury or substantial property damage occurs in connection with the performance of this Contract, Attorneys shall immediately notify the City's Risk Manager by telephone. If any accident occurs in connection with this Contract, Attorneys shall promptly submit a written report to City, in such form as the City may require. This report shall include the following information: 1) name and address of the injured or deceased

person(s); 2) name and address of Attorney's subcontractor, if any; 3) name and address of Attorney's liability insurance carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or materials were involved.

6. **NON-DISCRIMINATION**

Attorneys hereby agree to comply with the provisions of Berkeley Municipal Code ("B.M.C.") Ch. 13.26 as amended from time to time. In the performance of this Contract, Attorneys agree as follows:

a. Attorneys shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

b. Attorneys shall permit the City access to employment advertisements, blank application forms, EEO-1 forms, affirmative action plans and any other documents, which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision. In addition, Attorneys shall fill-out, in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

7. **INDEPENDENT CONTRACTOR**

For purposes of this Contract and for the duration of this Contract, Attorneys shall be an independent contractor and not an employee of the City. The City shall not have the right to control when, where or how the service is rendered, but shall have the right to specify the results of the service rendered pursuant to this Contract.

8. **CONFLICT OF INTEREST PROHIBITED**

a. In accordance with Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Ch. 3.64, neither Attorneys nor any employee, officer, director, partner or member of Attorneys, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this Contract.

b. In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 et seq., no person who is a director, officer, partner, trustee, employee or consultant of the Attorneys, or immediate family member of any of the preceding, shall make or participate in a decision made by the City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Attorneys.

c. Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 et seq., its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Ch. 3.64.

d. Immediately upon discovering a breach of this paragraph City may terminate this Contract. Additionally, City may deem Attorneys a non-responsible bidder for five (5) years from the date the Contract is terminated.

9. **OPPRESSIVE STATES CONTRACTING PROHIBITION**

Unless a written exemption has been approved by the City Manager, the following provisions will apply for this agreement:

a. In accordance with Resolution No. 59,853-N.S., Attorneys certify that they have no contractual relations with, and agree during the term of this Contract to forego contractual relations to provide personal services to, the following entities:

(1) The governing regime in any Oppressive State.
(2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
(3) Any individual, firm, partnership, corporation, association, or any other commercial organization, and including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

b. Appendix A to Resolution No. 59,853-N.S. designates the following as Oppressive States for the purposes of this Contract: Tibet Autonomous Region and the provinces of Ado, Kham, and U-Tsang.

c. Attorneys' failure to comply with this section shall constitute a default of this Contract and City may terminate this Contract pursuant to Section 3. In the event that the City terminates Attorneys due to a default under this provision, City may deem Attorneys a non-responsible bidder for five (5) years from the date this Contract is terminated.

10. **SETOFF AGAINST DEBTS**

Attorneys agree that City may deduct from any payments due to Attorneys under this Contract any monies that Attorneys owe City under any ordinance, contract or resolution for any unpaid taxes, fees, licenses, unpaid checks or other amounts.

11. **NUCLEAR FREE BERKELEY**

Attorneys agree to comply with B.M.C. Ch. 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

12. **GOVERNING LAW**

The laws of the State of California shall govern this Contract.

13. **AMENDMENTS**

The terms and conditions of this Contract shall not be altered or otherwise modified except by a written amendment to this Contract executed by City and Attorneys.

14. **CONSULTANTS TO SUBMIT STATEMENTS OF ECONOMIC INTEREST**

The City's Conflict of Interest Code, Resolution No. 51,425-N.S., as amended, requires every consultant to disclose conflicts of interest by filing a Statement of Economic Interest (Form 730). Attorneys serving as consultants to the City under this Contract agree to file such statements with the City Clerk at the beginning of the contract period and upon termination of the Contract.

15. **CITY BUSINESS LICENSE, PAYMENT OF TAXES, TAX I.D. NUMBER**

Attorneys have obtained a City business license as required by B.M.C. Ch. 9.04, and its license number is written below; or, Attorneys are exempt from the provisions of B.M.C. Ch. 9.04 and have written below the specific B.M.C. section under which it is exempt. Attorneys shall pay all state and federal income taxes and any other taxes due. **Attorneys certify under penalty of perjury that the taxpayer identification number written below is correct.**

Business License No. [application submitted]
Taxpayer Identification No. 94-3309866

16. **RECYCLED PAPER FOR WRITTEN REPORTS**

If Attorneys are required by this Contract to prepare a written report or study, Attorneys shall use recycled paper for said report or study when such paper is available at a cost of not more than ten percent more than the cost of virgin papers, and when such paper is available at the time it is needed. For the purposes of this Contract, recycled paper is paper that contains at least 50% recycled product. If recycled paper is not available, Attorneys shall use white paper. Written reports or studies prepared under this Contract shall be printed on both sides of the page whenever practical.

17. **INSURANCE**

a. Attorneys shall maintain at all times during the performance of this Contract a professional liability insurance policy in the minimum amount of $1,000,000 to cover any claims arising out of Attorneys' performance of services under this Contract. Attorneys shall provide an original Certificate of Insurance evidencing the required coverage.

b. If Attorneys employ any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days written notice to the City Attorney; 2) provide for a waiver of any right of subrogation against City to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the Risk Manager.

c. Attorneys shall forward all insurance documents to:

City Attorney
City of Berkeley
2180 Milvia St., 4th Floor
Berkeley, CA 94704

18. **BERKELEY LIVING WAGE ORDINANCE**

a. Attorneys hereby agree to comply with the provisions of the Berkeley Living Wage Ordinance, B.M.C. Chapter 13.27. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, as indicated by the Living Wage Certification form, attached hereto, Attorneys will be required to provide all eligible employees with City mandated minimum compensation during the term of this Contract, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein. Attorneys expressly acknowledge that, even if Attorneys are not currently subject to the Living Wage Ordinance, cumulative contracts with City may subject Attorneys to the requirements under B.M.C. Chapter 13.27 in subsequent contracts.

b. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, Attorneys shall be required to maintain monthly records of those employees providing service

under the Contract. These records shall include the total number of hours worked, the number of hours spent providing service under this Contract, the hourly rate paid, and the amount paid by Attorneys for health benefits, if any, for each of its employees providing services under the Contract. Attorneys agree to supply City with any records it deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 20.

c. If Attorneys are currently subject to the Berkeley Living Wage Ordinance, Attorneys shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subcontracts in which Attorneys engages to execute its responsibilities under this Contract. All subcontractor employees who spend 25% or more of their compensated time engaged in work directly related to this Contract shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

d. If Attorneys fail to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Attorneys' failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this Contract pursuant to Section 3. In the event that City terminates Attorneys due to a default under this provision, City may deem Attorneys a non-responsible bidder for not more than five (5) years from the date this Contract is terminated.

In addition, at City's sole discretion, Attorneys may be responsible for liquidated damage in the amount of $50 per employee per day for each and every instance of an under-payment to an employee. It is mutually understood and agreed that Attorneys failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Attorneys' breach. City may deduct any assessed liquidated damages from any payments otherwise due Attorneys.

19. **BERKELEY EQUAL BENEFITS ORDINANCE**

a. Attorneys hereby agree to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Attorneys are currently subject to the Berkeley Equal Benefits Ordinance, as indicated by the Equal Benefits Certification form, attached hereto, Attorneys will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this contract, as well as comply with the terms enumerated herein.

b. If Attorneys are currently or becomes subject to the Berkeley Equal Benefits Ordinance, Attorneys agree to provide the City with all records the City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 20.

c. If Attorneys fail to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

Attorneys' failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this contract pursuant to Section 3. In the event the City terminates this contract due to a default by Attorneys under this provision, the City may deem Attorneys a non-responsible bidder for not more than five (5) years from the date this

Contract is terminated.

In addition, at City's sole discretion, Attorneys may be responsible for liquidated damages in the amount of $50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Attorneys' failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Attorneys' breach. City may deduct any assessed liquidated damages from any payments otherwise due Attorneys.

20. **SANCTUARY CITY CONTRACTING**

Contractor hereby agrees to comply with the provisions of the Sanctuary City Contracting Ordinance, B.M.C. Chapter 13.105. In accordance with this Chapter, Contractor agrees not to provide the U.S. Immigration and Customs Enforcement Division of the United States Department of Homeland Security with any Data Broker or Extreme Vetting Services as defined herein:

a. "Data Broker" means either of the following:

   i. The collection of information, including personal information about consumers, from a wide variety of sources for the purposes of reselling such information to their customers, which include both private-sector business and government agencies;

   ii. The aggregation of data that was collected for another purpose from that for which it is ultimately used.

b. "Extreme Vetting" means data mining, threat modeling, predictive risk analysis, or other similar services. Extreme Vetting does not include:

   i. The City's computer-network health and performance tools;

   ii. Cybersecurity capabilities, technologies and systems used by the City of Berkeley Department of Information Technology to predict, monitor for, prevent, and protect technology infrastructure and systems owned and operated by the City of Berkeley from potential cybersecurity events and cyber-forensic based investigations and prosecutions of illegal computer based activity.

21. **AUDIT**

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Attorneys' financial, performance and compliance records maintained in connection with the operations and services performed under this Contract. In the event of such audit, Attorneys agree to provide the City Auditor with reasonable access to Attorneys' employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Attorneys an opportunity to discuss and respond to any findings before a final audit report is filed.

22. **ENTIRE CONTRACT**

a. The terms and conditions of this Contract, all exhibits attached and any documents expressly incorporated by reference represent the entire Contract between the parties with respect to the subject matter of this Contract.

b. This Contract shall supersede any and all prior contracts, oral or written, regarding the subject matter between City and Attorneys. No other contract, statement, or promise relating to the subject matter of this Contract shall be valid or binding except by a written amendment to this Contract.

c. If any conflicts arise between the terms and conditions of this Contract and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this Contract shall control.

IN WITNESS WHEREOF, City and Attorneys have executed this Contract as of the date written on the first paragraph of this Contract.

CITY OF BERKELEY

By: _____
City Attorney

Registered by:

_____
City Auditor

Attest:

_____
ASST. City Clerk

Registered on behalf of the City Auditor:

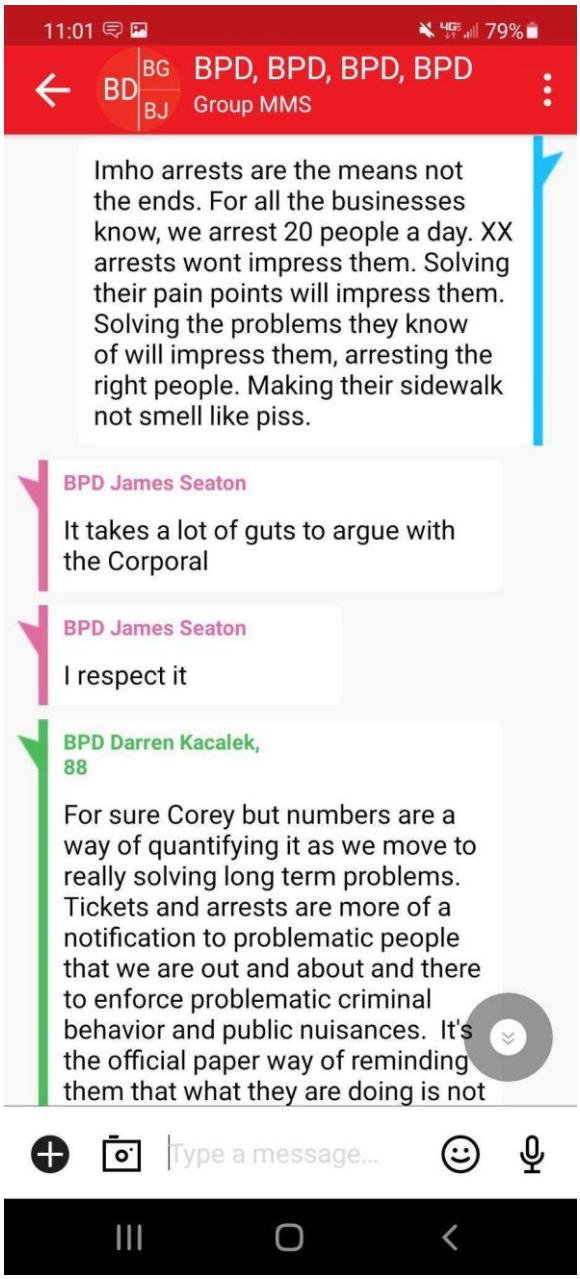
_____
Finance Department

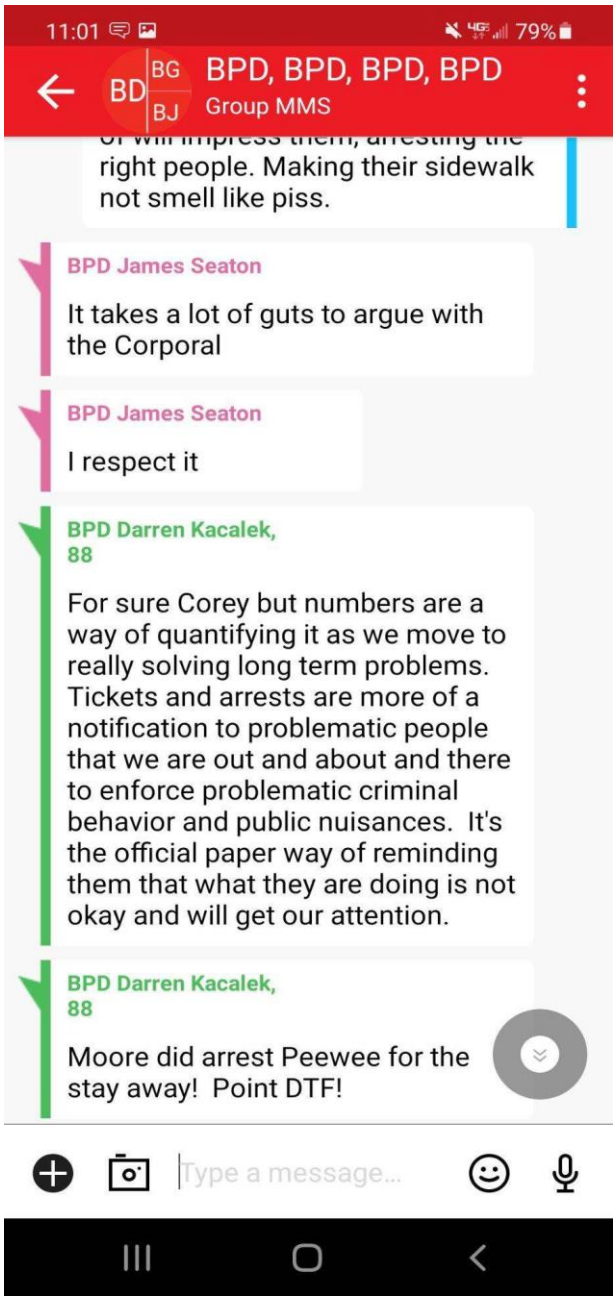
ATTORNEYS

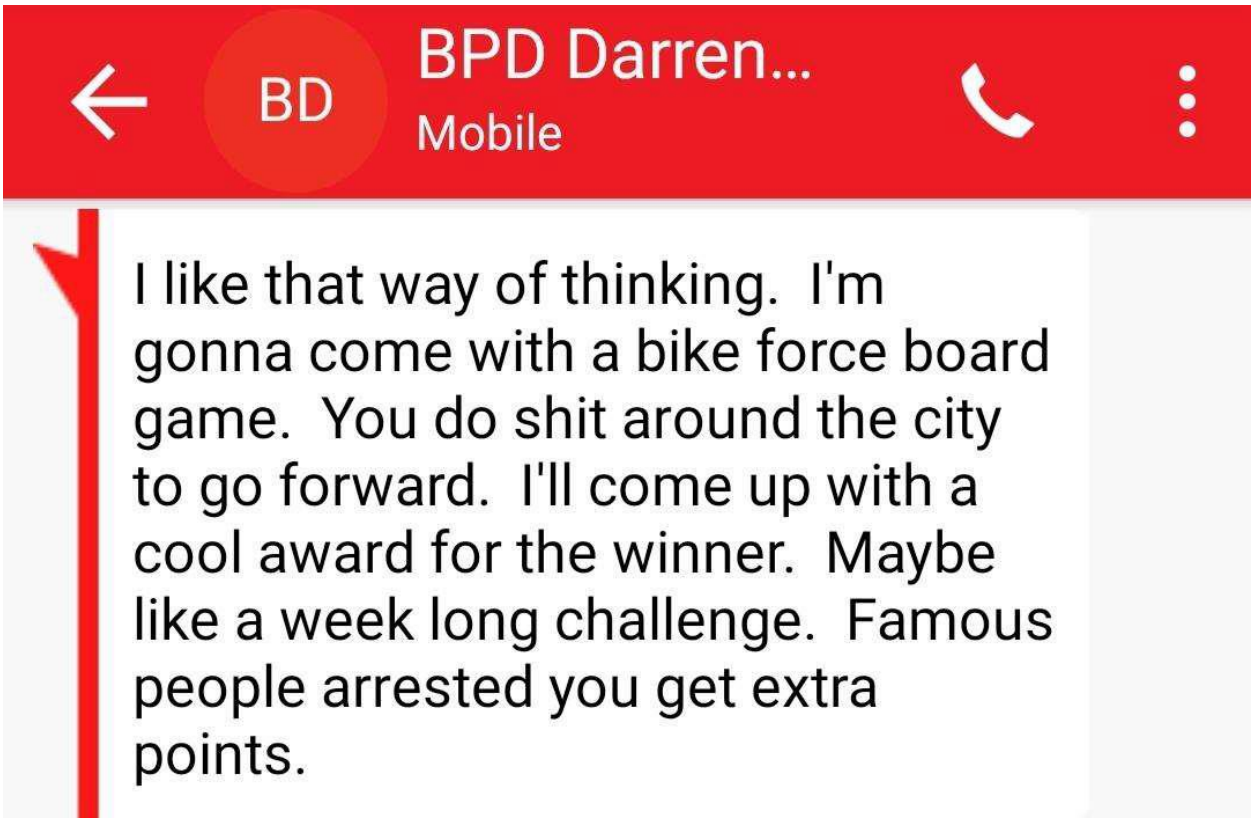
By Edward W. Swanson
Swanson & McNamara LLP

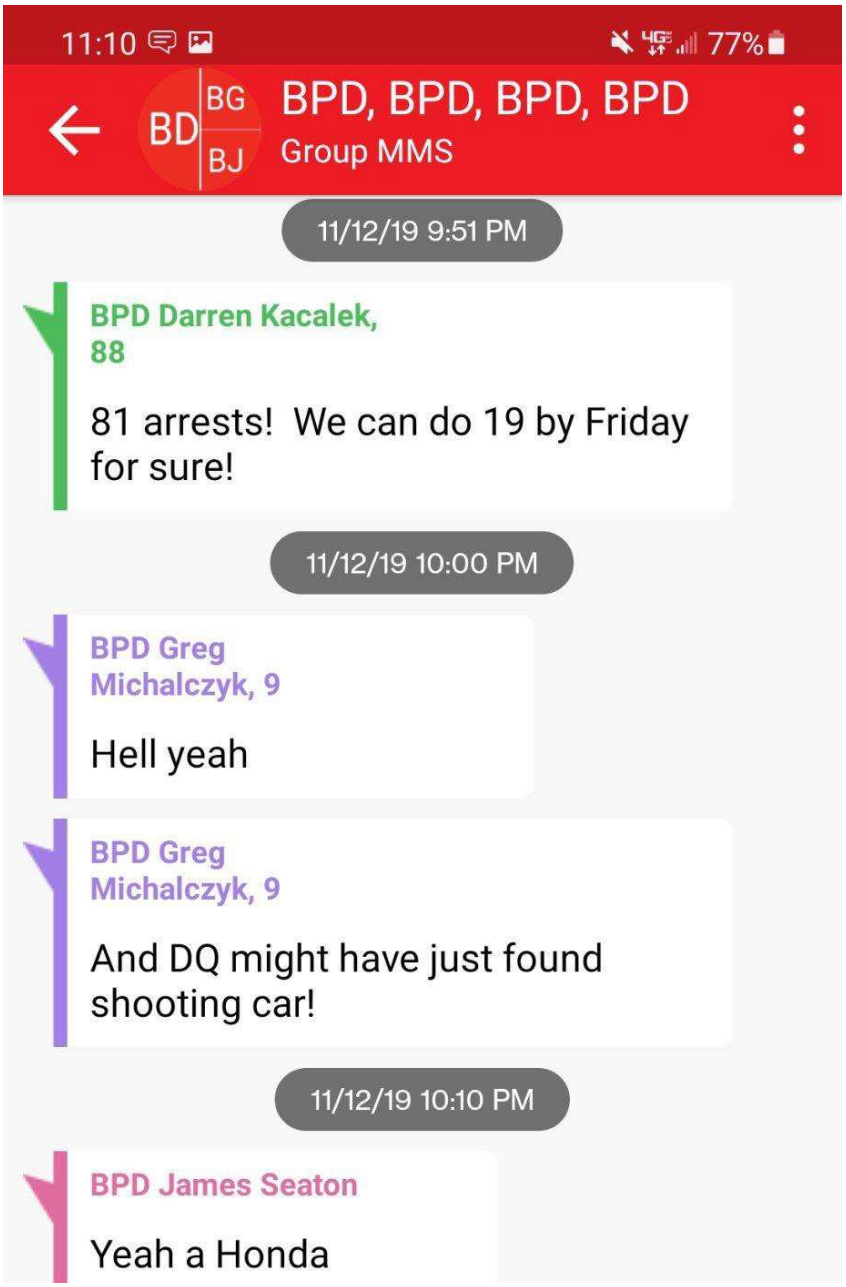
Taxpayer Identification No.
Incorporated: Yes (X) No ( )
Certified Woman Business Enterprise: Yes ( ) No (X)
Certified Minority Business Enterprise: Yes ( ) No(X)
If yes, state ethnicity: _____
Certified Disadvantaged Business Enterprise: Yes ( ) No (X)

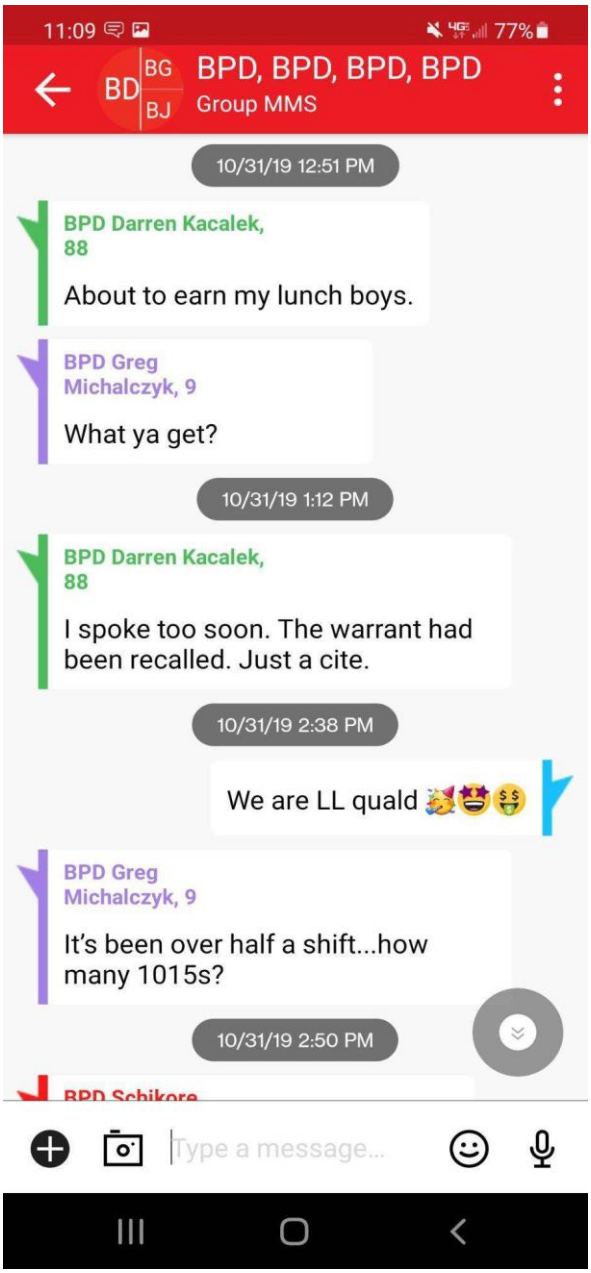
Appendix 2. Text Messages Sent by the Downtown Task Force and Bike Unit Members

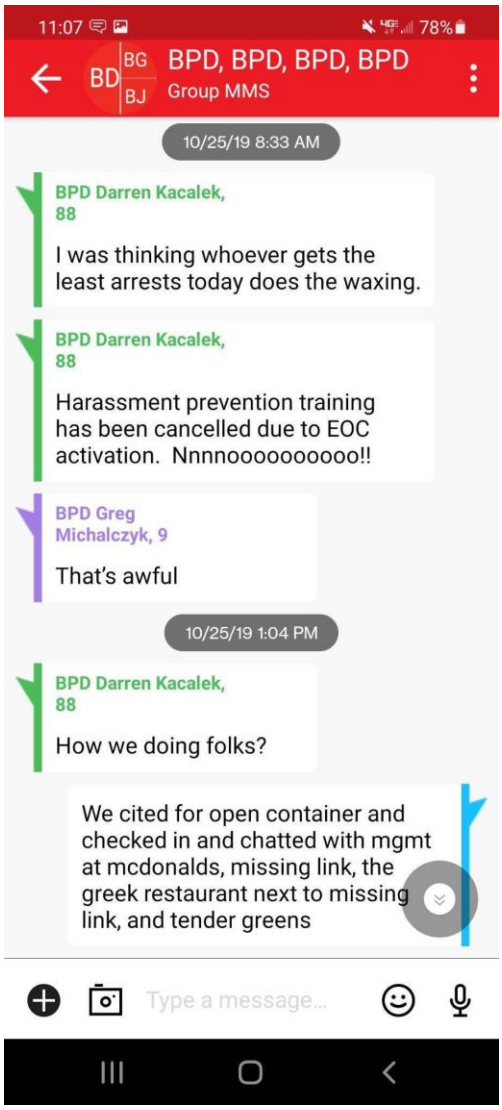

11:01
79%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
Imho arrests are the means not the ends. For all the businesses know, we arrest 20 people a day. XX arrests wont impress them. Solving their pain points will impress them. Solving the problems they know of will impress them, arresting the right people. Making their sidewalk not smell like piss.
BPD James Seaton
It takes a lot of guts to argue with the Corporal
BPD James Seaton
I respect it
BPD Darren Kacalek, 88
For sure Corey but numbers are a way of quantifying it as we move to really solving long term problems. Tickets and arrests are more of a notification to problematic people that we are out and about and there to enforce problematic criminal behavior and public nuisances. It's the official paper way of reminding them that what they are doing is not
Type a message...

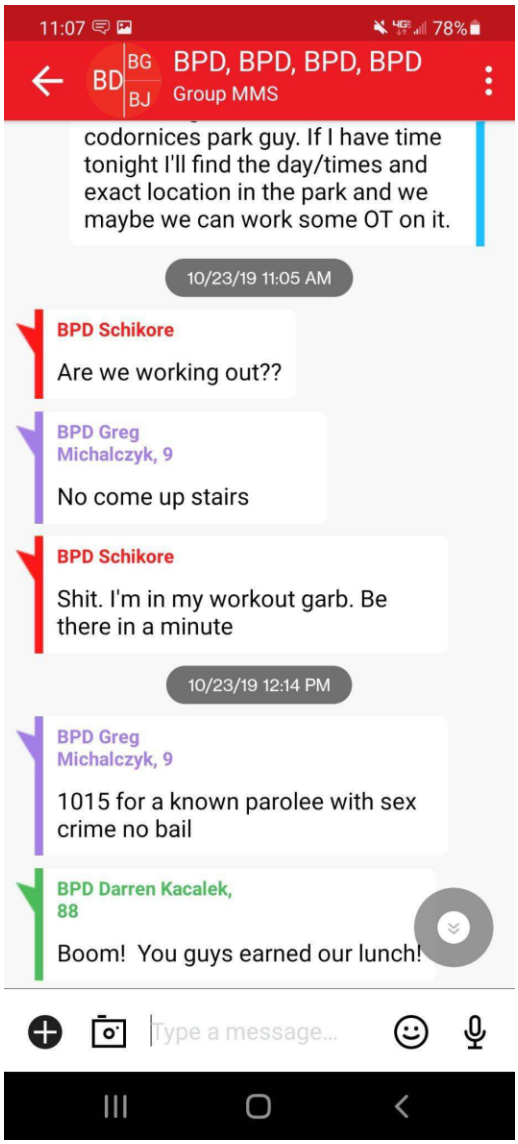

11:01
79%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
right people. Making their sidewalk not smell like piss.
BPD James Seaton
It takes a lot of guts to argue with the Corporal
BPD James Seaton
I respect it
BPD Darren Kacalek, 88
For sure Corey but numbers are a way of quantifying it as we move to really solving long term problems. Tickets and arrests are more of a notification to problematic people that we are out and about and there to enforce problematic criminal behavior and public nuisances. It's the official paper way of reminding them that what they are doing is not okay and will get our attention.
BPD Darren Kacalek, 88
Moore did arrest Peewee for the stay away! Point DTF!
Type a message...

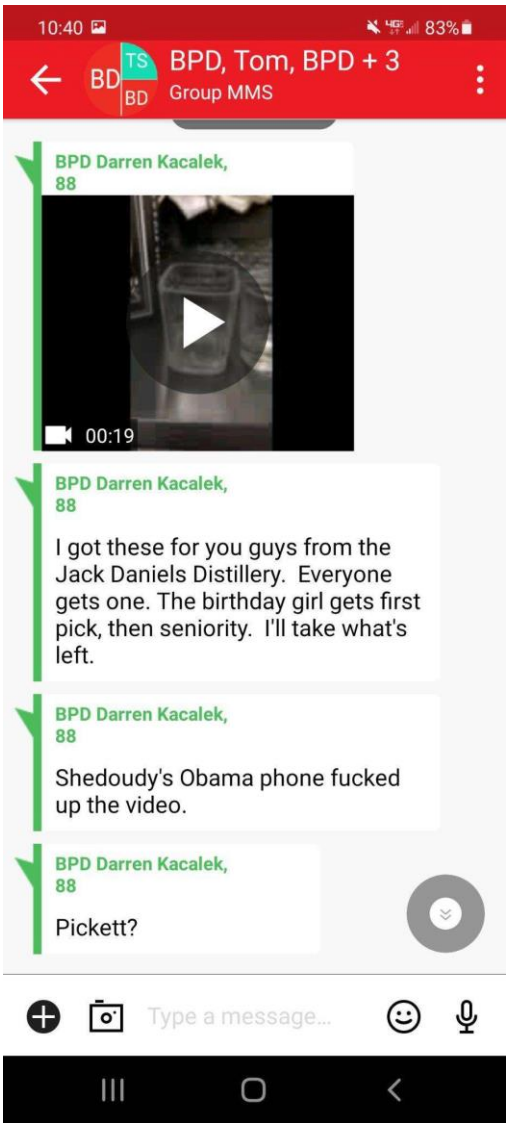

BD
BPD Darren...
Mobile
I like that way of thinking. I'm gonna come with a bike force board game. You do shit around the city to go forward. I'll come up with a cool award for the winner. Maybe like a week long challenge. Famous people arrested you get extra points.

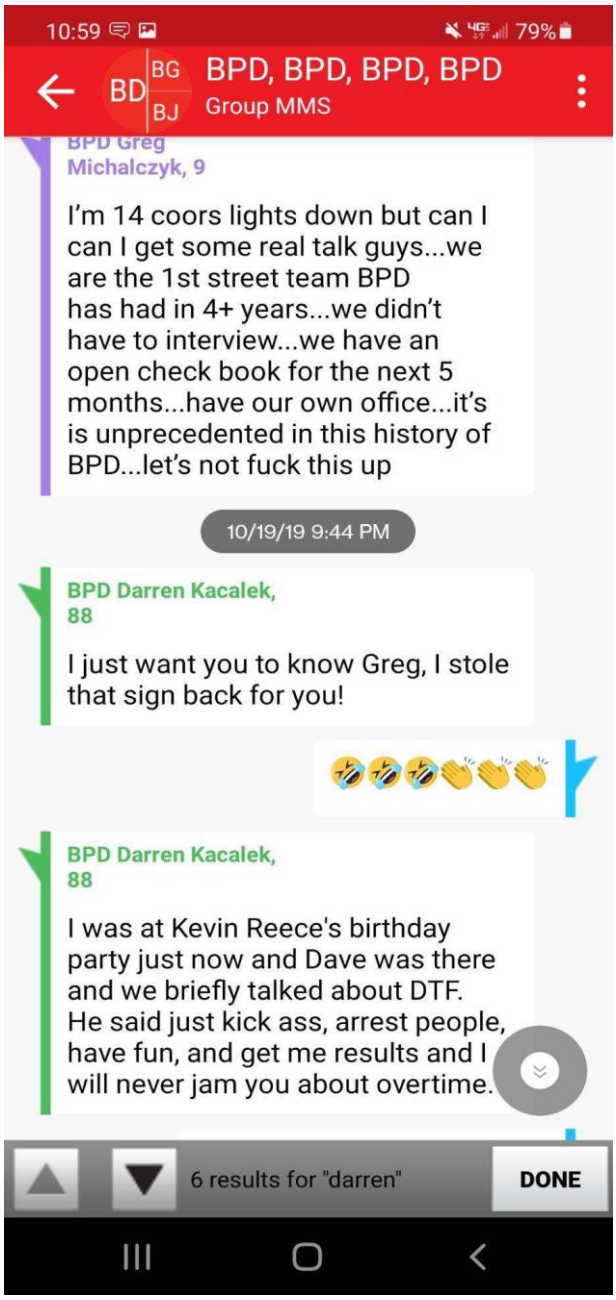

11:10
77%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
11/12/19 9:51 PM
BPD Darren Kacalek, 88
81 arrests! We can do 19 by Friday for sure!
11/12/19 10:00 PM
BPD Greg Michalczyk, 9
Hell yeah
BPD Greg Michalczyk, 9
And DQ might have just found shooting car!
11/12/19 10:10 PM
BPD James Seaton
Yeah a Honda

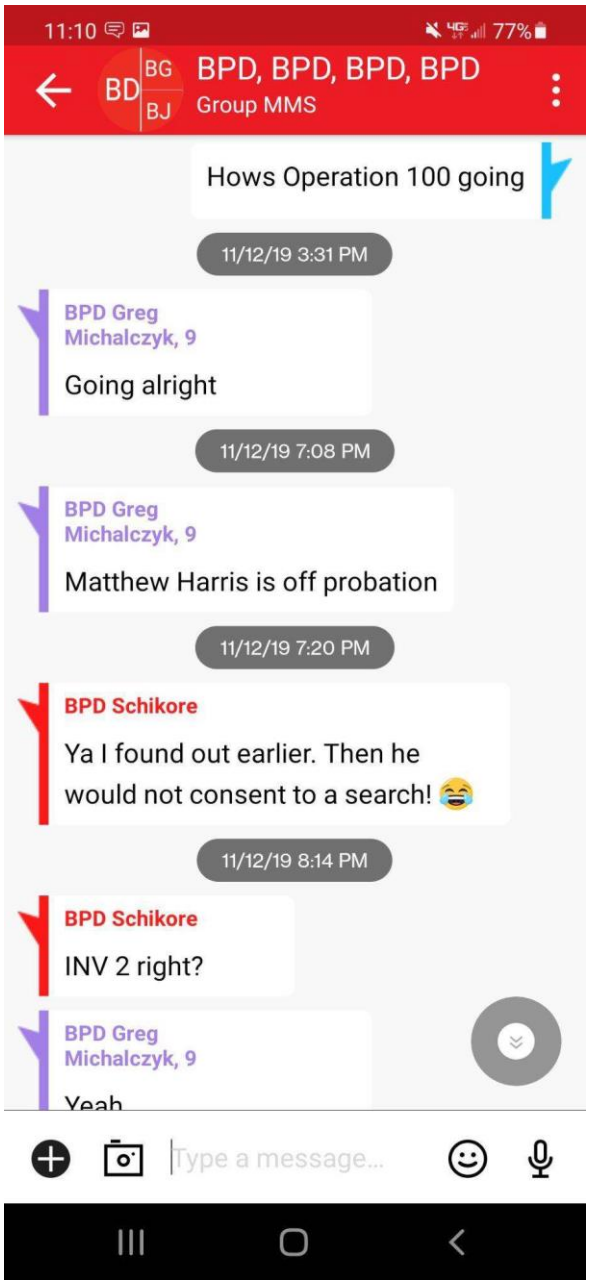

11:09
77%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
10/31/19 12:51 PM
BPD Darren Kacalek, 88
About to earn my lunch boys.
BPD Greg Michalczyk, 9
What ya get?
10/31/19 1:12 PM
BPD Darren Kacalek, 88
I spoke too soon. The warrant had been recalled. Just a cite.
10/31/19 2:38 PM
We are LL quald
BPD Greg Michalczyk, 9
It's been over half a shift...how many 1015s?
10/31/19 2:50 PM
Type a message...

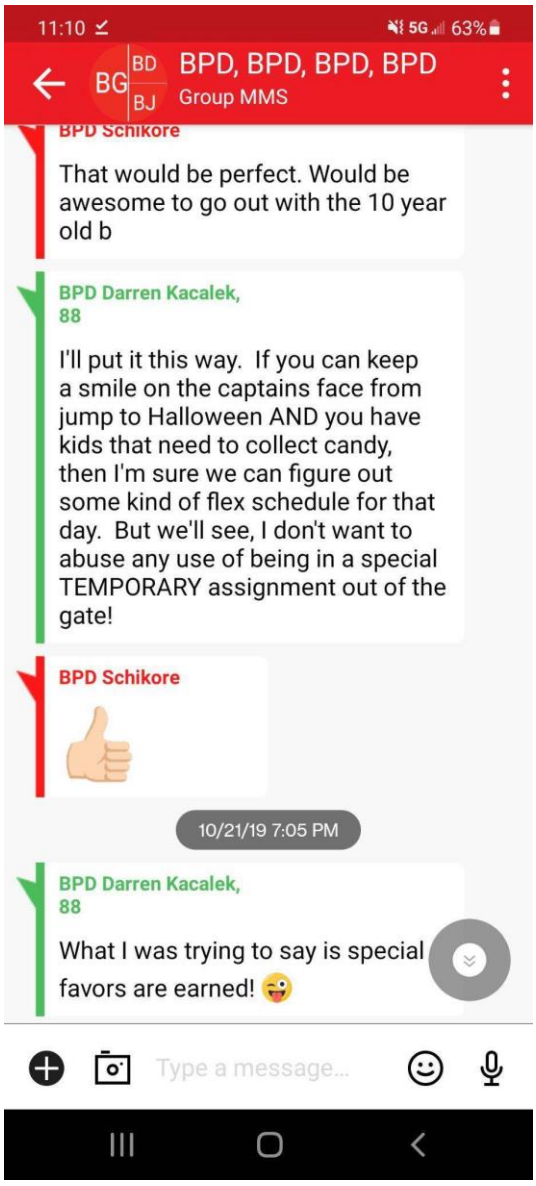

11:07
78%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
10/25/19 8:33 AM
BPD Darren Kacalek, 88
I was thinking whoever gets the least arrests today does the waxing.
BPD Darren Kacalek, 88
Harassment prevention training has been cancelled due to EOC activation. Nnnnooooooooooo!!
BPD Greg Michalczyk, 9
That's awful
10/25/19 1:04 PM
BPD Darren Kacalek, 88
How we doing folks?
We cited for open container and checked in and chatted with mgmt at mcdonalds, missing link, the greek restaurant next to missing link, and tender greens
Type a message...

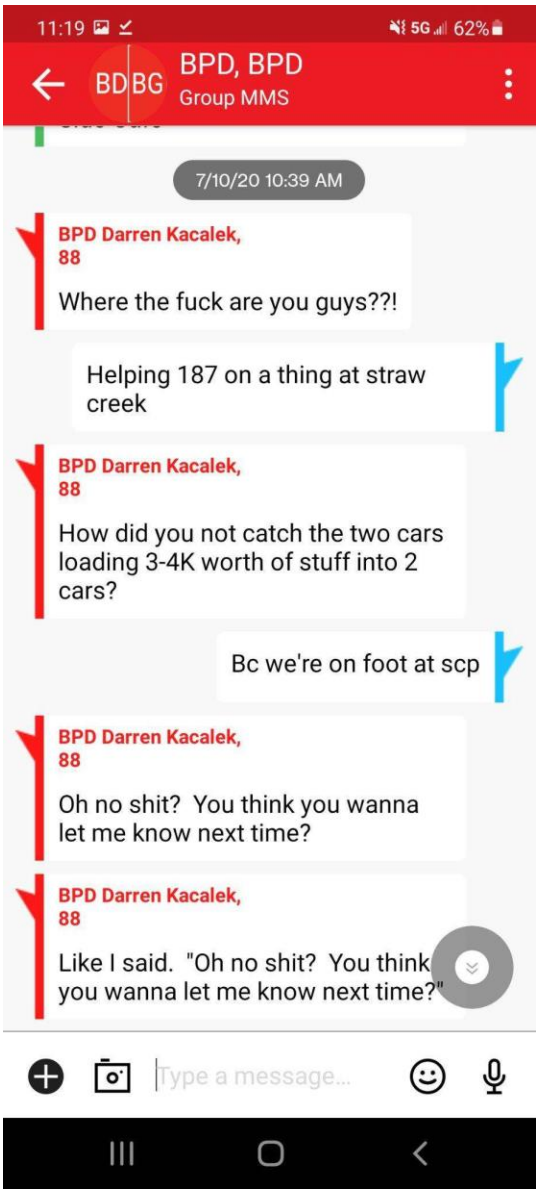

11:07
78%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
codornices park guy. If I have time tonight I'll find the day/times and exact location in the park and we maybe we can work some OT on it.
10/23/19 11:05 AM
BPD Schikore
Are we working out??
BPD Greg Michalczyk, 9
No come up stairs
BPD Schikore
Shit. I'm in my workout garb. Be there in a minute
10/23/19 12:14 PM
BPD Greg Michalczyk, 9
1015 for a known parolee with sex crime no bail
BPD Darren Kacalek, 88
Boom! You guys earned our lunch!
Type a message...

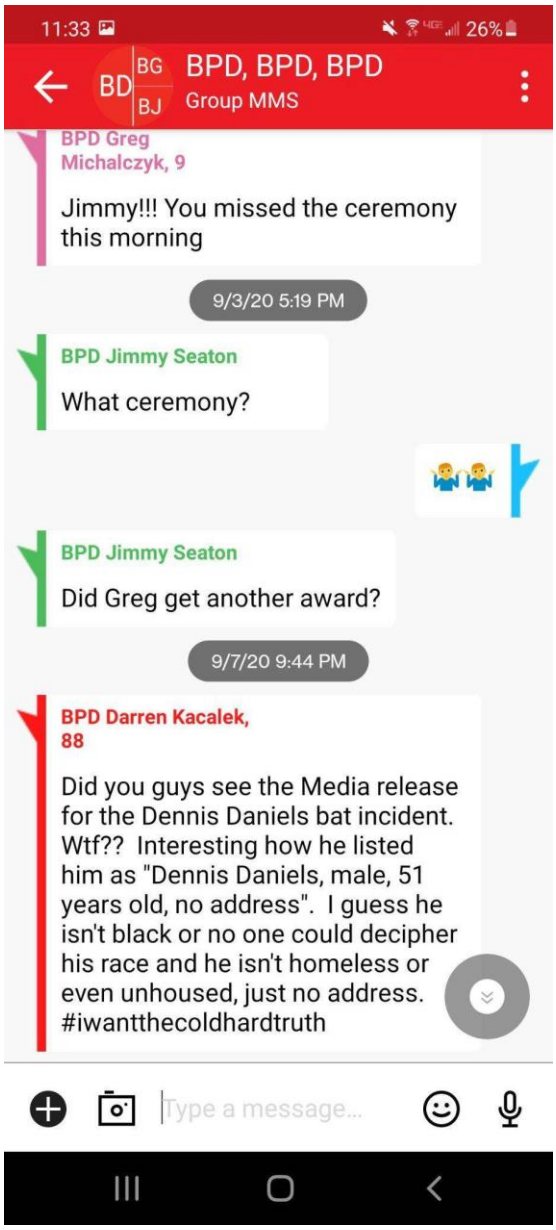

10:40
83%
BD
TS
BD
BPD, Tom, BPD + 3
Group MMS
BPD Darren Kacalek,
88
00:19
BPD Darren Kacalek,
88
I got these for you guys from the Jack Daniels Distillery. Everyone gets one. The birthday girl gets first pick, then seniority. I'll take what's left.
BPD Darren Kacalek,
88
Shedoudy's Obama phone fucked up the video.
BPD Darren Kacalek,
88
Pickett?
Type a message...

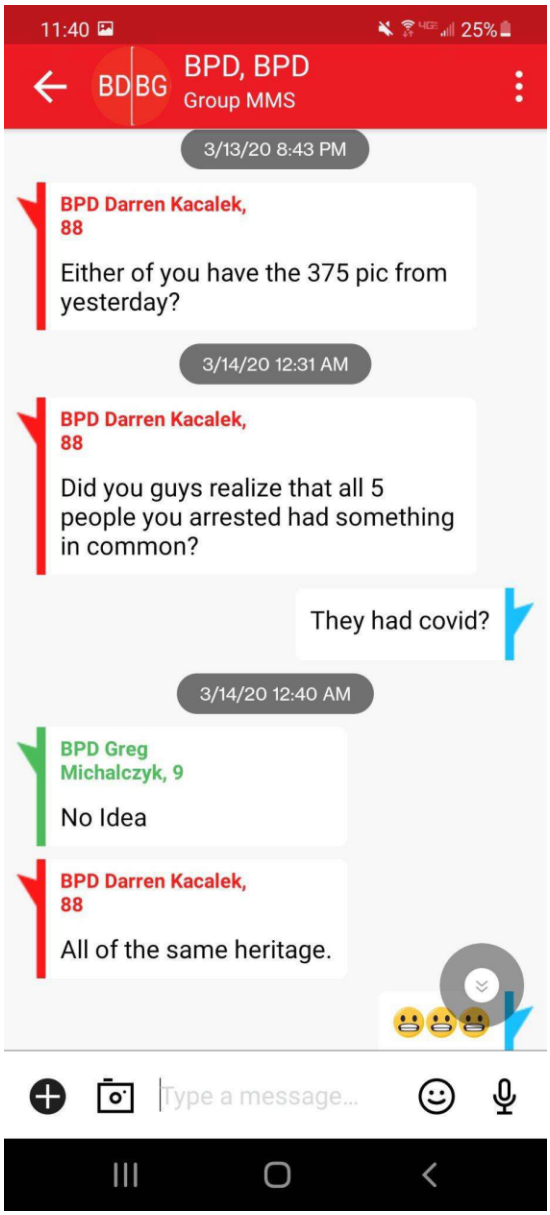

10:59
79%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
BPD Greg Michalczyk, 9
I'm 14 coors lights down but can I can I get some real talk guys...we are the 1st street team BPD has had in 4+ years...we didn't have to interview...we have an open check book for the next 5 months...have our own office...it's is unprecedented in this history of BPD...let's not fuck this up
10/19/19 9:44 PM
BPD Darren Kacalek, 88
I just want you to know Greg, I stole that sign back for you!
BPD Darren Kacalek, 88
I was at Kevin Reece's birthday party just now and Dave was there and we briefly talked about DTF. He said just kick ass, arrest people, have fun, and get me results and I will never jam you about overtime.
6 results for "darren"
DONE

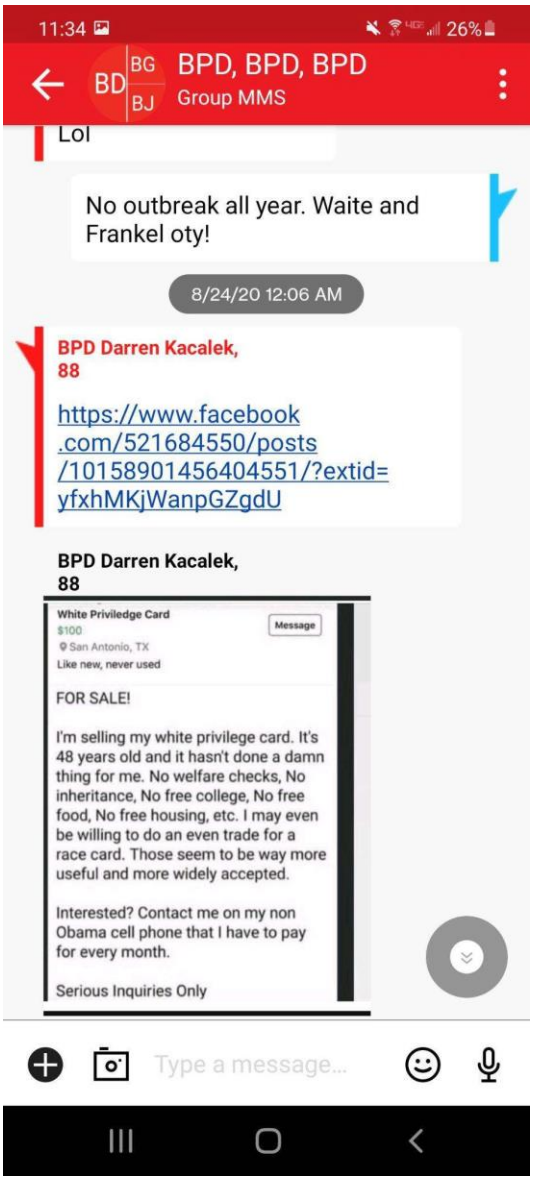

11:10
77%
BD
BG
BJ
BPD, BPD, BPD, BPD
Group MMS
Hows Operation 100 going
11/12/19 3:31 PM
BPD Greg Michalczyk, 9
Going alright
11/12/19 7:08 PM
BPD Greg Michalczyk, 9
Matthew Harris is off probation
11/12/19 7:20 PM
BPD Schikore
Ya I found out earlier. Then he would not consent to a search!
11/12/19 8:14 PM
BPD Schikore
INV 2 right?
BPD Greg Michalczyk, 9
Yeah
Type a message...

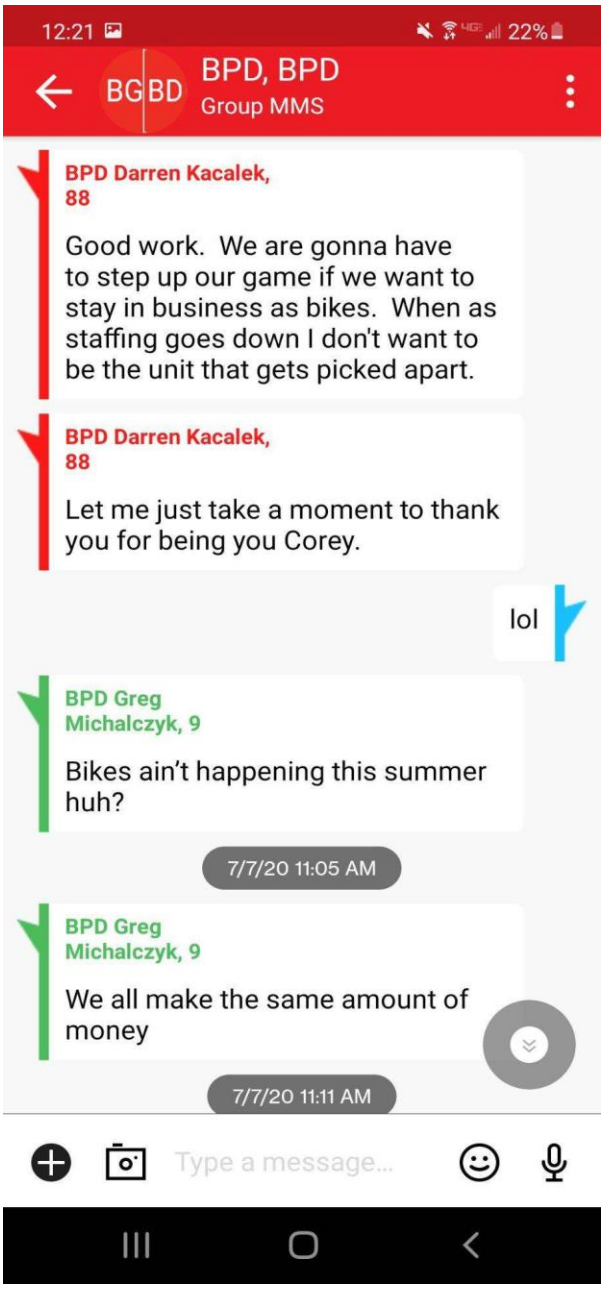

11:10
5G 63%
BG
BD
BJ
BPD, BPD, BPD, BPD
Group MMS
BPD Schikore
That would be perfect. Would be awesome to go out with the 10 year old b
BPD Darren Kacalek, 88
I'll put it this way. If you can keep a smile on the captains face from jump to Halloween AND you have kids that need to collect candy, then I'm sure we can figure out some kind of flex schedule for that day. But we'll see, I don't want to abuse any use of being in a special TEMPORARY assignment out of the gate!
BPD Schikore
10/21/19 7:05 PM
BPD Darren Kacalek, 88
What I was trying to say is special favors are earned!
Type a message...


11:19
5G 62%
BD BG
BPD, BPD
Group MMS
7/10/20 10:39 AM
BPD Darren Kacalek, 88
Where the fuck are you guys??!
Helping 187 on a thing at straw creek
BPD Darren Kacalek, 88
How did you not catch the two cars loading 3-4K worth of stuff into 2 cars?
Bc we're on foot at scp
BPD Darren Kacalek, 88
Oh no shit? You think you wanna let me know next time?
BPD Darren Kacalek, 88
Like I said. "Oh no shit? You think you wanna let me know next time?"
Type a message...


11:33
26%
BD
BG
BJ
BPD, BPD, BPD
Group MMS
BPD Greg Michalczyk, 9
Jimmy!!! You missed the ceremony this morning
9/3/20 5:19 PM
BPD Jimmy Seaton
What ceremony?
BPD Jimmy Seaton
Did Greg get another award?
9/7/20 9:44 PM
BPD Darren Kacalek, 88
Did you guys see the Media release for the Dennis Daniels bat incident. Wtf?? Interesting how he listed him as "Dennis Daniels, male, 51 years old, no address". I guess he isn't black or no one could decipher his race and he isn't homeless or even unhoused, just no address. #iwantthecoldhardtruth
Type a message...


11:40
25%
BD BG
BPD, BPD
Group MMS
3/13/20 8:43 PM
BPD Darren Kacalek, 88
Either of you have the 375 pic from yesterday?
3/14/20 12:31 AM
BPD Darren Kacalek, 88
Did you guys realize that all 5 people you arrested had something in common?
They had covid?
3/14/20 12:40 AM
BPD Greg Michalczyk, 9
No Idea
BPD Darren Kacalek, 88
All of the same heritage.
Type a message...


11:34
26%
BD
BG
BJ
BPD, BPD, BPD
Group MMS
Lol
No outbreak all year. Waite and Frankel oty!
8/24/20 12:06 AM
BPD Darren Kacalek, 88
https://www.facebook.com/521684550/posts/10158901456404551/?extid=yfxhMKjWanpGZgdU
BPD Darren Kacalek, 88
White Priviledge Card
$100
San Antonio, TX
Like new, never used
Message
FOR SALE!
I'm selling my white privilege card. It's 48 years old and it hasn't done a damn thing for me. No welfare checks, No inheritance, No free college, No free food, No free housing, etc. I may even be willing to do an even trade for a race card. Those seem to be way more useful and more widely accepted.
Interested? Contact me on my non Obama cell phone that I have to pay for every month.
Serious Inquiries Only
Type a message...


12:21
22%
BG BD
BPD, BPD
Group MMS
BPD Darren Kacalek, 88
Good work. We are gonna have to step up our game if we want to stay in business as bikes. When as staffing goes down I don't want to be the unit that gets picked apart.
BPD Darren Kacalek, 88
Let me just take a moment to thank you for being you Corey.
lol
BPD Greg Michalczyk, 9
Bikes ain't happening this summer huh?
7/7/20 11:05 AM
BPD Greg Michalczyk, 9
We all make the same amount of money
7/7/20 11:11 AM
Type a message...

Appendix 3. Sample Quota Ban Policy

STOP, ARREST, AND TICKET QUOTAS PROHIBITION

XXX.1 PURPOSE AND SCOPE

The Berkeley Police Department (BPD) is committed to fostering fair and equitable law enforcement practices that prioritize public safety and community well-being. The purpose of this policy is to explicitly prohibit the imposition of stop, ticket, and arrest quotas in any law enforcement activities conducted by the Berkeley Police Department. This goes beyond the parameters defined in the California Vehicle Code § 41603.

Stop, ticket and arrest quotas, whether formal or informal, establish numerical targets for officers, compelling them to issue citations or make arrests based on predetermined numbers rather than legitimate law enforcement needs. This policy aims to uphold the values of fairness, impartiality, and community-focused policing, ensuring that enforcement actions are driven by genuine circumstances and the safety needs of our community.

This policy reflects the Berkeley Police Department's unwavering dedication to maintaining high standards of ethical conduct and professionalism while serving and safeguarding the interests of the Berkeley community.

XXX.2 POLICY

This policy unequivocally prohibits the use of quotas **(whether informal or formal)** to require or encourage officers to meet predetermined numerical targets for stops, tickets, or arrests.

The Berkeley Police Department is committed to promoting public trust, transparency, and accountability in all law enforcement endeavors. This policy serves as a cornerstone in guiding our officers to conduct themselves with integrity, professionalism, and a commitment to community service, devoid of the imposition of arbitrary enforcement quotas that could compromise these principles.

Officers are encouraged to prioritize public safety and law enforcement compliance based on objective circumstances and genuine enforcement necessities, fostering a culture of equitable and community-oriented policing.

XXX.3 DEFINITION

The following words and terms shall have these assigned meanings throughout the Policy Manual, unless it is apparent from the content that they have a different meaning:

STOP, ARREST AND TICKET QUOTAS PROHIBITION

Arrest quota means any policy, practice, or directive that explicitly requires or pressures a peace officer or parking enforcement employee to make a certain number of arrests.

Ticket quota means any policy, practice, or directive that explicitly requires or pressures a peace officer or parking enforcement employee to issue a certain number of citations or tickets.

Informal quota means any policy, practice, or directive that implicitly requires or pressures a peace officer or parking enforcement employee to make a certain number of arrests or issue a certain number of citations. This includes, but is not limited to, the following:

(a) Talking about specific stop, arrest, or citation targets in a way that suggests they are important.
(b) Linking performance evaluations or promotions to arrest or citation numbers.
(c) Providing incentives such as barbecue (BBQ), pizza, gift cards, car wash coupons, and trophies to officers who meet quotas.
(d) Offering overtime.
(e) Establishing adverse employment actions such as denial of days off, transfers, undesirable assignments, and termination.
(f) Creating a competitive environment where officers are encouraged to make more arrests or issue more citations than their colleagues.
(g) Making jokes or innuendos that incentivize achieving a specific number of stops, arrests, or tickets.

CITY OF BERKELEY

OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY

COMPANION REPORT TO BERKELEY POLICE DEPARTMENT TEXTING ALLEGATIONS: AN INDEPENDENT INVESTIGATION BY THE POLICE ACCOUNTABILITY BOARD

SUBMITTED TO CITY CLERK ON: AUGUST 29th, 2024

MAYOR
Jesse Arreguín

CITY COUNCIL

Rashi Kesarwani, District 1
Terry Taplin, District 2
Ben Bartlett, District 3
Igor Tregub, District 4
Sophie Hahn, District 5
Susan Wengraf, District 6
Cecilia Lunaparra, District 7
Mark Humbert, District 8

City Manager
LaTanya Bellow, Interim City Manager

Berkeley Police Department
Jennifer Louis, Chief of Police

POLICE ACCOUNTABILITY BOARD (PAB) MEMBERS
John "Chip" Moore, Chair
Leah Wilson, Vice-Chair
Brent Blackaby
Kitty Calavita
Joshua Cayetano
Juliet Leftwich
Alexander Mozes
David Williams

OFFICE OF THE DIRECTOR OF POLICE ACCOUNTABILITY (ODPA) STAFF
Hansel Alejandro Aguilar, Director of Police Accountability
Jose De Jesus Murillo, Policy Analyst
Jayson Wechter, Investigator
Keegan Horton, Investigator
Melanie E. Beasley, Administrative Analyst
Lucky, Therapy Animal

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Establish a communications policy, corresponding training, and compliance mechanisms to ensure impartiality and neutrality during the pendency of an active personnel investigation 9
Research the viability and fitness for law enforcement accreditation for BPD and the viability of utilizing a law enforcement agency assessment tool like NYU's Policing Project SAJE tool 13
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Work with the City Auditor and IT to modify existing policies regarding city-issued devices and ensure compliance through randomized audits 15
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Seek Charter amendment to allow ODPA/PAB to conduct personnel misconduct investigations sua sponte (of one's own accord) 17
Conclusion 18

PREFACE

On November 10, 2022 former Berkeley Police Department (BPD) Officer Corey Shedoudy brought allegations forward regarding improper conducted committed by BPD's Downtown Task Force and Bike Unit (DTF). The explicit nature of the texts and the gravity of the accusations of arrest quotas and questionable legal tactics jolted the Berkeley community and its political leaders. In response to these serious allegations, the City, through direction of the city manager, hired an external law firm to investigate the authenticity and implications of these texts, which were ultimately confirmed as genuine. The Police Accountability Board (PAB) conducted an independent investigation of the policies and practices related to the allegations. The report was approved for submission to the Council on July 10th, 2024.

According to the City of Berkeley Commissioners' Manual[1], a companion report from the City Manager is required when the City Manager differs with the recommendations of a commission or wishes to include additional or different information. While the Commissioners' Manual does not specifically reference a companion report from the Director of Police Accountability (DPA), the DPA, as a Charter officer and secretary to the Police Accountability Board (PAB), when supporting the PAB, has in effect the same authority as it relates to the City Manager's relationship with other Boards and Commissions. Therefore, this companion report aims to augment the recommendations by providing additional objective analysis. This companion report is intended to complement the PAB report, ensuring the City Council fully understands the issue and the necessary actions.

ACKNOWLEDGEMENTS

- Former Board Members who served during the revelation of these allegations: Nathan Mizell, Ismael Ramsey, Dobbie Levine, and Cheryl Owens
- Berkeley Copwatch for sharing the analysis of their independent investigation
- Community member Mr. Charles Clarke for his independent analysis
- Late Assemblyman John Miller for his contributions to reducing unjust practices in policing.
- People of Berkeley

EXECUTIVE SUMMARY

The objective of this companion report is to propose additional necessary reforms to prevent future occurrences and institutional missteps that may still occur without firm city council, city manager and or community guidance. The report emphasizes the importance of transparency, accountability, and community trust in policing practices.

To that end the ODPA recommends the following actions for **COUNCIL**:

[1] CITY OF BERKELEY COMMISSIONERS' MANUAL 2019 EDITION: BACKGROUND INFORMATION RULES AND PROCEDURES
https://berkeleyca.gov/sites/default/files/2022-03/Commissioners-Manual.pdf

1. Call on the California Legislature to amend Government Code section 12519[2] to include heads of civilian oversight agencies as one of the enumerated requestors.
2. Direct the City Manager and Chief of Police, with input from the newly formed Office of Strategic Planning and Accountability (OSPA), to procure the services of a vendor that can conduct real-time audits and analysis of BWC footage.
3. Direct the City Manager to work with the City Attorney's Office to establish a protocol, subject to Council approval, with clear guidelines for how the City Manager should handle complaints against the Chief of Police including designating the PAB/ODPA as an investigative body. (consider PRC Ordinance: "*that all such complaints filed with other offices, boards, bureaus, and departments of the City, including the Police Department, shall be referred to the Commission for investigation*").
4. Direct the City Manager to work with the City Attorney's Office to establish a communications policy, corresponding training, and compliance mechanisms to ensure impartiality and neutrality during the pendency of an active personnel investigation
5. Direct the City Manager and Chief of Police, with input from the OSPA, to expand the Berkeley Police Transparency Hub by including data on the prosecutorial outcomes of each arrest made by the BPD.
6. Direct the City Manager and Chief of Police, with input from the OSPA, to work with the PAB/ODPA to research the:
    - Viability and the fitness for law enforcement accreditation for BPD.
    - Viability and the fitness for utilizing a law enforcement agency assessment tool like NYU's Policing Project SAJE tool[3]
7. Direct the City Manager and Chief of Police, with input from the OSPA, to utilize the guidelines in the DOJ report " Considerations for Specialized Units A Guide for State and Local Law Enforcement Agencies to Ensure Appropriateness, Effectiveness, and Accountability Specialized Units A Guide for State and Local Law Enforcement Agencies to Ensure Appropriateness, Effectiveness, and Accountability " to critically

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[2] Government Code section 12519 states:
"*The Attorney General shall give the Attorney General's opinion in writing to any Member of the Legislature, the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, State Lands Commission, Superintendent of Public Instruction, Insurance Commissioner, any state agency, and any county counsel, district attorney, or sheriff when requested, upon any question of law relating to their respective offices*.

"*The Attorney General shall give the Attorney General's opinion in writing to a city prosecuting attorney when requested, upon any question of law relating to criminal matters*."

Under this statute, the Attorney General may give opinions only to these specified public officials, and not to private individuals or to public officials who are not listed in the statute.
Source:https://oag.ca.gov/opinions/faqs#:~:text=Government%20Code%20section%2012519%20states%20that%20opinions%20shall%20be%20provided,cases%20arising%20in%20the%20city.

[3] The SAJE Policing Assessment is a tool designed to define and measure the characteristics of a sound, accountable, just, and effective policing agency. This much-needed resource helps police leaders and agencies, municipal leaders, and the communities they serve understand agency performance across 100 critical metrics.
Source: https://www.policingproject.org/saje-policing-assessment

examine the necessity, effectiveness, and oversight of specialized units within the Berkeley Police Department (BPD)

8. Adopt a resolution issuing a formal apology to the City of Berkeley community for the improper messaging displayed by this incident and reaffirm a commitment to support the work of the Fair and Impartial Committee, the PAB, the ODPA, the Peace and Justice Commission and other City Departments, community stakeholders working towards a more equitable and just City of Berkeley.

The ODPA additionally recommends that the **CITY MANAGER**:

1. Work with the City Auditor and IT to modify existing policies regarding city-issued devices and ensure compliance through randomized audits.
2. Work with the BPD to draft and adopt an Alcohol Rehabilitation Leave Procedure similar to Dallas Police Department General Order 446.00[4]

Lastly, the ODPA calls on the **COMMUNITY** to consider the following:

1. Seek Charter amendment to Section (15) Legal Counsel[5]: To provide independent counsel to the ODPA/PAB for all legal advice. Independent Counsel may be a staff employed by the ODPA or on retainer.
2. Seek Charter amendment to allow ODPA/PAB to conduct personnel misconduct investigations *sua sponte (*of one's own accord*).*

In instances where public trust has been impacted in such a manner, it is not only important to look at ways in which systems can be improved but also to be intentional about ways to heal the community and improve relationships down the line. This requires ongoing dialogue, community engagement, and concrete actions to rebuild trust and demonstrate a genuine commitment to change.

In closing, this report seeks to fulfill our commitment to the Berkeley community by providing a thorough examination of the incident and offering actionable recommendations. The goal is to foster a law enforcement environment that upholds the highest standards of integrity and

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[4] 446.01 Purpose
"*The purpose of the Alcohol Rehabilitation Leave Procedure is to provide employees of the police department with support and assistance in securing confidential care to help them overcome the detrimental use of alcohol before their career and personal lives are irreparably damaged. A concerning number of alcohol-related arrests and incidents involving members of the department have occurred and continue to occur. Employee safety and well-being is paramount for the Dallas Police Department. As a proactive measure, this procedure is being implemented immediately to support department employees. Our success as a Department is dependent on a physically and mentally healthy workforce who care for themselves just as much as the community they serve*."
Source: https://dallaspolice.net/resources/Shared%20Documents/General-Orders.pdf

[5] Berkeley Charter Section 125(15)(a):
The Board and the Director of Police Accountability shall use the services of the City Attorney's Office for legal advice.
Source: https://berkeley.municipal.codes/Charter/125(15)(a)

accountability, thereby restoring public trust and aligning policing practices with the values of the Berkeley community.

Introduction

The ODPA presents this companion report subsequent to an exhaustive review conducted by the Subcommittee on Policy and Practices concerning the Downtown Task Force and Bike Unit Allegations of the PAB which was then formally discussed and approved by the full Board. Central to the concerns under scrutiny is the grave allegation of police quotas attributed to the Downtown Task Force, a matter that resonates deeply with both historical precedent and contemporary societal discourse.

The allegation of police quotas strikes at the core of the delicate balance between law enforcement's role in ensuring public safety and the imperative to safeguard individual rights and dignity. This issue's legislative history, though often obscured and scattered across many states, finds its origins rooted in Berkeley—a city renowned for its progressive and forward-thinking stance in shaping societal norms and legal frameworks (see Ossei-Owusu, 2021).

Remarkable legislative activity emerged in the 1970s, with Black Democratic Assemblyman John Miller at the helm, introducing California's bill in 1975. Miller, often described as a "progressive independent in local politics," demonstrated a keen political acumen, underpinning his support for quota bans with inclusive rhetoric (Id.). His district, which encompassed the diverse cities of Oakland and Berkeley, provided a unique perspective, one that resonated with concerns for both police officers and the general public.

Miller's stance articulated the inherent injustice in quotas, deeming them "unfair, undemocratic, and unjust." (see Ossei-Owusu, 2021 citing *Measure to Outlaw CHP's Ticket Quotas*[6], *supra* note 69, at 1.) He was troubled by the notion that an officer's failure to meet quotas could lead to demotion, while simultaneously expressing concerns for "the average California driver," who might find themselves disbelieved by a "rubber stamp traffic court system." (Id.)

California's statute, birthed from a convergence of multi-constituent concerns, remains relevant today, specifically in the City of Berkeley. It serves as a historical testament to the enduring pursuit of justice and fair play, core tenets that guide our efforts in maintaining police accountability, fostering public trust, and safeguarding the principles of democracy within the City of Berkeley.

This report endeavors to shed light on the contemporary implications of the allegations surrounding police quotas, while acknowledging their historical resonance within our community's consciousness. Through our investigations, we aim to contribute to the ongoing dialogue surrounding public safety, police conditions, and the eradication of police corruption, underscoring our commitment to a just and equitable Berkeley.

[6] Ossei-Owusu, S. (2021). Police quotas. NYUL Rev., 96, 529.

Additionally, this report investigates the alarming findings related to the DTF, particularly the use of arrest quotas, inappropriate behavior among officers, and the troubling internal culture that has surfaced through the examination of text messages exchanged within the unit. These findings underscore the need for immediate and decisive action to address the systemic issues within the BPD, particularly those related to the DTF's operations. This report presents a series of recommendations aimed at reforming the BPD to ensure transparency, accountability, and a renewed commitment to fair and just policing. These recommendations include proposed amendments to local legislation, the adoption of new internal policies, and the implementation of rigorous oversight mechanisms. By confronting these issues head-on and implementing the suggested reforms, Berkeley can restore public trust in its police department and reaffirm its dedication to upholding the highest standards of law enforcement.

Recommendations for Council

Call on the State Legislature to Amend Government Code section 12519

Civilian oversight agencies play a crucial role in maintaining transparency and accountability within law enforcement. However, their effectiveness is often limited by the scope of their authority and access to necessary resources. The current Government Code section 12519 restricts the ability to request investigative assistance from the Attorney General's office to a limited group of officials, thereby excluding civilian oversight leaders who are often at the forefront of addressing public concerns regarding police misconduct. Amending this section to include heads of civilian oversight agencies as authorized requestors would not only empower these agencies but also ensure that they can perform their duties without unnecessary hindrances, especially in cases where their investigations encounter substantial resistance or require specialized expertise.

The recent findings in the PAB report highlight the numerous obstacles civilian oversight bodies face when attempting to access critical information, such as the Swanson report and other internal records. These challenges underscore the need for civilian oversight agencies to have the legal backing necessary to overcome such barriers, particularly when investigating serious allegations of misconduct. By allowing civilian oversight leaders to request assistance from the Attorney General's office, the Legislature would be affirming the importance of transparency and accountability in law enforcement, while also providing these agencies with the tools needed to conduct thorough and effective investigations.

Moreover, this amendment would signal the Legislature's commitment to strengthening civilian oversight in California, a state that has been at the forefront of progressive policing reforms. By expanding the scope of section 12519, the Legislature would not only bolster the independence of civilian oversight agencies but also promote a more robust system of checks and balances within law enforcement. This change would be a significant step towards ensuring that all investigations into police misconduct, particularly those involving complex or sensitive issues, are conducted with the highest standards of integrity and thoroughness.

Procure the services of a vendor that can conduct real-time audits and analysis of BWC footage.

The integration of body-worn cameras (BWC) into police operations was initially heralded as a key tool for enhancing transparency and accountability. However, the effectiveness of BWC footage in holding officers accountable depends heavily on the ability to analyze and audit this data in a timely and systematic manner. As highlighted in the PAB report, the current oversight mechanisms are insufficient, often leaving critical data unanalyzed due to limited resources and access issues. By procuring the services of a vendor that specializes in real-time audits and analysis of BWC footage, the City can ensure that this valuable resource is fully utilized to monitor police conduct, identify potential issues early, and provide an objective record of interactions between officers and the public.

Real-time analysis of BWC footage would also serve as a proactive measure to deter misconduct and reinforce a culture of accountability within the Berkeley Police Department. By enabling continuous monitoring, the City can swiftly address any deviations from policy, reducing the likelihood of incidents escalating into more severe issues. This approach aligns with the PAB's recommendations for more robust oversight and reflects the City's commitment to upholding the highest standards of policing. Moreover, the use of advanced technology to audit BWC footage can provide comprehensive insights into patterns of behavior, helping to inform future policy decisions and training programs.

Furthermore, the involvement of the Office of Strategic Planning and Accountability (OSPA) in this process ensures that the procurement of these services aligns with the broader strategic goals of the City and the Police Department. The OSPA can provide valuable input on the selection of the vendor, ensuring that the chosen solution is tailored to the specific needs of Berkeley's oversight framework. By integrating real-time BWC footage analysis into the City's accountability systems, Berkeley can set a new standard for transparency and public trust, demonstrating a commitment to continuous improvement in police oversight.

Establish a protocol, subject to Council approval, with clear guidelines for how the City Manager should handle complaints against the Chief of Police

The authority and responsibility of the Chief of Police place them at the center of law enforcement operations, making it essential that any complaints against them are handled with the utmost transparency and impartiality. The recent PAB report revealed significant challenges in accessing information necessary for oversight, particularly in cases involving high-ranking officials. To address these concerns, it is recommended that the City Manager, in collaboration with the City Attorney's Office, develop a clear and robust protocol for handling complaints

against the Chief of Police. This protocol should be subject to Council approval to ensure it reflects the community's expectations for transparency and accountability.

Central to this protocol should be the designation of the PAB and the ODPA as the primary investigative bodies for such complaints. This approach is consistent with the precedent established by the PRC Ordinance, which mandates that complaints filed with other city offices, boards, or departments be referred to the appropriate oversight commission for investigation. By formalizing this process, the City can ensure that complaints against the Chief of Police are not only investigated thoroughly but also in a manner that is independent of the Police Department's internal mechanisms, thereby avoiding any potential conflicts of interest.

Additionally, the establishment of clear guidelines for handling these complaints would provide all stakeholders, including the public, with confidence in the process. It would outline the specific steps to be taken from the receipt of a complaint through to its resolution, including timelines, investigative procedures, and reporting requirements. This transparency is crucial for maintaining public trust, particularly in situations where the actions of the Chief of Police are called into question. By implementing a well-defined protocol, the City of Berkeley can demonstrate its commitment to holding all members of its law enforcement agencies accountable, regardless of rank, and ensure that the principles of justice and fairness are upheld in all circumstances.

Establish a communications policy, corresponding training, and compliance mechanisms to ensure impartiality and neutrality during the pendency of an active personnel investigation

Figure 1 City Manager Email to City Council acknowledging allegations

Former Berkeley Police Officer Email-Corey Shedoudy

Williams-Ridley, Dee 3:40 PM
Arreguin, Jesse L., + 11

Mayor and Council,
I understand that you have all received a very disturbing email from former Berkeley Police Officer Corey Shedoudy. I want to assure you that the allegations will be investigated fully and any additional investigative oversight needed will be sought. The allegations and texts messages shared, should not be distributed. I will work with the City Attorney and Human Resources to determine immediate next steps in this matter.

Lastly, I do not see any reason to pause the upcoming item requesting the appointment of Jen Louis to Chief of Police. My initial inquiry affirms that she had no knowledge of the allegations or text messages provided by Former Officer Shedoudy.

If and/or when this email is made public by Shedoudy, you should expect to have inquiries from media outlets. At this time, it is best to refer all inquiries to Matthai Chakko, Public Information Officer, who will work with me and the City Attorney on messaging. Should you need to respond please use the following:

"My office is aware of the seriousness of the matter and has been assured that the allegations will be investigated thoroughly. Since this is a confidential personnel matter, there are no other comments at this time".

Please call if you have any questions,
Dee

On November 10, 2022 City Manager Williams-Ridley, by way of email, acknowledged to the Mayor and Council the allegations as brought forth by former BPD Officer Shedoudy (see Figure 1). In the email, the City Manager classified the email from the former officer as "disturbing". Furthermore, she assured the Mayor and Council that the "allegations will be investigated fully and any additional investigative oversight needed will be sought." This initial paragraph is without concern to the Board, but the subsequent paragraph reveals practices and policies (or lack thereof) regarding the operation of the Berkeley Police Department- as they relate to investigations of higher-ranking law enforcement officials- that are ripe for yielding prejudiced or biased conclusions.

Specifically, in the follow up paragraph, the City Manager states that she does "*not see any reason to pause the upcoming item requesting the appointment of Jen Louis to Chief of Police*." This statement is extremely concerning in the context of serious allegations that needed to be "fully investigated" and where the item dealt with the potential subject of an investigation to be undertaken. Additionally, the City Manager adds that her *"initial inquiry affirms that she [Chief Louis] had no knowledge of the allegations or text messages provided by Former Officer Shedoudy*." It is unclear to the Board what the depth and scope of the "initial inquiry" was, but if at that time the City Manager had not independently corroborated the lack of knowledge of the allegations by Chief Louis through independent witnesses that may had knowledge about this, through an administrative review of emails and text

messages of the Chief, it is difficult to understand how an "initial inquiry" could have *affirmed* that information. If at that time, the "initial inquiry" merely included a discussion with Chief Louis about the matter, that information, in and of itself, would have been insufficient by a preponderance of the evidence to "affirm" that the Chief had no knowledge about these allegations. At most, the Chief's denial about having knowledge could have "suggested" that the allegations lacked or possessed questionable merit.

Notwithstanding, considering that at this juncture of the events, the City Manager had not formally recused herself from investigating this matter[7] and the other Departments/units within the City with authority to investigate the matter *sua sponte*[8] were the BPD and IAB respectively, statements made by her (or her office) could had the effect of prejudicing the investigation. From an investigative and adjudicatory perspective, this presents various obvious problems that must be addressed through the enactment of policies or the guidance of practices.

There are many sources for policy and or practice guidance on navigating the delicate nature of investigations, but two important ones that can guide our City are:

- State Bar of California- RULES OF PROFESSIONAL CONDUCT[9] ; and
- U.S Department of Justice, Office of Community Oriented Policing Services (COPS)- STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: Recommendations from a Community of Practice[10]

In Rule 3.6 Trial Publicity, the State Bar of California prohibits lawyers who are participating or have participated in the investigation or litigation of a matter from making, "*extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means*

[7] Section 28(f) of the City Charter indicates that one of the powers and duties of City Manager is: "To make investigations into the affairs of the City, or any department or division thereof, or any contract, or the proper performance of any obligation running to the City."

In practice, the City Manager does not personally investigate affairs of the City, but rather delegates them to the appropriate personnel. In this instance, a matter concerning the Berkeley Police Department (in accordance with the BMC 2.64.030) would also be under the control and supervisory authority of the Chief of Police: "*The Chief of Police shall be responsible for the supervision and control of all divisions of the department and for the performance of the functions herein assigned to the department*."

[8] Section 125(3)(a)(3) of the City Charter specifies that the Board has authority to receive and consider findings of the Director of Police Accountability, where a complaint is filed by members of the public: "*To receive and consider the findings and recommendations of the Director of Police Accountability regarding complaints filed by members of the public against sworn employees of the Police Department and to recommend if discipline is warranted when misconduct is found and, pursuant to Section 18, the level of discipline for sustained findings of misconduct"*;

[9] State Bar of California- RULES OF PROFESSIONAL CONDUCT
https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.6-Exec_Summary-Redline.pdf

[10] U.S Department of Justice, Office of Community Oriented Policing Services (COPS)- STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: Recommendations from a Community of Practice
https://portal.cops.usdoj.gov/resourcecenter/ric/Publications/cops-p164-pub.pdf

of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter*." Serving in her capacity as the City Manager, it can be reasonably concluded that the City Manager knew or reasonably should have known (i.e. Brown Act) that her extrajudicial statements could be 1) disseminated by means of public communication and 2) have a substantial likelihood of materially prejudicing an adjudicative proceeding[11] in the matter.

Furthermore, the Rule provides guidance on what statements can be made depending on whether they focus on non-criminal or criminal cases. Specifically, in cases that are non-criminal in nature, according to Rule 3.6 (b), a lawyer may state:

> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;
>
> (2) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary
>
> thereto;
>
> (6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe* that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public;

Given the guidance provided by the State Bar of California's Rules of Professional Conduct, it is evident that the City Manager's public statements regarding the allegations against the Berkeley Police Department's leadership, and specifically Chief Louis, should have been more cautiously framed to avoid any potential for prejudicing ongoing investigations. The premature affirmation of the Chief's lack of knowledge, without a thorough and independent inquiry, not only risks undermining the integrity of the investigation but also erodes public trust in the fairness of the process. It is crucial for city officials, particularly those in positions of authority, to refrain from making statements that could be perceived as influencing or pre-judging the outcome of such investigations.

To address the concerns raised by this incident, it is recommended that Berkeley adopt clear policies and procedures that align with the best practices outlined in the DOJ's "Standards and Guidelines for Internal Affairs" and the State Bar's Rules of Professional Conduct. These policies should emphasize the importance of impartiality and caution in public communications,

[11] Currently, the BPD's adjudicative proceeding consists of a hearing process which includes members of the City Manager's Office.

particularly when an investigation is ongoing. Moreover, the City should consider implementing training for city officials on these standards to ensure that future communications do not inadvertently compromise the integrity of investigations. By doing so, Berkeley can strengthen its commitment to transparency, accountability, and the rule of law, ensuring that all investigations are conducted with the highest standards of fairness and integrity.

Expand the Berkeley Police Transparency Hub by including data on the prosecutorial outcomes of each arrest made by the BPD

Expanding the Berkeley Police Transparency Hub[12] to include data on the prosecutorial outcomes of each arrest made by the BPD represents a significant step toward enhancing transparency and accountability within the city's law enforcement operations. The report titled " Purging the Poor: Arrest Quotas, Racist Texts and the Role of City Leadership in the "Textgate" Scandal" by Berkeley Copwatch[13] underscores the importance of examining the entire spectrum of police interactions, from initial stops to final prosecutorial outcomes. Subsequently, Mr. Charles Clarke submitted his independent analysis on the prosecutorial outcomes related to this unit for the PAB's and ODPA's consideration (see attachments 1 and 2). Currently, the Transparency Hub provides valuable data on police stops, arrests, and other metrics, but it lacks critical information on how these arrests are processed and adjudicated within the criminal justice system. By including prosecutorial outcomes—such as charges filed, cases dismissed, plea bargains, and trial results—the City can offer a more complete picture of the effectiveness and fairness of BPD practices, allowing the community and oversight bodies to better understand the full impact of police actions, as well as any potential disparities in how justice is administered.

This expanded dataset would also provide crucial insights into potential disparities in the criminal justice process. For instance, if data reveals that certain demographic groups are disproportionately facing harsher prosecutorial outcomes, it could signal the need for further investigation and reforms within both the police department and the prosecutorial system. Moreover, such transparency would enable the PAB and other oversight entities to identify patterns of concern, such as frequent dismissals of cases due to insufficient evidence, which might indicate systemic issues in how arrests are conducted or how evidence is gathered. Ultimately, this initiative would empower the City of Berkeley to address these issues proactively, fostering greater trust between the police department and the community it serves.

Furthermore, the inclusion of prosecutorial outcomes in the Transparency Hub would reinforce Berkeley's commitment to data-driven decision-making and continuous improvement in public safety practices. By making this information publicly available, the City would not only increase accountability but also encourage a broader dialogue among stakeholders—including law enforcement, community leaders, and policymakers—about the intersections between policing and the judicial system. This holistic approach to transparency would set a precedent for other

[12] https://bpd-transparency-initiative-berkeleypd.hub.arcgis.com/
[13] https://www.berkeleycopwatch.org/_files/ugd/9faa72_175f75bda71646b983857d0a0e352434.pdf?index=true

jurisdictions, demonstrating Berkeley's leadership in advancing equitable and just law enforcement practices.

Research the viability and fitness for law enforcement accreditation for BPD and the viability of utilizing a law enforcement agency assessment tool like NYU's Policing Project SAJE tool[14]

The pursuit of law enforcement accreditation and the adoption of advanced assessment tools are crucial strategies for ensuring that the BPD meets the highest standards of professional conduct and operational effectiveness. By directing the City Manager and Chief of Police, in consultation with the OSPA, to explore the viability and fitness of these initiatives, Berkeley can systematically evaluate its policing practices against national and international benchmarks. Accreditation from recognized bodies like CALEA (Commission on Accreditation for Law Enforcement Agencies) would not only affirm the BPD's commitment to excellence but also provide a structured framework for continuous improvement, covering critical areas such as policy development, training, and accountability mechanisms.

In addition to exploring accreditation, researching the potential adoption of a law enforcement assessment tool like NYU's Policing Project SAJE (Sound, Accountable Just, and Effective) would allow Berkeley to engage in a more nuanced evaluation of its policing practices. The SAJE tool is specifically designed to assess law enforcement agencies on key metrics related to justice, equity, and public safety outcomes. By implementing such an assessment, the BPD can gain deeper insights into areas that require reform or enhancement, particularly in the context of community trust and fairness in policing. This would also enable the PAB and ODPA to play a more informed role in oversight, ensuring that the department's practices align with the community's expectations and the City's commitment to equitable law enforcement.

These initiatives—pursuing accreditation and employing advanced assessment tools—would significantly strengthen Berkeley's oversight capabilities and enhance the BPD's transparency and accountability. By rigorously evaluating the department's operations through these lenses, Berkeley can identify best practices and areas for improvement, ensuring that its police force not only meets but exceeds the standards of modern, community-oriented policing. This forward-looking approach would reinforce Berkeley's role as a leader in innovative police reform and set a high bar for law enforcement agencies nationwide.

[14] For preliminary research on these tools consider ODPA's memo presented to the PAB on March 13, 2024: https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/2024-03-13%20PAB%20Agenda%20Packet.pdf

Utilize the guidelines in the DOJ report " Considerations for Specialized Units: A Guide for State and Local Law Enforcement Agencies to Ensure Appropriateness, Effectiveness, and Accountability" to critically examine the necessity, effectiveness, and oversight of specialized units within the BPD

The findings from the PAB report on the BPD Downtown Task Force and Bike Unit raise serious concerns about the operations and oversight of these specialized units, including potential misuse of power and negative community impact. To address these issues and ensure that specialized units within the BPD are functioning effectively and justly, it is recommended that the City Manager and Chief of Police, with input from the OSPA, adopt the guidelines provided in the DOJ's "Considerations for Specialized Units: A Guide for State and Local Law Enforcement Agencies to Ensure Appropriateness, Effectiveness, and Accountability."[15]

This guide offers a comprehensive framework for law enforcement agencies to assess the appropriateness, effectiveness, and accountability of their specialized units. By applying these guidelines, the BPD can conduct a thorough evaluation of its specialized units to determine whether they are necessary, whether their operations are aligned with the department's mission and values, and whether they have appropriate oversight mechanisms in place to prevent misconduct and ensure transparency.

The evaluation should include a review of the units' goals, operational practices, and community impact, with a particular focus on identifying any areas where reforms may be needed to align with best practices for accountability and fairness. Implementing the recommendations from the DOJ guide will help ensure that all specialized units within the BPD operate in a manner that promotes public trust and community safety, reinforcing Berkeley's commitment to equitable and just policing.

Adopt a resolution issuing a formal apology to the City of Berkeley community for the improper messaging displayed by this incident and reaffirm a commitment to support the work of the Fair and Impartial Policing Committee

The recent revelations of improper messaging within the Berkeley Police Department, as detailed in the PAB report, have understandably caused significant concern within the community, undermining trust in local law enforcement. To address this breach of public confidence, it is essential that the City Council adopt a resolution issuing a formal apology to the City of Berkeley community. This apology should acknowledge the harm caused by the insensitive and inappropriate communications, recognizing their impact on the community's perception of the

[15] National Policing Institute. 2024. Considerations for Specialized Units: A Guide for State and Local Law Enforcement Agencies to Ensure Appropriateness, Effectiveness, and Accountability. Washington, DC: Office of Community Oriented Policing Services.
Source: https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-r1140-pub.pdf

police and reaffirming the City's commitment to maintaining the highest standards of professionalism and respect within its police force.

In addition to the apology, the resolution should also explicitly reaffirm the City's ongoing commitment to supporting the work of key oversight and community-oriented bodies, including the Fair and Impartial Policing Committee, the PAB, the Office of the Director of Police ODPA, the Peace and Justice Commission, and other relevant City departments and stakeholders. These entities play a vital role in promoting equity, justice, and accountability in Berkeley, and their work is more important than ever in the wake of this incident. By publicly committing to support these bodies, the City Council can help ensure that they have the resources and authority needed to carry out their mandates effectively, fostering a culture of transparency and continuous improvement.

Moreover, this resolution would serve as a critical step in healing the relationship between the BPD and the community it serves. By taking responsibility for the actions of its police force and demonstrating a sincere commitment to addressing the underlying issues, the City of Berkeley can begin to rebuild trust and move forward with a renewed focus on equity and justice. This formal apology, coupled with a reaffirmed commitment to oversight and reform, would underscore the City's dedication to creating a police department that truly reflects the values and expectations of its diverse and vibrant community.

Recommendations for the City Manager

Work with the City Auditor and IT to modify existing policies regarding city-issued devices and ensure compliance through randomized audits

The effective management and oversight of city-issued devices are critical to maintaining the integrity and security of Berkeley's operations. Current policies governing the use of these devices must be updated to reflect evolving technology, security risks, and the need for accountability in their use. Collaborating with the City Auditor and IT department will allow Berkeley to establish more stringent guidelines for the use of city-issued devices, ensuring that they are utilized appropriately and securely for official purposes. By refining these policies, the City can mitigate risks associated with data breaches, unauthorized use, and potential misconduct related to the use of these devices.

To ensure compliance with the updated policies, the City should implement a system of randomized audits. These audits will serve as a critical oversight mechanism, verifying that city-issued devices are being used in accordance with the established guidelines. Randomized audits provide a deterrent effect, reducing the likelihood of misuse by ensuring that all city employees are aware that their device usage may be subject to review at any time. This proactive approach will help to identify any instances of non-compliance or security vulnerabilities early, allowing the City to address issues before they escalate.

Moreover, this initiative will enhance transparency and accountability across all departments, demonstrating Berkeley's commitment to responsible governance and the

safeguarding of public resources. Regular audits and policy reviews will not only protect the City's technological assets but also foster a culture of accountability and ethical conduct among employees. By prioritizing the proper management of city-issued devices, Berkeley can ensure that its operations remain secure, efficient, and aligned with best practices in public administration.

Work with the BPD to draft and adopt an Alcohol Rehabilitation Leave Procedure similar to DPD GO 446.00

Recognizing the importance of supporting the well-being and health of police officers, and in light of the troubling references to alcohol in the text messages exchanged among members of the Downtown Task Force, it is recommended that Berkeley work with the BPD to draft and adopt an Alcohol Rehabilitation Leave Procedure, modeled after DPD GO 446.00[16]. The text messages revealed that alcohol was frequently mentioned as a prize or reward for making arrests, raising serious concerns about the role of alcohol within the department's culture. This procedure would provide a structured and compassionate approach for officers who are struggling with alcohol dependency, offering them the opportunity to seek treatment without fear of stigma or career repercussions. By adopting such a policy, Berkeley would demonstrate its commitment to the holistic health of its law enforcement personnel, acknowledging that the mental and physical well-being of officers is integral to their ability to serve the community effectively.

The Alcohol Rehabilitation Leave Procedure would outline clear guidelines for officers to request leave for alcohol rehabilitation, ensuring confidentiality and support throughout the process. This policy would include provisions for treatment programs, reintegration plans, and monitoring to ensure that officers receive the help they need while maintaining the integrity of the department's operations. By providing a pathway to recovery, the City can help officers address substance use issues proactively, reducing the risk of related misconduct, such as the troubling behaviors highlighted in the PAB report, and enhancing overall department morale.

Furthermore, implementing this procedure would align Berkeley with best practices in law enforcement, emphasizing the importance of health and wellness initiatives within the police force. By adopting a proactive stance on alcohol rehabilitation, particularly in response to the issues revealed in the text messages, the City can foster a supportive environment where officers feel empowered to seek help when needed, ultimately leading to a more resilient and effective police department. This initiative would also reflect the City's broader commitment to public health, extending support to those who serve and protect the community while addressing the underlying cultural issues that may contribute to unhealthy behaviors within the force.

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Recommendations for the Community

Seek Charter amendment to Section (15) Legal Counsel: To provide independent counsel to the ODPA/PAB for all legal advice

To enhance the independence and effectiveness of the ODPA and the PAB, it is recommended that Berkeley seek a Charter amendment to Section 15, which governs Legal Counsel. This amendment would provide for the appointment of independent legal counsel dedicated solely to the ODPA and PAB, ensuring that all legal advice and representation is free from potential conflicts of interest. By establishing independent counsel, either as a staff position within the ODPA or through a retainer arrangement, the City can ensure that the ODPA and PAB receive unbiased, expert legal guidance tailored to their unique oversight functions.

Independent counsel would play a critical role in advising the ODPA and PAB on a wide range of legal issues, including investigations, policy reviews, and disciplinary recommendations. This arrangement would allow the ODPA and PAB to operate with greater autonomy, as they would no longer need to rely on legal advice from the City Attorney's office, which also represents the police department and other city entities. Ensuring that the ODPA and PAB have their own legal counsel would reinforce their ability to carry out their mandates effectively, without concerns about divided loyalties or conflicts of interest that might arise when the same legal office advises both oversight bodies and the police department.

Moreover, this amendment would signal Berkeley's commitment to robust civilian oversight of law enforcement, providing the ODPA and PAB with the tools they need to perform their duties independently and effectively. By securing independent legal counsel, Berkeley would enhance the credibility and authority of its police oversight institutions, fostering greater public trust in the integrity of the oversight process. This move would align Berkeley with best practices in police accountability, ensuring that the ODPA and PAB are equipped to fulfill their critical role in promoting transparency, accountability, and justice within the Berkeley Police Department.

Seek Charter amendment to allow ODPA/PAB to conduct personnel misconduct investigations sua sponte (of one's own accord)

To further strengthen the oversight capabilities of the ODPA and the PAB, it is recommended that Berkeley seek a Charter amendment allowing these bodies to initiate personnel misconduct investigations *sua sponte*, or of their own accord. Currently, the ODPA and PAB are often limited to responding to complaints filed by members of the public, which can restrict their ability to address misconduct proactively. By granting the authority to initiate investigations independently, the ODPA and PAB would be better equipped to address potential issues of police misconduct that may not come to light through public complaints alone.

This amendment would empower the ODPA and PAB to act on credible information or patterns of behavior that suggest misconduct, even in the absence of a formal complaint. Such

authority is crucial for addressing systemic issues within the police department that may otherwise go unchecked. By allowing these oversight bodies to investigate proactively, Berkeley can ensure that all instances of misconduct are thoroughly examined and addressed, reinforcing the city's commitment to maintaining high standards of conduct within its police force.

Moreover, this change would align Berkeley with national effective practices in police oversight, where independent civilian bodies are granted the authority to initiate investigations based on their observations or information received from other sources. By enabling the ODPA and PAB to conduct investigations *sua sponte*, Berkeley would enhance the effectiveness of its police oversight mechanisms, ensuring that the department remains accountable to the public it serves. This amendment would further solidify Berkeley's leadership in police reform and its commitment to transparency, accountability, and justice in law enforcement.

Conclusion

The investigation into the BPD's Downtown Task Force and Bike Unit has revealed significant issues within the department, including the existence of arrest quotas, problematic messaging, and a culture that at times prioritizes performance metrics over ethical and just policing. The verified text messages that circulated among DTF members not only exhibited racial and socioeconomic biases but also suggested that alcohol was used as a reward for meeting arrest targets. These revelations underscore the urgent need for comprehensive reforms within the BPD to restore public trust and ensure that all policing practices align with the principles of fairness, equity, and transparency that Berkeley holds dear.

This companion report has provided a series of recommendations aimed at addressing the systemic issues uncovered during this investigation. These recommendations are designed to enhance the accountability of the BPD, strengthen oversight mechanisms, and support the well-being of officers to prevent future occurrences of misconduct. Key among these recommendations is the call for amendments to state legislation, the adoption of rigorous auditing and real-time monitoring of body-worn camera footage, and the establishment of clear protocols for handling complaints against high-ranking officials within the department.

The City of Berkeley has a longstanding commitment to progressive policing and community-oriented public safety. To honor this commitment, it is essential that the City Council, City Manager, and all relevant stakeholders take decisive action in implementing the recommendations outlined in this report. By doing so, Berkeley can lead by example, demonstrating that accountability and integrity are non-negotiable values in law enforcement. Moving forward, continuous dialogue, community engagement, and transparent governance will be critical in healing the divisions caused by these recent events and in building a more just and equitable future for all residents of Berkeley.

ATTACHMENT 1.

Arrest Quotas Memorandum from Charles Clarke, August 18, 2023 To the City of Berkeley Police Accountability Board and Director of Police Accountability

Arrest Quotas

Memorandum from Charles Clarke, August 18, 2023 To the City of Berkeley Police Accountability Board and Director of Police Accountability

On November 10, 2022, ex-Berkeley Police Department (BPD) Officer Corey Shedoudy e-mailed to the Berkeley City Council a collection of text messages that, among other things in Shedoudy's words, "clearly outline a practice of illegal arrest quotas".[1] Arrest quotas have been prohibited by the California Vehicle Code since 1976:[2]

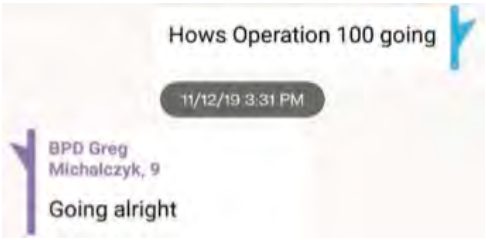
> "No..local agency employing peace officers…may establish any policy requiring any peace officer…to meet an arrest quota."

This memorandum addresses the arrest quota element of Shedoudy's allegations.

The "Operation 100" Bike Unit Text Messages Suggest an Arrest Quota

The Shedoudy text messages[3] provided to the City Council have been (with one exception, not relevant here) authenticated by a vendor retained by the outside investigator Swanson & McNamara.[4]

On November 12, 2019, an unnamed officer (most likely then-Ofcr. Shedoudy) asked Ofcr. Greg Michalczyk about "Operation 100".[5]



[1] Police Accountability Board Special Meeting Agenda Packet, July 24, 2023, https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/2023-07-24%20PAB%20Spe.Mtg_.Pkt_.pdf, "November 10, 2022, Email from Corey Shedoudy to the Mayor and Berkeley City Council," p. 36

[2] California Vehicle Code § 41602 *Arrest Quotas*, https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=17.&chapter=7.&lawCode=VEH, attached as Exhibit 1.

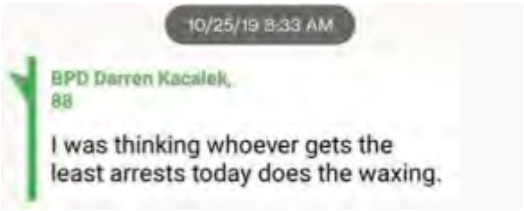
[3] PAB Packet, supra n. 1, "Text Messages Attached to Shedoudy's November 10, 2022 Email to the Mayor and City Council," pp. 38 et seq.

[4] PAB Packet, supra n. 1, "Summary of Investigation Process," p. 25

[5] PAB Packet, supra n. 1, p. 49

Later that day the meaning of "100" as a count of arrests was illustrated in an exchange between Ofcr. Michalczyk and Sergeant Darren Kacalek, the Bike Unit supervisor.[6]

The preceding month Sgt. Kacalek had suggested penalizing the officer with the fewest arrests to the drudgery of waxing (bikes, presumably).[7]



Also that same month Sgt. Kacalek had emphasized arrests to his unit (then known as the DTF, Downtown Task Force).[8]

(Overtime then as now had become a perennial challenge to the Berkeley Police Department,[9] so relaxing that constraint in explicit exchange for arrests ran the implicit risk of establishing a quota.)

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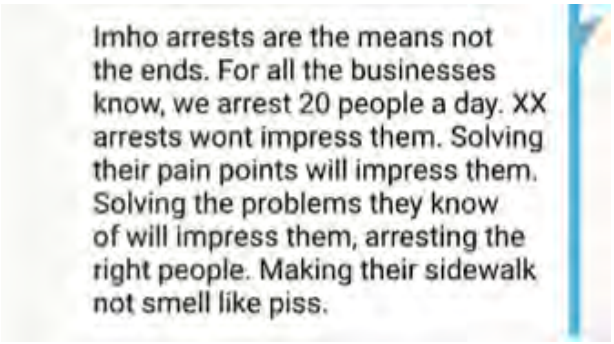
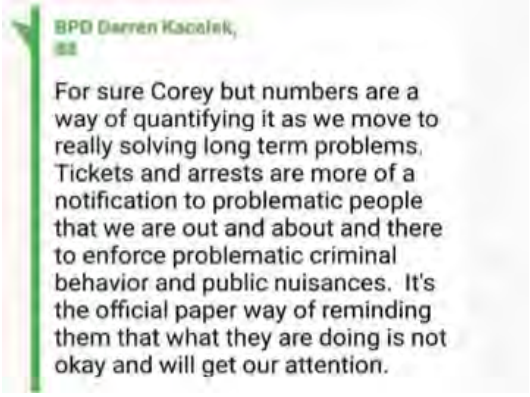
[6] PAB Packet, supra n. 1, p. 43
[7] PAB Packet, supra n. 1, p. 45
[8] PAB Packet, supra n. 1, p. 48, apparent approximate date October 19, 2019
[9] Berkeley City Auditor, *Berkeley Police: Improvements Needed to Manage Overtime and Security Work for Outside Entities*, March 3, 2022, https://berkeleyca.gov/sites/default/files/2022-04/Berkeley%20Police%20-%20Improvements%20Needed%20to%20Manage%20Overtime%20and%20Security%20Work%20for%20Outside%20Entities.pdf

However, beleaguered local businesses might not connect arrest counts to their own sense of security – an issue raised by an unnamed officer (likely ex-Ofcr. Shedoudy) in an undated message.[10]



Sgt. Kacalek responded that "numbers are a way of quantifying it…a notification to problematic people that we are out and about."[11]



From this evidence I conclude that the Bike Unit, in the person of its supervisor Sgt. Kacalek, paid attention to the count of arrests made in late 2019. At least with Ofcr. Michalczyk there was an explicit numerical target. Whether this attention constituted a *quota* – for Ofcr. Michalczyk or the entire Bike Unit – with the attendant suggestion that at least some arrests were made *unlawfully*, is suggested but not proven by the sample of text messages so far produced. A deeper look is needed.

[10] PAB Packet, supra n. 1, p. 40
[11] PAB Packet, supra n. 1, p. 41

The Downtown Task Force/Bike Unit Has Met A City Policing Priority

Swanson & McNamara identified the Downtown Task Force's start date as October 22, 2019.[12] However, as early as 2018 BPD had "[s]taffed overtime patrols in the downtown,"[13] partially in response to a campaign position from Councilmember Kate Harrison reflecting concerns of her Downtown constituents:[14]

> "More community policing – with foot and bicycle police – would improve community relations, particularly in the Downtown. Officers would get to know the merchants, residents and high school students and diffuse *[sic]* situations."

BPD would count among its 2019 strategies and accomplishments:[15]

> "Downtown Task Force…Began Bike Patrol training and equipment acquisition."

This priority was reflected in the FY 2020/2021 biennial budget adopted in mid-2019:[16]

> "The Bike Patrol will provide proactive patrols in the downtown and south campus, and support problem-solving efforts associated with those areas."

The onset of the COVID-19 pandemic in March 2020 led to increased concern about safety in Downtown and south of campus. In the words of three members of the City Council in June 2020:[17]

> "During this COVID-19 emergency, City staff have received numerous complaints from local businesses regarding problematic and violent behavior, including assault of employees and property damage. As a result of increased criminal activity, the Berkeley Police Department have deployed overtime shifts in Telegraph and the Downtown to increase police patrols to respond more quickly to calls for service and to increase police presence to deter crime. While

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[12] "Summary of Investigation Process," supra n. 4

[13] Berkeley Police Department, *2018 Annual Crime Report*, March 19, 2019, p. 3, https://records.cityofberkeley.info/PublicAccess/api/Document/Ae3FvWxdiUDVkDsWDvyxHMc492HuYFW0lJpÉpp601ZyyWihrOgcndqMWadQzZ9QpPkazKJgV5uZUIWmgvutEEac%3D/

[14] Kate Harrison, *Berkeley Progressive Alliance Candidate Questionnaire*, p. 3, https://www.berkeleytenants.org/wp-content/uploads/2017/01/Questionnaire.-Harrison.pdf

[15] Berkeley Police Department, *2019 Crime Report and Five Year Use of Force Report*, October 13, 2020, p. 3,4, https://records.cityofberkeley.info/PublicAccess/api/Document/AfPSh1Yn6aÁYFbhJYqtRQgUtÉmAT74LfpBLjvP9AwFsflVemWdd89cg9B4lFNHSMaxk8ÁpAlICAr2wmQEKnnbbQ%3D/

[16] City Manager, *FY 2020 & FY 2021 Biennial Budget Adoption*, June 25, 2019, p. 295 of 570, https://records.cityofberkeley.info/PublicAccess/api/Document/AcuCVnDbGawvbuIJ5bA6dÁkBWuDhZpxNnJyKMWTP7MeÉgslmZNIPG3s0vBJM4McaNB8jGcD2WeKCmVPNhEOAjU0%3D/

[17] Mayor Arreguín, Councilmembers Harrison and Robinson, *Establishing a COVID-19 Business Damage Mitigation Fund*, June 2, 2020, p. 1, https://records.cityofberkeley.info/PublicAccess/api/Document/Aa4fp020coTCJkfwrmÉ7ffbVgxl0b0QMhpQ7jxf9dboKOZUwMkWucvfvNNoVODsyCv1JG6i1chEaCdjZu48evu4%3D/

> the deployment of the Downtown Task Force has provided additional presence and support for businesses, crime is still occurring."

By September 2020 the Bike Unit had been fully re-launched with a complement of six officers supervised by Sgt. Kacalek.[18] Since the re-launch Berkeley Copwatch has added Ofcr. George Schikore, the Area 4 (West Berkeley) Coordinator,[19] as a target for scrutiny in the Operation 100 text messages matter.[20] This deeper look will focus on these eight officers, pictured in Figure 1.

Figure 1. Downtown Task Force/Bike Unit Officers

(upper, from left) Darren Kacalek (Badge #88 and S-18), Greg Michalczyk (#9), James Seaton (#66), Tom Stern (#8); (lower, from left) Marissa Pickett (#81), Corey Shedoudy (#127), Dan Breaux (#15), George Schikore (#13). Photos: Berkeley Copwatch

[18] Berkeley Police Department, *Berkeley PD re-launches our Bike Detail*, September 22, 2020, https://berkeleyca.gov/community-recreation/news/berkeley-pd-re-launches-our-bike-detail
[19] Berkeley Police Department, *Community Liaisons*, https://berkeleyca.gov/safety-health/police/community-liaisons (accessed August 8, 2023)
[20] Berkeley Copwatch, *BPD Textgate Scandal, View The Officers Here*, https://www.berkeleycopwatch.org/textgate (accessed August 8, 2023)

What Do The Data Say?

The Berkeley Police Department has released Department-wide officer-level arrest activity in response to a public records request.[21] The dataset includes:

Arrest Identifiers: Date and Time; Arrest Number; Case Number; Statute(s) Violated
Arrest Type, one of: Court Filed (Warrant), Field Cite, On-view by Citizen, On-view by Officer, Suspicion of Felony, Other Arrest
Arrestee Demographics: Race (Asian, Black, Hispanic, White, Other); Sex (Male, Female)
Arresting Officer ID (last name, first name initial when needed to disambiguate)

A total of 10,330 arrests spanning 60 months (calendar years 2018 to 2022, inclusive) have been reported. These arrests collectively accounted for a total of 22,829 reported statutory violations (on average a bit more than 2 violations per arrest, ranging from 1 to a maximum of 16).

Table 1. Arrests Per Officer, 2018-2022 Total and Monthly Average, Bike Unit vs. BPD

	Kacalek	Breaux	Michalczyk	Pickett	Schikore	Seaton	Shedoudy	Stern	DTF/ Bike Unit	Rest of BPD
Arrests	52	121	536	114	117	198	84	168	1,390	8,940
Months*	28	43	60	51	39	51	24	40	60	60
Monthly Average	1.9	2.8	8.9	2.2	3.0	3.9	3.5	4.2	3.8	2.5

* Months in which at least one arrest is reported

Table 1 summarizes the counts of arrests for the 8 Bike Unit officers, individually and as a group, and for the remaining non-Bike Unit officers of the Berkeley Police Department. In a typical month in the sample period about 60 non-Bike Unit BPD officers would make at least one arrest. The monthly average denotes the average over months in which that officer reported at least one arrest.

The most remarkable feature in Table 1 is the average arrest activity of Officer Michalczyk (8.9 arrests per month), more than double the monthly Bike Unit average (3.8), which is itself about 50% higher than the BPD non-Bike Unit average (2.5).

Distinguishing an officer's voluntary vigor from his laboring under a quota is a difficult task with the data in hand. Table 2 shows the five BPD officers making the most arrests in the sample period. Ofcr. Michalczyk made significantly more arrests

[21] City of Berkeley, Public Record Request 23-138, https://cityofberkeleyca.nextrequest.com/requests/23-138

than any other BPD officer. Only one other Bike Unit member, Ofcr. Seaton, was in the top 5.

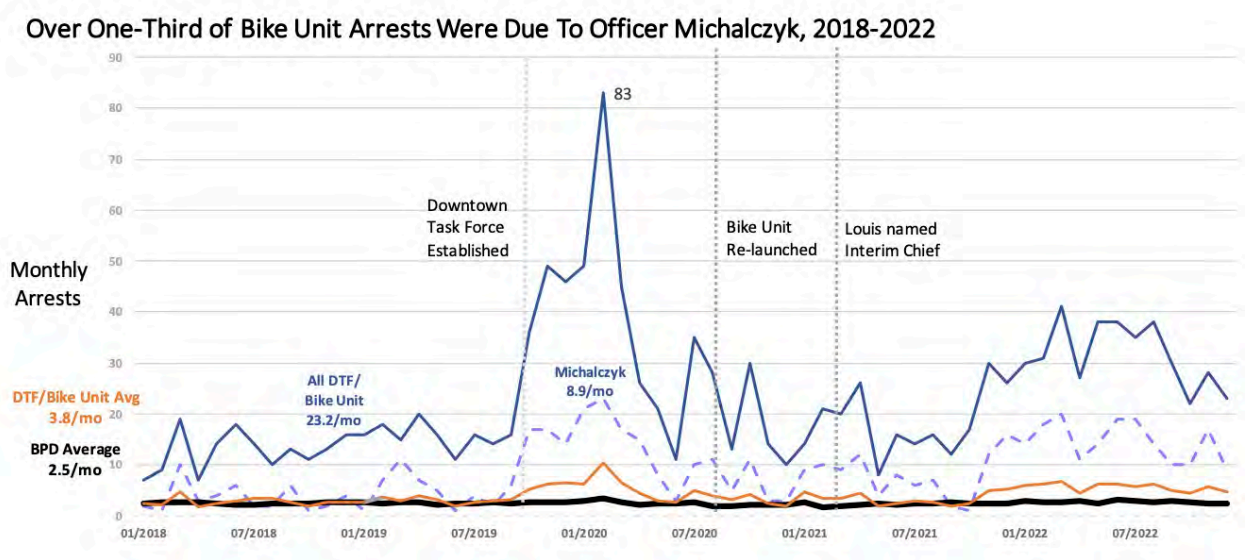
Table 2. Top 5 BPD Officers, by Arrests, 2018-2022

Officer	Arrests	Months*	Monthly Average
Greg Michalczyk **	536	60	8.9
Jason Muniz	228	50	4.6
Wesley Grover	202	54	3.7
James Seaton **	198	51	3.9
Graham Shivas	190	26	7.3

* Months in which at least one arrest is reported ** DTF/Bike Unit

Figure 2 displays the time patterns of Bike Unit and non-Bike Unit arrest activities. The Bike Unit (the solid blue line) attained its monthly maximum of 83 arrests in February 2020, when Ofcr. Michalczyk (the dotted blue line) also reached his monthly arrest maximum (23). Over the 3+ years of the Downtown Task Force/Bike Unit in the dataset, Ofcr. Michalczyk accounted for over one-third of the unit's arrests. The peak in DTF/Bike Unit arrest activity shortly before and in the early days of the COVID-19 pandemic is evident.

Figure 2. Time Pattern of Bike Unit Arrests vs. BPD's Arrest Average



The DTF/Bike Unit average (the solid orange line) of about 3.8 arrests per officer per month (including Ofcr. Michalczyk) is about 50% higher than the non-Bike Unit BPD average (the solid black line), about 2.5 arrests per arresting officer per month.

Figure 2 indicates that the "Operation 100" moniker was not literally realized, but failure to attain a quota does not disprove its existence. It is worth noting at the very time the quota was allegedly in effect (2019) the Berkeley Police Association recognized Ofcr. Michalczyk as its Officer of the Year.[22] Two years later a supervising sergeant recognized his (and Ofcr. Stern's) vigor on the Bike Unit, attached as Exhibit 2.[23]

The Bike Unit (and its predecessor Downtown Task Force) was intended to increase police presence to deter crime. Because a bike officer could be said to be "closer" to the public than a car-borne officer, I would expect a Bike Unit officer to see more instances of crime directly and to respond more rapidly to citizen reports of crimes. This expectation is broadly fulfilled by the relative proportions of arrest types reported in Table 3 below.

In particular, 50% of DTF/Bike Unit arrests were made pursuant to direct observation by the officer (vs. 38% for the rest of BPD). The proportion of Bike Unit arrests due to citizen identifications was also somewhat greater (18% vs. 15%). The shares due to warrant service – aggregating warrants from BPD and outside jurisdictions, felonies and misdemeanors – were equal (15%) between the Bike Unit and the rest of the BPD.

In summary the DTF/Bike Unit arrest type mix shown in Table 3 broadly reflects a more up-close community policing approach than the rest of the BPD. The variation of arrest types across Bike Unit officers does not immediately suggest to me a Unit-wide quota based on the type of arrest.

[22] Berkeley Police Association, December 12, 2019, https://www.facebook.com/BerkeleyPoliceAssoc/posts/pfbid02kCFphZQkQLccoszcUMBtVQAxDsN5tmocjdKumwetFAycNN12zzK3KsZXcKs2Bftkl

[23] Berkeley Police Department Memorandum, *Commendation for Officers Michalczyk and Stern*, April 21, 2021, p. 72 in PAB Special Meeting Packet (part 1 of 3), April 27, 2022, https://berkeleyca.gov/sites/default/files/legislative-body-meeting-attachments/2022.04.27.PAB_.Pkt%281of3%29.pdf. Attached hereto as Exhibit 2.

Table 3. Arrest Type Proportions, DTF/Bike Unit vs. BPD, 2018-2022

	Kacalek	Breaux	Michalczyk	Pickett	Schikore	Seaton	Shedoudy	Stern	DTF/ Bike Unit	Rest of BPD
On-View by Officer	50%	43%	53%	32%	59%	58%	46%	40%	50%	38%
On-View by Citizen	13%	14%	21%	14%	6%	21%	24%	17%	18%	15%
Warrant	2%	17%	12%	24%	28%	11%	8%	17%	15%	15%
Susp. Of Felony	31%	14%	13%	19%	4%	9%	14%	23%	14%	27%
Field Cite	4%	10%	0%	11%	2%	2%	7%	4%	3%	5%
Other Arrest	0%	2%	0%	0%	1%	0%	0%	0%	0%	1%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Did the Bike Unit Charge Different Violations From the Rest of BPD?

Ex-Ofcr. Shedoudy has alleged the DTF/Bike Unit under Sgt. Kacalek used "questionable legal tactics that included stop and frisk, probation searches with no reasonable suspicion of a crime, and a very loose interpretation of stay-away orders from UC Berkeley."[24] The available *arrest* data do not directly measure Bike Unit *search* behavior but they do indicate the frequency that officers (claimed to have) found probable cause that certain statutory violations could be charged to make an arrest.

The top ten statutory violations charged by the Bike Unit and by the rest of BPD over the sample period 2018-2022 are shown in Table 4. These statutory violations (*charges*) can be grouped into meaningful categories of the California Penal Code[25] as follows:

- *Warrants* for arrest issued by a court pursuant to a probable-cause statement by BPD or another law enforcement agency, for felony or misdemeanor offenses;[26]
- *Violation of a court order*, including *probation* for felony (f) or misdemeanor (m) offenses, or prohibition of some other activity (e.g. a stay-away order);[27]

[24] "November 10, 2022, Email from Corey Shedoudy," supra n. 1, p. 36
[25] California Penal Code, https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=PEN&tocTitle=+Penal+Code+-+PEN
[26] Cal. P.C. §§ 813-829, The Warrant of Arrest. Note that the Table 4 proportions for Warrant arrests are lower than in Table 3 because other offenses for a given arrest may have been reported in Table 4.
[27] Cal. P.C. §§ 1203.2 (felony & misdemeanor), 166(A)(4)

- *Substance abuse*, specifically possession of drug paraphernalia or methamphetamine, or public intoxication;[28]
- *Property crime*, specifically petty theft (value less than $950) or burglary;[29] and
- *Resisting arrest* incident to apprehension for some other offense.[30]

These listed charges in Table 4 constituted 63% of Bike Unit arrests but only 44% of arrests by the rest of BPD, consistent with more diffuse crime patterns across the wider city.

Table 4. Arrest Charge Proportions, DTF/Bike Unit vs. BPD, 2018-2022

Charge	Kacalek	Breaux	Michalczyk	Pickett	Schikore	Seaton	Shedoudy	Stern	DTF / Bike Unit	Rest of BPD
Warrant*	6%	12%	11%	18%	21%	10%	7%	12%	12%	11%
Probation violation (m)	10%	7%	15%	8%	11%	15%	16%	11%	13%	5%
Probation violation (f)	4%	5%	2%	1%	2%	3%	2%	2%	2%	4%
Violation of court order	5%	0%	4%	1%	5%	3%	3%	1%	3%	1%
Poss. of drug paraphernalia	7%	9%	14%	11%	9%	9%	11%	14%	12%	5%
Poss. of meth-amphetamine	3%	4%	8%	5%	7%	6%	5%	7%	7%	4%
Public intoxication	7%	2%	2%	5%	4%	6%	3%	2%	3%	3%
Petty theft	2%	3%	9%	8%	1%	6%	11%	7%	7%	4%
Burglary	1%	0%	1%	0%	1%	1%	1%	1%	1%	4%
Resisting arrest	4%	2%	3%	4%	2%	4%	4%	5%	3%	3%
Subtotal	48%	44%	69%	61%	63%	64%	63%	62%	63%	44%
Other	52%	56%	31%	39%	37%	36%	37%	38%	37%	56%
Grand Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

* Warrant = BPD & Outside Agency, felony (f) & misdemeanor (m) Poss. = possession

The Bike Unit executed warrants in approximately the same proportion of its arrests (12%) as the rest of BPD (11%), and arrested approximately the same proportion due to property crime (both totaling about 8%) and for resisting arrest (both 3%).

[28] Cal. P.C. §§ 11364(A), 11377(A), 647(F)
[29] Cal. P.C. §§ 484(A), 459
[30] Cal. P.C. § 148(A)(1)

Bike Unit arrests for violation of court orders were about twice as frequent relative to the rest of BPD, especially for misdemeanor probation violation (13% vs. 5%) and other court orders (3%, about triple BPD's 1%).

This relatively greater frequency bears upon the "questionable legal tactics" that ex-Ofcr. Shedoudy has alleged. It is noteworthy that, among Bike Unit members, the ex-officer made proportionately the most arrests for misdemeanor probation violation (16% of his total) and approximately the Bike Unit average (3%) for violation of court orders (e.g. stay-aways).

Bike Unit arrests for substance abuse were about twice as frequent relative to the rest of BPD, particularly possession of drug paraphernalia (12% vs. 5%) and possession of methamphetamine (7% vs. 4%).

The prevalence of drug abuse in the Bike Unit's territory – and consequent arrests – should come as no surprise to anyone who walked the streets of downtown Berkeley (especially Shattuck Avenue from Hearst Ave. south to Derby St.) or south of campus (including Peoples Park), particularly in the 2019-2022 period.

For example, on August 30, 2021, about 7:30 PM, I walked past an encampment on the southeast corner of Shattuck Ave. and Blake St. Three men focused intently on a vessel they held over a camp stove. They glowered at me as I passed, seemingly irritated at my presence on a public street corner. A fourth man wearing a blanket in the manner of a cape danced with a nearby streetlight pole, oblivious to the world. I later learned that, two hours later at that site, a BPD officer revived a man who may have overdosed on fentanyl.[31] The encampment, the glowering, the oblivion, the overdose has become all too typical in Berkeley, particularly in the Bike Unit's territory.

Bike Unit arrests solely for resisting arrest were slightly more frequent than for the rest of BPD. Arrests for which the only statutory violation listed is 148 (A)(1) (resisting the arrest itself) naturally invite scrutiny to determine whether the arrest was otherwise baseless – a possible abuse of police discretion – or whether a legitimate basis for arrest was not captured in the dataset. In the data 20 of the BPD's 8,940 arrests were solely for resisting arrest, or a rate of 0.22%. The corresponding rate for the Bike Unit was 4 of 1,390 arrests, or 0.29% (slightly higher, implying 1 more such arrest by the Bike

[31] Berkeley Police Department, *Unresponsive man revived with Narcan*, August 31, 2021, https://berkeleyca.gov/community-recreation/news/unresponsive-man-revived-narcan

Unit than if the BPD rate had obtained). This difference does not point toward a quota being satisfied with this potentially worrisome cause for arrest.

In summary the DTF/Bike Unit mix of charges (statutory violations) is more heavily weighted toward probation violations and substance abuse violations than the rest of the Police Department. Whether this emphasis reflects *lowered thresholds* below Constitutionally and Departmentally acceptable standards, or *higher prevalence* among the arrestee community in the Bike Unit territory, is an open question with the data in hand.

Were Bike Unit Arrests Racially Discriminatory?

Ex-Ofcr. Shedoudy has alleged a "practice of…racism…inside that [DTF/Bike] unit."[32] The arrest data can identify what the Bike Unit officers *did* in practice, but not what they *felt* in principle or attitude. The racial categorization of each Bike Unit officer's arrests, and for the DTF/Bike Unit as a whole and for the rest of the BPD, is presented in Table 5.

Table 5. Arrestee Race Proportions, DTF/Bike Unit vs. BPD

Race	Kacalek	Breaux	Michalczyk	Pickett	Schikore	Seaton	Shedoudy	Stern	DTF/ Bike Unit	Rest of BPD
Black	42%	52%	48%	54%	30%	44%	44%	51%	47%	50%
White	52%	27%	41%	31%	51%	40%	37%	39%	40%	28%
Asian	0%	2%	1%	3%	5%	1%	2%	1%	2%	3%
Hispanic	2%	17%	8%	10%	9%	12%	13%	5%	9%	14%
Other	4%	2%	3%	3%	4%	3%	4%	4%	3%	5%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

As a unit, the DTF/Bike Unit arrested proportionately fewer Black and Hispanic persons than the rest of the BPD as a whole (Black: 47% vs. 50%, Hispanic: 9% vs. 14%), and markedly proportionately more white persons (40% vs. 28%).

The variation across Bike Unit officers displays no distinct pattern. Of the Bike Unit members, Ofcr. Pickett arrested proportionately the most Black persons (54%); Sgt. Kacalek arrested proportionately the most white persons (52%); Ofcr. Schikore arrested proportionately the fewest Black persons (30%); while Ofcr. Breaux arrested

[32] "November 10, 2022, Email from Corey Shedoudy," supra n. 1, p. 36

proportionately the fewest white persons (27%) but proportionately the most Hispanic persons (17%, nearly twice the Bike Unit average).

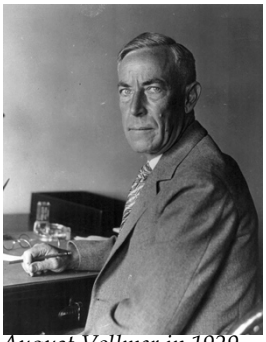
As the Center for Policing Equity summarized in 2018, at least two competing but not mutually exclusive explanations could be at work: *community factors* such as racially disparate crime rates, and *policing factors* whereby officer discretion results in observed differences.[33] It would be premature to assign variation only to policing factors from outcome data such as in Table 5. Additional information such as text messages among the Bike Unit could be illuminating.

In summary, compared to the rest of the Berkeley Police Department during the sample period 2018-2022, the DTF/Bike Unit racial disparities of arrests are weighted more heavily toward white arrestees and less toward Black and Hispanic arrestees. Nonetheless there persists a disparity in arrests of Black persons relative to their proportion of Berkeley residents due to a mix of community and policing factors. But I do not observe the operation of a quota according to race – a traditional concern about quotas – from the proportions shown for Bike Unit officers in Table 5.

Berkeley's History Against Arrest Quotas

August Vollmer, the first chief of the Berkeley Police Department, was applauded by an audience of his fellow police chiefs in 1919 when he identified arrests as an incomplete measure of public safety:[34]

> "Police efficiency should be measured by the amount of crime, poverty and sickness which is prevented on the beat, and not by the number of arrests made by the officer. (Applause)"



August Vollmer in 1929
Photo: Library of Congress

(Chief Vollmer's speech is attached as Exhibit 3. I commend it as a marker of police thought from a century ago that could inform today's Reimagining Public Safety initiative.)

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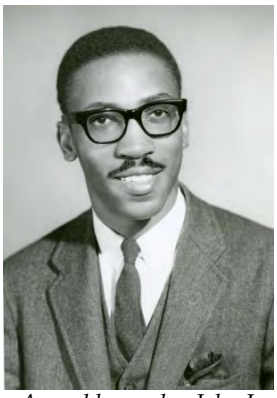
[33] Center for Policing Equity, *Berkeley Police Department - National Justice Database City Report*, May 2018, pp. 7-8, in *Report and Recommendations From Mayor's Fair and Impartial Policing Working Group*, February 23, 2021, https://berkeleyca.gov/sites/default/files/documents/2021-02-23%20Special%20Item%2001%20Report%20and%20Recommendations.pdf (pp. 51-52 of 201)

[34] August Vollmer, "The Policeman as a Social Worker," *Proceedings of the 26th Convention of the International Association of Chiefs of Police*, New Orleans, Louisiana, April 14-16, 1919, p. 36. Attached hereto as Exhibit 3.



Assemblymember John J. Miller in 1969. Photo: California State Library

Since 1976 California has legislated against arrest quotas[35] due to the advocacy of Assemblymember John J. Miller, who chaired the Assembly Judiciary Committee while representing Berkeley and Oakland in the then-13th District. As he said at the time,[36]

> "[A police officer] will feel under an obligation to write a ticket even in those cases where a citizen may not have committed a crime beyond all reasonable doubt…[It] goes against our historical concepts of justice and fair play."

(Asm. Miller represented Berkeley until 1978 when he was succeeded by Elihu Harris. He then served on the California First District Court of Appeal until his death in 1985.)

Recent legal commentary has explored *police quotas*, of which arrest quotas are an important variety. Professor Shaun Ossei-Owusu of the University of Pennsylvania Carey Law School has explained that, despite objections from police unions and racial minorities, arrest quotas are still practiced, even in jurisdictions in which they have been prohibited.[37] Quotas risk sacrificing quality (particularly legality) for quantity in undesirable ways.[38] His article is attached as Exhibit 5.

Shaun Ossei-Owusu Photo: Penn Carey Law School

(To continue the Berkeley theme of this section: Professor Ossei-Owusu earned his J.D. from Berkeley Law School and his Ph.D. from the U.C. Berkeley Department of African American Studies.)[39]

Issues of Potential Interest to the Police Accountability Board

The PAB should continue its investigation, I hope with the benefit of this memorandum's findings. I suggest several investigative directions:

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[35] California Vehicle Code §§ 41600-41603, *Arrest Quotas*, supra n. 2. Also attached as Exhibit 1.
[36] *Berkeley Gazette*, "Measure to outlaw CHP's ticket quotas," July 22, 1975, p. 1. Attached as Exhibit 4.
[37] Shaun Ossei-Owusu, "Police Quotas," 96 *New York University Law Review* 529-605, available as Faculty Scholarship at Penn Law, https://scholarship.law.upenn.edu/faculty_scholarship/2835. Attached as Exhibit 5.
[38] E.g. Ossei-Owusu, supra n. 37, pp. 579-580, "Thin Evaluations," esp. fn. 305
[39] Shaun Ossei-Owusu LPS '08, https://www.law.upenn.edu/faculty/oss

1. Ex-Ofcr. Shedoudy has characterized the text messages he has already released as "the tip of the iceberg," and that he would release "hundreds of DTF/Bike Force text messages" at the conclusion of his arbitration (appealing his termination from BPD service).[40] **This Board should request those additional text messages from ex-Ofcr. Shedoudy** for review to more fully understand the operation of the alleged arrest quota that my analysis in this memorandum has failed to detect.
2. Ex-Ofcr. Shedoudy has alleged that the Bike Unit was ordered to perform "probation searches with no reasonable suspicion of a crime."[41] Table 4 above indicates that (among Bike Unit members) ex-Ofcr. Shedoudy arrested proportionally the most persons for misdemeanor probation violations. **This Board should invite the ex-officer to disclose whether the alleged arrest quota induced him to make arrests that were, in retrospect, unjustifiable in the eyes of the law.**
3. The strongest evidence that a quantitative target may have driven arrests concerned Ofcr. Michalczyk's "Operation 100." Table 2 and Figure 2 illustrate that Ofcr. Michalczyk has arrested far more people than any other BPD officer in the past five years. **This Board should seek Ofcr. Michalczyk's account of this activity,** including his perception of the beat he has patrolled, and whether Bike Unit practices (including but not limited to a quota) have given rise to it. Under the City Charter this Board can compel attendance, and even subpoena, an officer,[42] but I do not envision this account to require those measures. The purpose of my suggestion is for the Board to review this particular Police Department practice so as to understand it.
4. The arrest *quantities* reported in this memorandum are separate from their *quality*, most notably their adequacy for prosecution by the Alameda County District Attorney (ACDA). **This Board should seek from ACDA the prosecutorial outcomes for the cases brought by Bike Unit arrests and for the**

[40] "November 10, 2022, Email from Corey Shedoudy," supra n. 1, p. 37, 36
[41] "November 10, 2022, Email from Corey Shedoudy," supra n. 1, p. 36
[42] Berkeley City Charter, Article XVIII, *Police Accountability Board and Director of Police Accountability*, § 125(3)(a)(5), https://berkeley.municipal.codes/Charter/ArtXVIII

Department as a whole. In particular, charges that ACDA deems *legally insufficient* (possibly indicating inadequate police work) should be distinguished from charges dropped for other reasons such as the exercise of prosecutorial discretion. The consultation of an outside source as to arrest quality would benefit the Board's understanding of BPD arrest activity.

5. A separate (albeit coarse) measure of an arrest's quality is whether it has given rise to a citizen complaint to the Board, the Police Department, or the courts. **This Board should seek from BPD all complaints (indexed with the BPD Case Number) in the past 5 years to determine whether any were connected to the Bike Unit**, and how they compared to complaints about the rest of BPD.

   Any inquiry by this Board into legal actions resulting from BPD arrests would likely compete with Berkeley Copwatch's recruitment of class-action plaintiffs to sue the City of Berkeley,[43] so I am less optimistic about that effort.

6. There has been much recent discussion of an early intervention system (EIS) to "inform goals and strategies and improve [BPD] accountability and transparency."[44] **This Board should consider in its investigation the informational requirements of an EIS** capable of (correctly) detecting an alleged arrest quota, including in the case of the energetic Ofcr. Michalczyk.

   Would information outside the Police Department be required to correctly identify an undesirable (indeed, illegal) practice such as an arrest quota? If so, what? This consideration may help set realistic expectations for the performance of the EIS ultimately adopted (now in the acquisition process).

7. The quantitative analysis presented here has compared the Bike Unit (and its individual officers) to the rest of BPD to determine whether the Bike Unit exhibited problematic behavior due to the alleged arrest quota on its operations. Such problematic behavior has not been found. This analysis has *not* established that the rest-of-BPD comparator is free from problematic behavior, contrary to

[43] Berkeley Copwatch, *BPD Textgate Scandal*, supra n. 20, "We are now in a process of gathering information and looking for plaintiffs for a class-action lawsuit" (accessed August 9, 2023)
[44] Councilmember Harrison and Vice Mayor Bartlett, *Referral $100,000 to the June 2023 Budget Process to Design a Comprehensive Berkeley Police Early Intervention and Risk Management System*, April 11, 2023, https://berkeleyca.gov/sites/default/files/documents/2023-04-11%20Item%2025%20Referral%20100%2C000%20to%20the%20June%2C%202023.pdf

the assertions of one City official.[45] Indeed, these assertions were rejected by deputy city manager LaTanya Bellow: "We regret that the investigation's findings were characterized too broadly in the press."[46] I quite agree.

The analysis here *has* established that Black persons in Berkeley are arrested by both the Bike Unit and the rest of BPD at a rate more than six times their proportion of the City's residential population. Table 6 compares the racial proportions of Table 5 to the proportions from the 2020 Census.[47]

Table 6. Berkeley Population vs. Arrestee Race Proportions, DTF/Bike Unit & BPD

Race	2020 Census	DTF/ Bike Unit	Rest of BPD
Black	7.6%	47%	50%
White	50.2%	40%	28%
Asian	19.9%	2%	3%
Hispanic	13.7%	9%	14%
Other	8.6%	3%	5%
Total	100%	100%	100%

This disparity likely traces to the community factors and policing factors touched on by the Center for Policing Equity.[48] In any event the true measure of fair and impartial policing would be whether the *threshold of arrest* across the racial categories is equal. Assessing such a threshold turns out to be a remarkably difficult technical problem.[49] Arrest data such as in Tables 5 and 6 do not suffice to establish that proposition, so sliding from (mathematical) racial *disparity* to (behavioral) racial *bias* would be unjustified at this stage.

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[45] Emilie Raguso, "No arrest quotas, no racial bias: Berkeley police bike team cleared of claims by fired cop," The Berkeley Scanner, July 20, 2023, https://www.berkeleyscanner.com/2023/07/20/policing/berkeley-police-bike-team-cleared-systemic-problems/ ("'The investigation found that the department does not have a practice of racial bias,' said city spokesman Matthai Chakko. 'The investigation found that the department does not have any arrest quotas.'")

[46] LaTanya Bellow remarks, City Council regular meeting, July 25, 2023, 2:12:01-2:13:24, http://berkeley.granicus.com/player/clip/5093?view_id=5&redirect=true&entrytime=7921&stoptime=8024&autostart=0&embed=1&redirect=true&h=40d32dbeb55e5e9296a17e679bea5bb0

[47] Wikipedia, *Berkeley, California – Demographics – 2020 Census*, https://en.wikipedia.org/wiki/Berkeley,_California#2020_census

[48] Center for Policing Equity, supra n. 33

[49] Camelia Simoiu, Sam Corbett-Davies, and Sharad Goel, "The Problem of Infra-Marginality in Outcome Tests for Discrimination," 11 *The Annals of Applied Statistics* 3: 1193-1216, September 2017, https://5harad.com/papers/threshold-test.pdf

A police officer's task is to arrest the arrest-worthy, not some arbitrary percentage of the population. For the arrestee population to match the residential population along some dimension would require (incongruously enough) a sort of quota. **This Board should remain aware of the range of factors that lead to arrest outcomes** as displayed in Tables 5 and 6. At this stage those outcomes neither indict nor exonerate the Police Department as to racial discrimination.

Conclusions

1. I do not find quantitative evidence of an arrest quota despite the attention of the Bike Unit supervisor to the count of arrests.
2. I do find that one particular Bike Unit officer has made an unusually large number of arrests during the past five years.
3. The mix of Bike Unit arrest types is broadly consistent with the community policing orientation of the Bike Unit.
4. The mix of statutory violations charged is more heavily weighted toward drug offenses and probation violations than the overall BPD, possibly a consequence of the types of offenders found in the Bike Unit's territory.
5. The racial disparity in Bike Unit arrests is more heavily weighted toward white arrestees than arrests by the rest of the Police Department, but still exhibits the same disparity of arrests of Black persons that has long characterized police activity in Berkeley.

I recommend that the Police Accountability Board continue its investigation to understand more completely the alleged arrest quota scheme and whether individual officer behavior suffices to explain observed arrest patterns. I also recommend that other elements beyond the alleged arrest quota – notably, racist and malicious communications during City work time – be fully investigated.

Exhibit 1 – California Vehicle Code §§ 41600-41603 Arrest Quotas

Exhibit 2 – Commendation for Officers Michalczyk and Stern, April 21, 2021

Exhibit 3 – August Vollmer, "The Policeman as a Social Worker," April 1919

Exhibit 4 – *The Berkeley Gazette*, "Measure to outlaw CHP's ticket quotas," July 22, 1975

Exhibit 5 – Shaun Ossei-Owusu, "Police Quotas," *New York University Law Review*, May 2021

EXHIBIT 1

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VEHICLE CODE - VEH

DIVISION 17. OFFENSES AND PROSECUTION [40000.1 - 41610] *(Division 17 enacted by Stats. 1959, Ch. 3.)*

CHAPTER 7. Arrest Quotas [41600 - 41603] *(Chapter 7 added by Stats. 1976, Ch. 1111.)*

41600. For purposes of this chapter, "arrest quota" means any requirement regarding the number of arrests made, or the number of citations issued, by a peace officer, or parking enforcement employee, or the proportion of those arrests made and citations issued by a peace officer or parking enforcement employee, relative to the arrests made and citations issued by another peace officer or parking enforcement employee, or group of officers or employees.

(Amended by Stats. 2002, Ch. 105, Sec. 1. Effective January 1, 2003.)

41601. For purposes of this chapter, "citation" means a notice to appear, notice of violation, or notice of parking violation.

(Added by Stats. 1976, Ch. 1111.)

41601.5. For purposes of this chapter, "agency" includes the Regents of the University of California.

(Added by Stats. 2002, Ch. 105, Sec. 2. Effective January 1, 2003.)

41602. No state or local agency employing peace officers or parking enforcement employees engaged in the enforcement of this code or any local ordinance adopted pursuant to this code, may establish any policy requiring any peace officer or parking enforcement employees to meet an arrest quota.

(Amended by Stats. 2002, Ch. 105, Sec. 3. Effective January 1, 2003.)

41603. No state or local agency employing peace officers or parking enforcement employees engaged in the enforcement of this code shall use the number of arrests or citations issued by a peace officer or parking enforcement employees as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the agency. Those arrests or citations, and their ultimate dispositions, may only be considered in evaluating the overall performance of a peace officer or parking enforcement employees. An evaluation may include, but shall not be limited to, criteria such as attendance, punctuality, work safety, complaints by civilians, commendations, demeanor, formal training, and professional judgment.

(Amended by Stats. 2016, Ch. 99, Sec. 7. (AB 1953) Effective January 1, 2017.)

EXHIBIT 2

BERKELEY POLICE DEPARTMENT MEMORANDUM

April 21st, 2021

To: Chief Louis
Via Chain of Command

From: Sergeant Bonaventure S-10

Re: Commendation for Officers Michalczyk and Stern

On 4/10/21, approximately 1030 hours, Bike Force Officers Greg Michalczyk and Thomas Stern were proactively patrolling the downtown area when dispatch broadcast a bank robbery in progress at Bank of America, located at . Within 1 minute of the broadcast, Officers Michalczyk and Stern arrived on scene and exited their vehicle. As they were approaching the bank, Officers Michalczyk and Stern observed a male, later identified as , walking in a rapid pace away from the bank. As was walking away he peered over his shoulder, looked directly at Officers Stern and Michalczyk, and began to run away. Both Officers chased after as he ran across the street and into a Wells Fargo Bank.

In an effort to detain before he could victimize anyone else inside Wells Fargo Bank, Officers Stern and Michalczyk drew their firearms and entered through the front doors.

As Officers Stern and Michalczyk entered the bank, they saw leaning against a table with his right hand concealed behind his back. They immediately gave commands to show his hands, however, he did not immediately comply. After several commands, exposed his right hand which was holding a significant amount of U.S. currency. then began to walk away from the Officers and towards a glass door that connected the bank to another business. Both Officers Michalczyk and Stern ran towards , grabbed him before he could escape, and placed him in handcuffs.

A search of revealed he was in possession of a large knife and the U.S. Currency that he stole from the bank.

A records check revealed that was on parole for prior bank robberies.

Officers Michalczyk and Stern deserve to be commended for their proactive policing and their courageous effort to detain a dangerous parolee who had just robbed a bank, and ran into another bank to elude capture. If it was not for their quick response, would have gotten away with bank robbery that day. If it was not for their courage, would have had the time to victimize more Berkeley Citizens within the second bank.

EXHIBIT 3

International Association
. . . of . . .
CHIEFS of POLICE

POLICE

Proceedings 26th Convention

NEW ORLEANS, LOUISIANA
April 14, 15 and 16, 1919

President Long: We shall next hear a paper prepared by Chief Vollmer, of Berkeley, California. (Applause).

Chief Vollmer: Mr. President, ladies and gentlemen: I always esteem it a privilege to prepare a paper. When the President calls upon me to prepare a paper, I am pretty well flattered. I think it is a wonderful thing to get an opportunity to present your views, even if they may be wrong. It gives the other fellow an opportunity to tell you that you are wrong, and you may get a good idea.

The subject of my paper is: "The policeman as a social worker."

Crime prevention, that all-important police function, is compelling the attention of some of the world's greatest thinkers, and though

the appreciation of criminology as a science is still in its infancy, and the surface has been merely scratched, sufficient light has been thrown on the subject to prove that old methods of dealing with crime must be changed, and newer ones adopted. The time to begin is past but the time to keep going what has been started is now.

Ordinarily, the policeman feels that his duty is well done when the offender is promptly apprehended and placed behind the bars. His failure to note that the prisoner may be the sole support of a large family, who, left to shift for themselves, must steal or starve, is only one of numerous mistakes that our peace guardians are making, in their efforts to serve the public faithfully.

Big, healthy, honest, and kind, ready to die without hesitancy when duty calls them, their usefulness is impaired by reason of their ignorance of the many causes of delinquency. Even though the experienced policeman knows that poverty, unemployment, defective home conditions, bad companions, sickness, alcohol, gambling and prostitution are crime factors, he does not feel that it is any part of his duty to assist in the correction or elimination of these great contributors to criminality.

Co-operation with social service agencies is out of the question; they can do nothing to help him, nor has he the time nor the inclination to assist them. Policemen do aid the injured, give the needy lodger a cot to sleep on, search for missing persons, and render other services not necessarily police duties, but here ends their activities as humanitarians.

However, the pendulum is beginning to swing the other way, and the policeman is beginning to realize his power as a social worker, and the future is frought with wonderful possibilities, if all will realize their potential worth.

The policeman is learning that dependency, criminality and industrial unrest have a common origin, and that upon him rest far more important and far greater obligations than the mere apprehending and prosecuting of lawbreakers. He is fast learning that dealing with criminals after the evil habits have been formed is a hopeless task as far as the eradication, or even lessening of crime is concerned.

If he would serve his community by reducing crime he must go up the stream a little further and dam it up at its source, and not wait until it is a rushing torrent, uncontrollable and resistless. Moreover, if he would succeed in his efforts he must utilize to the fullest extent every helpful agency in the community, such as schools, churches, recreation and juvenile departments, public welfare and employment bureaus, clinics, dispensaries, hospitals and fraternal and labor organizations. Co-operation is also necessary with character forming organizations, such as Boy Scouts, Campfire Girls, well organized boys' clubs, community social centers and auxiliary and junior police forces.

Nor must the modern police overlook the importance of publicity in social police work, since after all is said and done, unless the public is informed his efforts to bring about a better state of affairs will not be fruitful of results. This most desirable publicity of police social work should be spread by the citizens of the community and by proper newspaper propaganda.

And the work which Major Pullman has just referred to is one of the things that we should keep going, and keep going fast.

Much desirable publicity can also be spread by means of special educational circularization, and not by any means the least important, an occasional instructive as well as interesting moving picture of such police work should be presented.

Such moving pictures as have been spoken of by Major Pullman just

now, and others, think, specially prepared by the Los Angeles Police Department, showing the things that actually confronts the policeman, showing the difficulties and the temptations that beset him, showing after all, that the policeman is not such a bad fellow.

You will ask what can the policeman do, and how shall he proceed to get the best results. My answer is,—fight for everything which helps to decrease crime and dependency, and in this connection a few suggestions are offered for social service work in the community and state. And let me add that these are merely a few suggestions. There are many, many possibilities.

In many cities the schools are unable to accommodate all of the school children. This results in many of them being on the streets, with the attendant evils. The policeman can do his share to correct this condition by stating the facts to the voters whenever an opportunity is afforded.

It is also true that no city in this country gives sufficient thought to the physical welfare of the children. Supervised recreation grounds are few in number, and we know from experience that much of our juvenile problem may be traced to misdirected eneregy. Here again, the policeman in his rounds, and in contact with people generally, can be useful by calling attention to the community's need for sufficient play ground space for children to give expression to their play tendencies.

The school and the church as community social centers have passed the experimental stage in several cities. As agencies for the Americanization of the community's foreign element the school and the church community social centers rank first. Social centers will displace the saloons, the dance halls and gambling dens and will serve to dispel or prevent other social factors of evil tendencies. Social center activities should be encouraged in every way.

The child study departments in our schools are of great importance in detecting the child of unusual abilities or disabilities, thus making it possible to give timely physical, mental and moral direction to the potentially dependent or delinquent child as well as to give wholesome encouragement and special direction to the child of more than average ability. The data which the child study department is able to furnish will be of immense value to the teachers in our schools in training our chlidren toward better citizenship.

Free clinics and dispensaries are invaluable in the community, but frequently are handicapped by lack of fnuds. Statistics are not wanting of cases of delinquency directly attributable to physical abnormalities, such as defective vision, defective hearing, defective teeth, adenoids, and numerous other pathological conditions. Poor people may be unable to employ the services of a family physician to correct these defects, and if there are no well conducted clinics to which the child can be taken for diagnosis and treatment, there is always the possibility that the police may have to deal with the child as a delinquency problem.

Public welfare bureaus, like the clinics and dispensaries, actually have to fight for existence in this civilized country. Their efforts are often viewed with suspicion, due to the lack of knowledge of social service work. Often the public does not understand that the rehabilitation of the family by scientific social service is more beneficial than sporadic donations of money, food, fuel, clothing and shelter. The public welfare bureau performs excellent crime preventive work, and should have the support of every police official. Where is there a police department that has not dealt with the man or woman who in desperation has stolen to keep the family from starving, and further,

that has not dealt with the product of the other family which starved rather than steal?

Considering at this time only the unemployed, and not the unemployable (the latter being institutional problems), the police should not only advocate the establishment of municipal, state and federal employment bureaus, but in addition thereto, should cooperate with such bureaus to the fullest extent in finding positions for the deserving and capable. Friendly relations must be established with labor unions as their assistance is occasionally required in these cases.

Furthering the cause of laws to provide funds for orphans, industrial compensation for the injured, prevention of child labor, eight hour labor laws, probation laws, prohibition, veneral disease control and other legislative acts having for their purpose the prevention of feeblemindedness, insanity, criminality, prostitution, dependency, and the protection of the family, is the bounden duty of every member of the police force.

From investigations conducted by Healy, Bowers, Glueck, Stearns, Ball, Hoag and others, we are safe in assuming that at least one-half of our criminals and prostitutes are persons suffering from mental peculiarities or abnormalities. This immediately suggests the need for psychopathic clinics in juvenile detention homes, police departments and state prisons in order that we may reclaim those who may be helped and permanently confine the defective or insane criminal, who will always be a menace to society if permitted to roam at large. The psychopathic clinics should be identified with a state psychopathic hospital which will not only serve as a clearing house for their activities, but will also care for the incipient mental and nervous cases. The policeman can render no greater service to the community than to participate in the movement to establish psychopathic clinics and hospitals in his city and state.

I may say, just at this moment, before going further, that the Boston psychopathic hospital had sent to them, year before last, over 1500 suspected cases of venereal disease, and out of that group, just one fourth of them were found to be suffering from syphilitic infection, and this institution sent out their workers and brought in to the institution the other members of the families, and in that one-fourth of those persons who were found suffering, one-third of the persons who were brought in—coming willingly in most cases—were actually found to be infected and not known to be infected. Now, we know that 25 per cent of all of our insane are syphilitic. You will find the figures are absolute in every institution throughout the country.

Every humane and intelligent official recommends and should work for, the establishing of industrial farms for prostitutes, drunkards, drug addicts, and criminals, and more modern institutions and a more sane treatment for the insane or defective criminal.

Any one who has given thought to the conditions in the average city prison and county jail must know that they are schools for crime, and few men profit morally by their confinement in these institutions. Some better method of dealing with minor offenders should be devised. Who, assuming that the official has the proper training, is better qualified to solve this problem than the policeman?

We have discussed briefly what can be done by the policeman in the city and state, let us next consider the neighborhood, or, in language more familiar to the police, the beat. No single individual in the community has more opportunities to do good, solid, constructive social service than the intelligent, sympathetic and trained policeman. His intimate knowledge of the character of the people residing on his beat makes it possible for him to acquaint immigrants liv-

ing therein with the laws of this country, protect them from petty political and business grafters, as well as from other unscrupulous persons, and help them to become decent, law-abiding citizens.

By close co-operation with schools and public welfare agencies, he will soon learn who the potential delinquents and dependents are, and can do much to assist in preventing them from becoming social failures. Boy gangs may be transformed into juvenile police and taught to be friendly helpers, or they may be helped to join boy scouts or similar boys' organizations, and through these agencies become helpful members of the community.

Wayward girls may be saved from taking the final plunge into a life of evil, and many homes saved from disgrace and sadness, by the kindly counsel of the policeman. Sick and poor may be directed to the established places for their relief. These cases should be carefully followed up and nothing left undone which would be of assistance in their rehabilitation.

Police efficiency should be measured by the amount of crime, poverty and sickness which is prevented on the beat, and not by the number of arrests made by the officer. (Applause.)

In his daily contact with cases of delinquency the policeman has unlimited opportunities to demonstrate his ability as a social worker and public benefactor. The few cases cited below illustrate what may be done if policemen are properly trained.

Now, let me say to you that the men who took care of these cases, the men who followed up the cases that I am going to mention, are the old-time policemen that you and everybody here knows, men who have been trained, but they were the old-type, the old fellow who believed that the way to suppress crime was to knock them down and bring them in.

Annie,—aged 14, stole five dollars from the purse of a fellow employee who reported the theft to the police. The officer detailed discovered that Annie had been systematically pilfering money and articles from other employees. He learned, too, that these thefts began shortly after she had been engaged by the firm. During the examination the girl gave as her reason for taking money, "I just wanted to look nice, like the other girls." The officer visited the home and found that her family were living in an unclean and poorly furnished three-room house. Because the father earned but little money it was impossible to provide sufficient wholesome food for the family. The mother was tubercular, and the father an unstable and nervous fellow. Two sisters died in infancy. One sister now ten years of age was suffering from heart trouble, and one eight year old brother was physically weak. Annie's school teacher said that she was an ordinary pupil until she reached the fifth grade; at the age of thirteen she left the school, at which time she was doing poor work in the sixth grade. She was taken to the psychopathic clinic, where it was found that she was somewhat retarded mentally. It was the opinion of the medico-psychologist that adenoids and enlarged tonsils might be responsible for her defect. Accordingly the consent of the mother and child was secured and an appointment made with the specialist at the public clinic to perform the required operations. A change in environment and employment was also recommended by the medico-psychologist, and a position was obtained for Annie in a respectable family. The rest of the family are receiving medical aid at the dispensary and some financial help through a public welfare bureau.

Harry,—aged thirteen, was arrested for burglary and turned over to his parents for attention and correction. Later this boy entered not less than twenty stores during the night hours, and took money from

the cash registers. His family history was good, no evidence of anything serious on either side. Two sisters, sixteen and eighteen, respectively, were apparently normal girls. From the family physician and parents it was learned that Harry was an ordinary boy physically. He had had measles, mumps and whooping cough when a little fellow, but had never suffered any severe ills. This child was also taken to the psychopathci clinic where it was learned that he was two years above his age. His parents accepted the suggestion made by the medico-psychologist and sent the boy to a relative in the country. It was also arranged at the same time to have him advanced two grades in his school work. From the last report received concerning this boy he is making good, absolutely, and without the advantage of the psychopathic clinic, plus intelligent handling of the case by the policeman he would have been in a reform school learning to be a real crook.

John Doe—age fifty eight years, high school teacher and inventor, was arranged on a charge of burglary. From the investigation conducted by the officers it was learned that his previous reputation for honesty in the community was excellent. Some years prior to his arrest the prisoner suffered a nervous collapse and quit teaching for two or three years. During this period he conducted a curio store in a neighboring town; there was no patronage, and he was obliged to close the doors of his place of business. He was heavily in debt and again took up teaching as a profession. His creditors crowded him for money and he eventually fell into the hands of some loan sharks. At this time he was also busily engaged in perfecting an invention which would assist in aerial navigation. Between teaching and work on his invention he was considerably overworked. From the general appearance and conduct of Doe at the time of his arrest the investigating officer came to the conclusion that he was a medical problem, despite the fact that he answered questions intelligently, and seemingly was possessed of all of his faculties. The medical examiner reported that the prisoner was a neurasthenic with morbid impulses; the result of over-work and financial worries. He was turned over to his family for care and treatment, and subsequently confined in a private sanitarium where he remained for a year or more. Through a few friends who were interested in the case, sufficient money was secured to tide the family over the difficult period immediately following his arrest. John Doe has recovered sufficiently to return to the community where he has again firmly established himself, and is regarded as one of our best citizens.

Now, I might go on and cite to you cases indefinitely. I am full of them. But it is enough to show you what may be done by the policeman.

Regardless of the policeman's efforts to contribute to social and economic betterment in the manner described above, we cannot close our eyes to the fact that crime will always be with us. Much can be done to further reduce the evil, providing we raise the educational and intellectual standard of our police departments, elevate the position of the policeman to that of a profession, eliminate politics entirely from the force, and secure the people's confidence, sympathy, respect and co-operation.

Policemen should jealously guard the reputation of their profession, and establish a code of ethics. Any and every member of the force who violates the provisions of the code should be vigorously prosecuted and expelled from the ranks. Policemens' lives must be dominated by the highest ideals if they hope to establish themselves in the affections of the people, and win for the profession such an exalted

plane that positions on the force will be sought for by the nation's best manhood. Let us speed the day when the appointment as a policeman shall be considered the greatest honor that the municipality may bestow upon one of its citizens. (Applause.)

EXHIBIT 4

THE INDEPENDENT GAZETTE

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WEATHER

Fair through tomorrow except patchy night and morning clouds along the coast. Slightly warmer with highs today and tomorrow in the 60s along the coast to low 80s inland. Lows tonight in the 50s. West to northwest winds at 10-20 m.p.h.

Measure to outlaw CHP's ticket quotas

The Chairman of the Assembly Judiciary Committee, Assemblyman John J. Miller (D-Berkeley-Oakland) said today the CHP "ticket slow-down" has persuaded him to introduce legislation out-lawing ticket quotas.

"For years we have been told that the highway patrol and various city and county traffic police do not have a quota of tickets to write," Miller said, "but recent statements by the CHP Commissioner which promise discipline and even dismissal of officers whose number of tickets fall below a certain number convinces me that an expected level of crimes is depended on by the CHP management. A quota by any other name — 'historical level of citation issuance' — is still a quota."

"If a CHP officer or any city or county police officer knows that he is expected to write so many citations, he will feel under an obligation to write a ticket even in those cases where a citizen may not have committed a crime beyond all reasonable doubt," Miller said. "It is simply unrealistic to tell the average California driver that his word is as good as that of a traffic cop in court. So the driver, I believe, has 1½ strikes against him: an officer who is pressured by his superiors to write citations; and a rubber stamp traffic court system which finds 90 percent of those cited guilty."

Miller said his legislation will prohibit ticket quotas in California for the same reason that speed traps were outlawed: "they are unfair, undemocratic and unjust. The spectacle of cities gaining revenue for the conviction of citizens, and judges creating revenue by making criminals out of those brought before them for fair trials somehow goes against our historical concepts of justice and fair play," he said.

The Bay Area legislator said he believes that traffic policemen should be guardians of safety on California streets and highways. "They should catch speeders who are endangering others and be helpful to motorists who are stranded or have flat tires. But if they find more stranded motorists on a given week than speeding motorists, should they be demoted or disciplined?"

Miller said he expects his legislation to be opposed by cities and counties "who make money off ticket quotas."

EXHIBIT 5

POLICE QUOTAS

SHAUN OSSEI-OWUSU*

The American public is slowly recognizing the criminal justice system's deep defects. Mounting visual evidence of police brutality and social protests are generating an appetite for something different. How to change this system is still an open question. People across the political spectrum vary in their conceptions of the pressing problems and how to solve them. Interestingly, there is one consequential and overlooked area of the criminal justice system where there is broad consensus: police quotas.

Police quotas are formal and informal measures that require police officers to issue a particular number of citations or make a certain number of arrests. Although law enforcement leadership typically denies implementing quotas, courts, legislators, and officers have all confirmed the existence of this practice and linked it to odious criminal justice problems such as racial profiling, policing for profit, and overcriminalization. These problems have led legislators in many states to implement statutory prohibitions on quotas. Some of these statutes are of recent vintage and others are decades old. Nevertheless, these prohibitions and their attendant litigation have escaped sustained analytical scrutiny. Legal scholars typically overlook police quotas, subsume them within other categories (e.g., broken windows policing), or give pat acknowledgment of their existence without explaining how they work.

This Article corrects these omissions and makes two arguments. First, it contends that police quotas are a significant but undertheorized feature of criminal law and procedure. Quotas make police rewards and sanctions significant features of punishment in ways that can trump criminal offending and pervert due process principles. Second, it argues that quota-based policing is a unique area where there is widespread agreement and possibilities for change. Liberals, libertarians, conservatives, police officers, police unions, and racial minorities have all criticized police quotas. These vastly different constituents have argued that quotas distort police discretion and produce unnecessary police-civilian interactions. This Article supplements these arguments with a novel descriptive, statutory, and jurisprudential account of police quotas in the United States. It offers a framework for understanding the arguments for and objections to quotas, and proposes some normative strategies that could build on statutory and litigation successes.

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INTRODUCTION

Before the Great Lockdown, criminal justice reformers across the ideological spectrum lamented "policing for profit."[1] Commentators usually discuss this practice through the more sanitized sounding category of "legal financial obligations" (LFOs).[2] The economic implications of the COVID-19 pandemic have put a spotlight on this type of predatory "cash register justice."[3] As of this writing, the National League of Cities has reported that 2,100 cities anticipate budget deficits.[4] Since hundreds of jurisdictions have relied on LFOs in the past,[5] and some have continued to do so during the crisis,[6] there is good cause for concern that LFOs will figure into an uncertain economic future. As Professor Brandon Garrett notes, "[a]fter the last financial crisis, most states ramped up on fines and fees," transformed police

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[1] DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER MCDONALD, INSTITUTE FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2d ed. 2015); Roger Pilon, *America's Frightening "Policing for Profit" Nightmare*, NAT'L INT. (Jan. 23, 2015), https://nationalinterest.org/feature/americas-frightening-policing-profit-nightmare-12094; Emma Andersson & Susan Dunn, *'Policing For Profit' Is Alive and Well in South Carolina*, ACLU (Feb. 12, 2019, 3:45 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police/policing-profit-alive-and-well-south-carolina.

[2] These LFOs include, but are not limited to: "usage fees" levied on defendants for their arrest, adjudication, incarceration, probation, and electronic monitoring; statutory fines that impose economic sanctions as punishments for crimes; and civil forfeiture laws that allow governments to confiscate money and property that are purportedly linked to crime.

[3] *See* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016) (discussing the turning of the criminal justice system into a revenue center for state courts and corrections); *see also Developments in the Law—Policing and Profit*, 128 HARV. L. REV. 1706, 1723–46 (2015) (discussing usage fees, for-profit probation supervision and civil forfeiture); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 175–78 (2020) (discussing predatory fees various U.S. cities impose on residents through excessive fines, property forfeiture, and debtors' prisons); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285–88 (2014) (describing various economic sanctions, including statutory fines, restitution, forfeitures, administrative court costs, incarceration costs, parole processing, and probation fees).

[4] NAT'L LEAGUE OF CITIES & U.S. CONF. OF MAYORS, THE ECONOMY AND CITIES: WHAT AMERICA'S LOCAL LEADERS ARE SEEING (2020), https://www.usmayors.org/2020/04/14/the-economy-and-cities-what-americas-leaders-are-seeing.

[5] *See* Mike Maciag, *Addicted to Fines*, GOVERNING (Sept. 2019), https://www.governing.com/topics/finance/gov-addicted-to-fines.html (finding through an extensive national analysis that fines fund "more than 10 percent of general fund revenues in nearly 600 U.S. jurisdictions").

[6] Brandon L. Garrett, *Guest Post: Court Fines and Fees Shouldn't Be Used to Recover Lost Revenue from Pandemic*, WASH. POST (May 12, 2020, 7:00 AM), https://www.washingtonpost.com/crime-law/2020/05/12/guest-post-court-fines-fees-shouldnt-be-used-recover-lost-revenue-pandemic ("[S]ome jurisdictions are still jailing people for unpaid debt, potentially exposing them to the novel coronavirus, which is exploding in our jails.").

officers into "revenue collectors," and relied on "our poorest citizens to fund basic functions of government."[7]

Amidst the epidemiological crisis, the summer 2020 protests inspired a new, popular reexamination of policing. Rooted primarily in anger around anti-Black police violence, the protests productively altered public opinion and amplified longstanding issues tied to the political economy of policing.[8] Concerns about cities using the police to generate municipal funds—which garnered attention after the Ferguson unrest six years ago[9]—remain on the reform agenda. But now there is closer scrutiny on the core functions of the police. Popular opinion still hews to the belief that law enforcement serves a public safety function,[10] but visual evidence of racialized police killings is applying pressure to that assumption. These instances of state violence have forced the general public to grapple with the racially and financially exploitative nature of the criminal justice system. Lurking beneath these concerns is a practice that has eluded legal scholars despite its reported prominence in criminal justice administration: police quotas.

Police quotas are formal and informal measures that require police officers to issue a particular number of citations or make a certain number of arrests. They are sometimes formal and pre-specify a quantity.[11] Other times, they are informal and premised on an implied understanding that employment actions—promotion, compensation, or discipline—will be predicated on an officer's ability to engage in a "sufficient" amount of enforcement activity.[12] Evaluative jargon such

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[7] *Id.*

[8] *See* Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html (noting leftward public opinion shift in support of race and criminal justice issues).

[9] *See* Editorial, *Policing for Profit Perverts Justice: Our View*, USA TODAY (Mar. 11, 2015, 7:01 PM), https://www.usatoday.com/story/opinion/2015/03/11/ferguson-mo-police-traffic-tickets-justice-department-editorials-debates/70175690 (bringing attention to "policing for profit" after Ferguson protests).

[10] *See* Kendall Karson, *64% of Americans Oppose 'Defund the Police' Movement, Key Goals: Poll*, ABC NEWS (June 12, 2020, 5:30 AM), https://abcnews.go.com/Politics/64-americans-oppose-defund-police-movement-key-goals/story?id=71202300 (describing how Americans oppose calls for defunding the police).

[11] *See, e.g.*, MO. ANN. STAT. § 304.125 (West, Westlaw through 2020 2d Reg. Sess.) ("No political subdivision or law enforcement agency shall have a policy requiring or encouraging an employee to issue a certain number of citations for traffic violations on a daily, weekly, monthly, quarterly, yearly, or other quota basis.").

[12] *See, e.g.*, TEX. TRANSP. CODE ANN. § 720.002(a)(1) (West, Westlaw through end of 2019 Reg. Sess.) ("A political subdivision or an agency of this state may not establish or maintain, formally or informally, a plan to evaluate, promote, compensate, or discipline a peace officer according to the officer's issuance of a predetermined or specified number of any type or combination of types of traffic citations.").

as "benchmarks,"[13] "productivity goals,"[14] and a host of other terms often obscure the operation of what are sheer police quotas.[15]

Quotas may seem like an inapt object of inquiry considering current calls for radical change as opposed to incremental reforms. But, as this Article shows, quotas animate important criminal justice issues, chiefly racial profiling, civil rights violations, and police corruption. In *Floyd v. City of New York*, the federal decision that struck down the New York Police Department's racially discriminatory stop-and-frisk policy, quotas were prominent themes.[16] The Department of Justice's report on Ferguson, which made the country aware of policing for profit, highlighted quota abolition in its Recommendation section.[17] Interestingly, more than twenty states have statutory prohibitions on police quotas.[18] Criminal defendants, civil rights plaintiffs, aggrieved police officers, and police unions have deployed these statutes in state and federal courts to challenge quotas and extract concessions from municipalities.[19] Nevertheless, police quotas, like criminal enforcement mechanisms more generally,[20] have not received meaningful consideration by legal academics.[21] Instead, scholars typically engage quotas via the related but analytically distinct practice of broken windows policing or anecdotal accounts.[22] This lack of sustained attention

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13 SERDAR KENAN GUL & PAUL E. O'CONNELL, POLICE PERFORMANCE APPRAISALS: A COMPARATIVE PERSPECTIVE 71 (2013) (acknowledging the existence of quotas and noting how some police departments use "benchmark targets for summonses and arrests").

14 POLICE REFORM ORG. PROJECT, WORKING TOWARDS A MORE SAFE AND FAIR CITY: ABOLISHING QUOTAS AND INVOLVING COMMUNITIES 2 (2014), https://www.policereformorganizingproject.org/wp-content/uploads/2012/09/Working_Towards_a_More_Safe_and_Fair_City.pdf ("'[P]roductivity goals'[sic] are a euphemism for a 'quota system.'").

15 *See infra* notes 32–36.

16 959 F. Supp. 2d 540, 596–602 (S.D.N.Y. 2013).

17 U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 91 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter Ferguson Report].

18 *See infra* Appendix A.

19 *See infra* Part II.

20 Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305 (2018) (describing how substantive criminal law scholarship rarely addresses issues of police conduct).

21 Some noteworthy exceptions that have given some attention to quotas include Nathaniel Bronstein, Note, *Police Management and Quotas: Governance in the CompStat Era*, 48 COLUM. J.L. & SOC. PROBS. 543 (2015) and Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1 (2007).

22 On broken windows policing, see generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (investigating the consequences of broken windows policing in New York City). For anecdotal accounts, see COREY PEGUES, ONCE A COP: THE STREET,

persists despite scores of case law,[23] empirical evidence,[24] references in government reports,[25] and annual settlements,[26] that all point to the existence of police quotas across the country.

THE LAW, TWO WORLDS, ONE MAN 146 (2016) (former NYPD officer describing the existence of quotas in the department); NORM STAMPER, TO PROTECT AND SERVE: HOW TO FIX AMERICA'S POLICE 1–4 (2016) (former San Diego officer describing the existence of quotas in his department); John Marzulli, *We Fabricated Drug Charges Against Innocent People to Meet Arrest Quotas, Former Detective Testifies*, N.Y. DAILY NEWS (Oct. 13, 2011), https://www.nydailynews.com/news/crime/fabricated-drug-charges-innocent-people-meet-arrest-quotas-detective-testifies-article-1.963021 (officer admitting that the NYPD framed people to meet quota requirements).

[23] *See, e.g.*, Becker-Ross v. State, 595 S.W.3d 261, 265, 269, 272 (Tex. App. 2020) (finding that there was sufficient evidence to show that the city administrator pressured the city marshal to write a certain number of traffic tickets within a specified period in violation of state prohibition on quotas); Policemen's Benevolent Labor Comm. v. City of Sparta, No. 5-19-0039, 2019 WL 5457948, at *1, *7 (Ill. App. Ct. Oct. 22, 2019) (concluding that a police department's practice of evaluating citations, traffic stop warnings, and extra-duty assignments violated state law prohibiting the implementation of quotas); Gerwer v. Kelly, 980 N.Y.S.2d 275, 275 (Sup. Ct. 2013) (ruling against an officer who falsified thirty-seven fictious summonses in order to meet an alleged quota requirement); People v. Schwartz, No. 282028, 2009 WL 30457, at *1, (Mich. Ct. App. Jan. 6, 2009) (noting that the defendant officer's issuing of four undated speeding tickets to meet a quota would secure entitlement to overtime).

[24] *See* JOHN MCLAUGHLIN, MCLAUGHLIN & ASSOC.'S, NEW YORK PATROLMEN'S BENEVOLENT ASSOCIATION MEMBERSHIP STUDY 53 (2016), https://www.nycpba.org/media/19346/160315-pbasurvey.pdf (surveying approximately 6,000 members of New York City's police union which found that 89% of respondents believed that NYPD supervisors imposed quotas); Jonathan Auerbach, *Are New York City Drivers More Likely to Get a Ticket at the End of the Month?*, SIGNIFICANCE MAG., Aug. 2017, at 25 (using significance testing to conclude that New York City drivers are more likely to receive a ticket at the end of the month, substantiating a long-held belief about the use of quotas); Scott W. Phillips, *Police Discretion and Boredom: What Officers Do When There Is Nothing to Do*, 45 J. CONTEMP. ETHNOG. 580, 589 (2016) (qualitative study of a police department finding that officers noted that there was no formal quota but that they were expected write about ten tickets a month).

[25] *See* Ferguson Report, *supra* note 17, at 11; U.S. DEP'T OF JUST., C.R. DIV. & U.S. ATT'Y.'S OFF., DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 21 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

[26] *See* Mike Sprague, *Whittier to Pay $3 Million to Settle Police Ticket Quota Case*, WHITTIER DAILY NEWS (Jan. 16, 2020, 2:11 PM), https://www.whittierdailynews.com/2020/01/15/whittier-to-pay-3-million-to-settle-police-ticket-quota-case; Matt Sledge, *Gretna Police Agree to $70K Settlement in Ex-Cop's Lawsuit Claiming Arrest Quotas*, NEW ORLEANS ADVOC., (June 3, 2019, 11:12 AM), https://www.nola.com/news/courts/article_b1990837-e425-5c46-a3d8-4817a8b81367.html; Joshua Sharpe, *DeKalb Still Denies Police 'Quota' System After Settling Suit for $150K*, ATLANTA J.-CONST. (Sept. 27, 2018), https://www.ajc.com/news/crime—law/dekalb-still-denies-police-quota-system-after-settling-suit-for-150k/IuFHQg3pT4lnsVyPETZxkM; Peggy Wright, *Mendham Twp. Cop's 'Ticket Quota' Lawsuit Settles for $650K*, MORRISTOWN DAILY REC. (Dec. 5, 2017, 8:37 AM), https://www.dailyrecord.com/story/news/2017/12/04/mendham-twp-cops-ticket-quota-lawsuit-settles-650-k/918964001; Hailey Branson-Potts & Emily Alpert Reyes, *City Will Pay LAPD Officer Nearly $1 Million to End Lawsuit over Ticket Quotas*, L.A. TIMES (Jan. 13, 2016, 11:05 PM), https://www.latimes.com/local/cityhall/la-me-0114-lapd-

This Article makes two straightforward arguments. First, it contends that police quotas shape the enforcement of criminal laws by introducing a host of perverse incentives into an already insecure body of criminal procedure. This leads to the Article's second claim. I argue that quota-based policing is a discrete area where there is widespread agreement about the problems with quota-based policing and possibilities for change. Police unions, often considered the source of our penal status quo, have argued that such requirements distort discretion and generate unnecessary police-civilian contact.[27] Liberal, conservative, and libertarian reformers have all lodged similar arguments and emphasized the ways quotas lead to violations of civil liberties.[28]

The broad condemnation of quota-based policing makes this issue a particularly ripe place for reform, and an area that should be scrutinized by legal scholars and advocates. This Article inaugurates the conversation. It builds on the fragments of existing scholarship to offer a robust framework for understanding police quotas. It offers a novel descriptive and statutory account of police quotas and is the first piece of scholarship to describe the jurisprudential landscape of this practice.

Eliminating police quotas would be no panacea. However, it is an underappreciated area that has synergies with a larger constellation of penal change strategies. For abolitionists, addressing quotas could be an interim step toward a world with a smaller police imprint.[29] If advocates achieve the goal of defunding the police, addressing quotas will become especially central, as smaller police forces may increas-

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settlement-20160114-story.html; J. David Goodman, *Officer Who Disclosed Police Misconduct Settles Suit*, N.Y. TIMES (Sept. 29, 2015), https://www.nytimes.com/2015/09/30/nyregion/officer-who-disclosed-police-misconduct-settles-suit.html ($600,000); Dave Phillips, *Former Novi Officer Gets $280,000 in Ticket Quota Lawsuit Settlement*, OAKLAND PRESS (Apr. 17, 2014), https://www.theoaklandpress.com/news/nation-world-news/former-novi-officer-gets-280-000-in-ticket-quota-lawsuit-settlement/article_35e4db17-f817-5965-98c9-cef2484f562b.html; Joel Rubin & Catherine Saillant, *L.A. Approves $6-Million Settlement over Alleged Traffic Ticket Quotas*, L.A. TIMES (Dec. 10, 2013, 12:00 AM), https://www.latimes.com/local/la-xpm-2013-dec-10-la-me-tickets-20131204-story.html.

[27] *See infra* Section III.C.1.

[28] *See infra* Section III.C.3.

[29] *See* Dorothy E. Roberts, *The Supreme Court, 2018 Term - Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 11, 114–18 (2019) (arguing that abolition movement activists can utilize the Reconstruction Amendments and "non-reformist reforms" to temporarily further their aims and ultimately build a society without prisons); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 460 (2018) (describing how the abolitionist approach focuses on reducing the greater social and fiscal footprint of police on society as opposed to efforts to improve the police and criminal law).

ingly rely on quotas and technology to do more with less personnel.[30] This is precisely what has occurred in Camden, New Jersey, a city that is considered a model for police reform.[31] For law enforcement officials who oppose quotas and a general public who believe the police have a role in our social order, attention to quotas could lead to more rigorous conversations about the function of police.

This Article proceeds in four Parts. Part I sketches the different ways police quotas take shape organizationally. It then offers a brief legislative history and analysis of anti-quota statutes.

Part II moves to the caselaw and describes how police officers, criminal defendants, and civil rights plaintiffs have challenged police quotas. This Part shows how doctrinal and evidentiary hurdles have hampered claims, but also details how some parties have succeeded in court or extracted settlements from municipalities.

Part III captures the definitional contours of quotas. First, I discuss the defensibility of this practice. Though often unarticulated, police quotas give law enforcement leadership a way to monitor, measure, and evaluate police activity while guarding against legitimate concerns about officers shirking their duties. Such evaluations are akin to the kinds of assessments that are standard in many workplaces. This Part offers responses to these defenses. It also describes additional problems that police quotas pose for three groups: police officers forced to comply with these requirements; marginalized communities that are often the subjects of quota-satisfying officers; and a general public that can be deprived of efficiently used resources because of quotas.

Part IV takes a normative turn. This Part offers suggestions for how to raise public awareness of quota-based policing and generate coalition-building in states that do not already have quota prohibitions. This Part also provides suggestions on how to improve existing statutes.

The Conclusion offers thoughts on the urgency of this topic, and the Appendices offer a comprehensive list of quota bills and statutes.

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[30] Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 285 (2020) (suggesting that defunding police could lead to excessive ticketing and civil asset forfeiture); *see* Ingrid Burrington, *What Amazon Taught the Cops*, NATION (May 27, 2015), https://www.thenation.com/article/archive/what-amazon-taught-cops (discussing how algorithmic criminal justice assumes the credibility of the underlying crime data and noting how "countless scandals over quotas" in policing suggest that this is a huge assumption).

[31] *See* Sidney Fussell, *What Disbanding the Police Really Meant in Camden, New Jersey*, WIRED (July 1, 2020, 3:03 PM), https://www.wired.com/story/disbanding-police-really-meant-camden (describing the increase in electronic surveillance after the city overhauled its police department); *see infra* notes 177–83 and accompanying text.

I
THE TEXTURE OF POLICE QUOTAS

This Part maps the terrain of police quotas. Scholars and the media often discuss the existence of quotas, but the term itself is often undefined or poorly described. Section I.A offers a robust representation of how quotas are administered. Section I.B details the statutory landscape of anti-quota laws and categorizes the twenty-one states that have enacted such legislation.

A. The Definitional Landscape

Quotas are formal and informal measures that require law enforcement to have a certain number of contacts with individuals or issue a certain number of citations or arrests. Because quotas have a pejorative connotation, law enforcement organizations use a range of alternative terms to accomplish the same work. These phrases—which are sometimes used earnestly and sometimes as subterfuge—include "benchmarks,"[32] "productivity goals,"[33] "targets,"[34] "performance management,"[35] and "objectives."[36] To get a more granular understanding of quotas, one might consider four features of this police practice: 1) the level of formality; 2) how they are quantified; 3) the law enforcement action that is required; and 4) the prospect of an adverse/favorable employment action.

1. Formality

Quotas range in their formality. Like any other policy, quotas can operate through formal channels (e.g., in writing or through official

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[32] GUL & O'CONNELL, *supra* note 13.

[33] *See* POLICE REFORM ORG. PROJECT, *supra* note 14; Robert Gangi, *When Police Are Encouraged to Abuse, Not Protect*, ALTERNET (Nov. 30, 2012), https://www.alternet.org/2012/11/when-police-are-encouraged-abuse-not-protect ("NYPD officials use the term 'productivity goals' as a poorly veiled euphemism for the Department's quota system, as a thin cover for the pressure placed on street officers to make an expected number of arrests, or to issue a sufficient number of summonses.").

[34] Malcolm K. Sparrow, *Measuring Performance in a Modern Police Organization*, NEW PERSPS. POLICING BULL., Mar. 2015, at 1, 18 ("[S]ome departments set targets for functional outputs, including enforcement activities such as arrests, stops, searches and traffic citations.").

[35] Jen Chung, *Bloomberg Says Police Quotas Will Be Investigated*, GOTHAMIST (Nov. 9, 2010, 5:45 PM), https://gothamist.com/news/bloomberg-says-police-quotas-will-be-investigated (quoting Mayor Bloomberg as saying "we don't have quotas . . . but we certainly have performance management").

[36] TODD DOUGLAS, THE POLICE IN A FREE SOCIETY: SAFEGUARDING RIGHTS WHILE ENFORCING THE LAW 71 (2017) (noting that many police agencies "have informal quotas: *precinct averages*, *benchmarks*, *performance goals*, *objectives*, *targets*, and other euphemistic references to what is essentially a quota").

communication) or through informal mechanisms. A useful example of a formal quota can be found in Ridgetop, Tennessee.[37] The city of approximately 2,000 people disbanded its police department in 2019 after officers exposed an attempt by the mayor and vice mayor to impose a quota. Officers recorded both officials demanding that the department write 210 citations to help generate revenue for the city.[38] Another example is from Brooklyn, New York, where a New York Police Department (NYPD) official posted memos in a police stationhouse detailing how many summonses cops were required to hand out.[39] One document outlined the specific number of tickets needed: sixty cell phone, fifty seatbelts, sixty-five double park, forty bus stops, and twenty-five tints.[40] Another memo began, "[g]ood day we need the following," and proceeded to list various moving violations.[41] That document required that summonses be handed out at accident-prone locations and specified five intersections.[42]

Quotas can also be informal and based on unwritten requirements or implied understandings.[43] In North Brunswick, New Jersey, one veteran officer recounted how officers would receive four hours of overtime pay for every forty tickets written.[44] Though the police department had no official policy, there was an "unwritten understanding."[45] Another law enforcement official described how officers would "go hunting" in Black and Latinx neighborhoods and compete to see who could issue the most tickets.[46] This kind of informality is especially common in states that legally prohibit police quotas, since police brass want to avoid memorializing requirements in ways that

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[37] Zuri Davis, *A Tennessee Police Department's Last Officer Resigns over Ticket Quotas*, REASON (Nov. 6, 2019, 2:45 PM), https://reason.com/2019/11/06/a-tennessee-police-departments-last-officer-resigns-over-ticket-quotas/printer.

[38] *Id.*

[39] *See* Chung, *supra* note 35.

[40] *Id.*

[41] James Fanelli, *Cops at Brooklyn's Crime-Ridden 77th Precinct Told to Meet Quotas for Moving Violations, Memos Say*, N.Y. DAILY NEWS (Nov. 8, 2010), https://www.nydailynews.com/new-york/cops-brooklyn-crime-ridden-77th-precinct-told-meet-quotas-moving-violations-memos-article-1.452621.

[42] *Id.*

[43] *See* Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, *Inside America's Police Departments*, PEW RSCH. CTR. (Jan. 11, 2017), https://www.pewsocialtrends.org/2017/01/11/inside-americas-police-departments (finding that about a third of police officers say they are expected to meet a quota for arrests and tickets).

[44] Sarah Wallace, *NJ Police Targeted Black and Latino Neighborhoods to Fulfill Ticket Quotas, Cops Say*, NBC N.Y. (Feb. 13, 2020, 8:08 PM), https://www.nbcnewyork.com/investigations/nj-police-targeted-black-and-latino-neighborhoods-to-fulfill-ticket-quotas-cops-say.

[45] *Id.*

[46] *Id.*

can be subject to discovery in future litigation or scrutinized by the media.

2. *Numerical Requirements*

Police quotas have quantitative dimensions. Sometimes they are numerically specific, as in the Brooklyn example mentioned above. Other examples are instructive. Police documents from Dekalb County, Georgia, for instance, revealed that officials kept detailed statistics on officer activities, with categories including "citation goal[s]," "total citations," and "% to goal citations."[47] A slogan for the police department was, "[t]wo tickets a day keep the sergeants away. Five a day keep the lieutenants at bay."[48] In Pennsylvania, two officers lied about a DUI arrest and were caught on police dashcam video conferring about which one would get credit for the arrest because they both needed their "20 for the month."[49] When criminal justice commentators discuss quotas, they usually focus on these numerically specific requirements.

But not all quotas are numerically precise. Sometimes the numerical dimension of a quota requirement is just a general guide and some quotas don't specify any number at all. On the former, Denver, Colorado, is noteworthy. Colorado has no statutory prohibition on quotas. In 2016, the City, which generated $30 million annually from parking citations, inked a $50 million contract with a software company to manage its parking enforcement.[50] Contract documents indicated that predictive algorithms produced a "daily citation expectation" for agents.[51] The City insisted that the goal was not a strict requirement but a "guide."[52] A legislative audit of West Virginia State Police, which identified an informal quota regime, illustrates the further vagueness of quotas that specify no number at all. The auditor's survey included many responses from officers who indicated

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47 Rhonda Cook, *Arrest Quotas Led Dekalb Officer to Plant Drugs, Lawsuit Claims*, ATLANTA J.-CONST. (Nov. 28, 2016), https://www.ajc.com/news/local/arrest-quotas-led-dekalb-officer-plant-drugs-lawsuit-claims/5AMfRowntaQrZfQLsAhL6K.

48 Sharpe, *supra* note 26.

49 Peter Hall, *Lawsuit Ends with Reminder to Pennsylvania State Troopers About Rule Against Ticket Quotas*, MORNING CALL (June 26, 2018), https://www.mcall.com/news/police/mc-nws-pa-state-police-dui-quota-settlement-20180626-story.html.

50 Jeremy Jojola, *A Quota Behind Denver Parking Citations?*, 9NEWS (Feb. 27, 2017, 11:12 PM), https://www.9news.com/article/news/local/investigations/a-quota-behind-denver-parking-citations/415777446.

51 *Id.*

52 *Id.*

that no specific requirements existed, but that "numbers are strongly emphasized."[53]

3. Law Enforcement Activity

Quotas require a particular kind of law enforcement activity. This is typically an arrest, citation, or ticket. In rare instances, they require contacts, warnings, or stops. Arrests, citations, and tickets are at the center of police quotas and constitute much of this Article's discussion. Allegations and settlements surrounding arrest quotas have hounded the NYPD for years.[54] Citations and tickets were at the center of the Department of Justice's Ferguson Report.[55] Contacts or stops require more explanation.

Sometimes contacts substitute for arrests and citations. For example, in Arizona, a state without a statutory prohibition on quotas, a Tucson police chief was criticized for an overt one-ticket-a-day policy. After he changed it to a one-contact-a-day requirement,[56] Republicans led a push for an anti-quota bill. Though the Fraternal Order of Police supported the bill, Governor Doug Ducey ultimately vetoed it.[57] As a result, police in Arizona remain free to use contacts to fulfill quota requirements.

South Carolina, which does have a statutory prohibition,[58] highlights the importance of contacts in police quotas. The Santee Police Department, situated along the well-traveled Interstate 95, came under scrutiny in 2019 after a memo demanding "a heavy increase" in traffic stops surfaced.[59] Lieutenant Riley Null authored the memo,

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[53] W. VA. LEGIS. AUDITOR, PERFORMANCE EVALUATION & RSCH. DIV., LEGISLATIVE PERFORMANCE REVIEW–WEST VIRGINIA STATE POLICE: SURVEY COMMENTS 46, 52, 54 (2008). The auditor asked: "Does the WVSP require each Trooper to issue a specified number of traffic citations or warning citations on a monthly basis?" Some of the responses included: "No specific #, but we have to show results. . . . No specific number is given, but 'numbers' are strongly emphasized. . . . There is no specific number but if you don't have contacts they reprimand you. . . . No specific #, but get bad [employee performance appraisals] or verbally reprimand [sic] for not having a considerable amount of contacts." *Id.* at 43–54.

[54] *See infra* notes 194–95.

[55] *See* Ferguson Report, *supra* note 17.

[56] Howard Fischer, *Arizona Bill Would Outlaw Police Traffic Ticket Quotas*, TUSCON.COM (Jan. 23, 2015), https://tucson.com/news/local/crime/arizona-bill-would-outlaw-police-traffic-ticket-quotas/article_d6bf8125-aec6-5e2e-ad0d-4ab16b181d4c.html.

[57] Ducey argued that "in its current form, I worry that police chiefs and local entities will be prevented from objectively gauging performance in their departments—a concern for officers themselves, the public and overall public safety." Matthew Hendley, *Ducey Vetoes Ban on Police Ticket Quotas*, PHX. NEW TIMES (Apr. 2, 2015, 5:57 AM), https://www.phoenixnewtimes.com/news/ducey-vetoes-ban-on-police-ticket-quotas-6661896.

[58] *See* S.C. CODE ANN. § 23-1-245 (West, Westlaw through 2020 Sess.).

[59] Michael Majchrowicz, *Internal Memo Suggests SC Police Department Violated Law Banning Ticket Quotas*, POST & COURIER (May 16, 2019), https://

sent it to patrol officers, and called for increased "contacts" with motorists.[60] Null threatened, "if activity is not increased, you will be required to have your body cameras recording during your entire shift to try and determine what activity is consuming your time."[61] Because the South Carolina statute makes an exception for points of contact,[62] the memo is likely legal. This is why it is important to offer the definitional landscape of quotas before delving into the statutory prohibitions: many of the statutes that prohibit quotas do not cover the full range of police activity that could be considered a quota.

4. Incentives/Adverse Employment Actions

Incentives and adverse employment decisions loom in the background of police quotas. Police departments have offered overtime, barbeque, pizza, gift cards, car wash coupons, and trophies to officers who meet quotas.[63] Failure to meet quotas can result in adverse employment actions, including denial of days off, transfers, undesirable assignments, and, of course, termination.[64] Police leadership can communicate the threat of an adverse employment action to an officer in an attempt to make them comply with a quota. In the cash-strapped city of Gretna, Louisiana, situated across the Mississippi River from New Orleans, threats of adverse employment decisions were rampant. In a recorded conversation with a patrolman, Lieutenant J.R. Rogers

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www.postandcourier.com/news/internal-memo-suggests-sc-police-department-violated-law-banning-ticket-quotas/article_aa02a4d6-77f2-11e9-8a32-b75a8475adde.html.

[60] *Id.*

[61] *Id.*

[62] *See* § 23-1-245 (defining "points of contact" as a "law enforcement officer's interaction with citizens and businesses within their jurisdictions and the law enforcement officer's involvement in community-oriented initiatives" and allowing for evaluations based on this category).

[63] Randy Travis, *Douglasville Cops Offered BBQ if They Wrote Enough Traffic Tickets*, FOX 5 ATLANTA (Mar. 10, 2020), https://www.fox5atlanta.com/news/douglasville-cops-offered-bbq-if-they-wrote-enough-traffic-tickets (barbeque); Daniela Altimari & John Lender, *Police Commissioner Says 'Pizza Memo' Was Not Ticket Quota*, HARTFORD COURANT (Apr. 2, 2012), https://www.courant.com/news/connecticut/hc-xpm-2012-04-02-hc-pizza-tickets-report-0403-20120402-story.html (pizza); Justin George, *Metro Transit Police Held a Competition to Encourage Arrests and Other Enforcement*, WASH. POST (Feb. 20, 2020, 7:02 PM), https://www.washingtonpost.com/local/trafficandcommuting/metro-transit-police-held-a-competition-to-encourage-arrests-and-other-enforcement/2020/02/12/02146d84-4dd7-11ea-9b5c-eac5b16dafaa_story.html (gift cards); Debbie Dujanovic, *Emails Reveal Incentives Behind Cottonwood Police Issuing Tickets*, KSL BROAD. (Oct. 24, 2013, 11:01 PM), https://www.ksl.com/article/27376993/emails-reveal-incentives-behind-cottonwood-police-issuing-tickets (carwash coupons and gift cards); Jack Douglas Jr. and Jason Allen, *One North Texas Officer Says Ticket Quotas Do Exist. . .And It May Be a Ticket to a Trophy*, CBS DFW (May 20, 2013, 10:23 PM), https://dfw.cbslocal.com/2013/05/20/one-north-texas-officer-says-ticket-quotas-do-existand-it-may-be-a-ticket-to-a-trophy (trophies and letters of appreciation).

[64] Cook, *supra* note 47.

insisted, "[s]omebody has got to go to jail every 12 hours," and threatened termination if the subordinate failed to comply.[65] Another officer testified that officers were told the city would stop paying for their insurance and contribute less to their retirement fund if they did not increase their arrests and citations.[66] The tethering of quota compliance to job security was so blatant that one officer gave a sergeant who was recently passed over for a promotion "a gift of knee pads, vaseline [sic], and ink pen refills—the implication being that the only way he'd be able to get that promotion was to either write up more of his patrolmen for not meeting the quota or perform sexual favors."[67]

Understanding these four features of quota-based policing—the level of formality, the nature of the numerical requirement, the enforcement activity demanded, and the potential employment actions—is important for a few reasons. First, the scholarly literature has yet to offer a robust description of quotas that captures the different permutations of the practice. Second, statutory prohibitions fall short of capturing the full scope of police activities that constitute quotas, which partially explains why quotas still exist in places that have enacted rules proscribing the practice. Third, these categories highlight gray areas in a non-transparent culture of policing. The strongest version of a quota would be a memorialized demand that police arrest a specific amount of people or face termination. A less detectable iteration might involve an informal communication to an officer to "increase their activity" with no threat of adverse employment outcome.[68] Such conduct would be permissible under some statutes and prohibited in others. Therefore, having a definitional grasp of these features is integral to understanding the following discussion about statutory prohibitions.

B. Statutory Landscape

This subsection briefly describes the politics that animated some of the legislative prohibitions on quotas. Some of these statutes are of late-twentieth-century vintage and developed against the backdrop of police professionalization. These early anti-quota laws were driven by interests in police work conditions, public safety, and fair policing.

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[65] Michael Isaac Stein, *Police Lawsuits Provide an Inside View of Cash Register Justice in Louisiana*, SCALAWAG (Nov. 5, 2018), https://www.scalawagmagazine.org/2018/11/louisiana-cash-register-justice.

[66] *Id.*

[67] *Id.*

[68] *See, e.g.*, CRIME + PUNISHMENT (Hulu 2018) (describing a conversation in which an NYPD lieutenant tells an officer that he needs to "catch up with everybody" in terms of numbers of arrests).

These issues, along with concerns about racial justice, have continued to inspire more recent statutes. After explaining this history, this subsection categorizes the various anti-quota statutes.

1. A Brief History

The legislative history of quota prohibitions is scattered because, in many states, legislators passed these laws without fanfare. However, a close inspection can impose some coherence and highlight themes of public safety, police conditions, and police corruption. Noteworthy legislative activity surfaced in the 1970s. Black Democratic Assemblyman John Miller ushered California's bill in 1975.[69] Miller, who has been described as a "progressive independent in local politics," was politically shrewd and couched his support for quota bans in inclusive rhetoric.[70] The Howard University-trained lawyer—whose district included the racially and socio-economically diverse cities of Oakland and Berkeley—voiced a simultaneous concern for police officers and for the public. Describing quotas as "unfair, undemocratic, and unjust," Miller was troubled by the idea that failure to meet quotas could lead to an officer's demotion.[71] At the same time, Miller expressed concern about "the average California driver" who would be unbelieved by a "rubber stamp traffic court system which finds 90 percent of those cited guilty."[72] Finally, Miller highlighted due process issues and presaged the problems the Department of Justice would find forty years later in Ferguson when he stated: "The spectacle of cities gaining revenue for the conviction of citizens, and judges creating revenue by making criminals out of those brought before them . . . goes against our historical concepts of justice and fair play."[73] In many ways, California's statute was motivated by multi-constituent concerns that remain applicable today.

New York passed its bill in 1978, and though police and the public may have been beneficiaries, the statute was a response to outright police corruption.[74] The Commission to Investigate Alleged Police

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[69] *See Measure to Outlaw CHP's Ticket Quotas*, BERKELEY GAZETTE, July 22, 1975, at 1 (describing Miller's role in helping pass California's anti-quota law).

[70] David Mundstock, *Chapter 10 – The June 1976 Campaign and the New Slate Politics*, BERKELEY CITIZENS ACTION, https://berkeleycitizensaction.org/?page_id=397 (last visited Dec. 28, 2020).

[71] *See Measure to Outlaw CHP's Ticket Quotas*, *supra* note 69, at 1.

[72] *Id.*

[73] *Id.*; *see* Ferguson Report, *supra* note 17, at 2 ("This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.").

[74] *See* Bronstein, *supra* note 21, at 544.

Corruption, or the Knapp Commission (led by United States District Court Judge Percy Knapp), produced one of the earliest and most extensive insights into the use of quotas in modern urban policing.[75] The Commission found that "informal arrest quotas" were "an inducement to a particular kind of corruption," most specifically, "the arrest of individuals not actually apprehended in the commission of the charged crime."[76] Testimony to the Commission described "a pattern of requiring a quota of four felony arrests per month."[77] The informal policy led to a practice of "flaking," which is when police plant drugs on suspects.[78] The longstanding, sexist practice of arresting sex workers and not their procurers also featured prominently in New York's quota-based culture. "Plainclothesmen assigned to prostitution details were faced with the necessity of producing a stipulated number of arrests a night and, in order to do so, often arrested persons they considered to be 'obvious' prostitutes, without obtaining sufficient legal evidence."[79]

Finally, the Commission unearthed widespread collusion between police and numbers runners, particularly in "ghetto neighborhoods" where investigators discovered "numerous bookmaking operations and some high-stakes, organized card and dice games."[80] These operations were brazenly public and payoffs to police ensured that these activities would go unpunished, "except for token arrests made to give an appearance of activity."[81] The report's description, which reveals the intricacy of corruption and its relationship to quotas, is worth quoting at length:

> Most often, when plainclothesmen needed a token arrest to meet arrest quotas or to give the appearance of activity, they would tell the operator of a spot and arrange a time and place for the arrest. The operator would then select someone to take the arrest, who was usually either one of his employees who had a relatively clean arrest record or an addict who was paid for his trouble. Whoever took the arrest would put a handful of bogus policy slips in his pocket and meet the plainclothesman at the designated time and place, where, often as not, he would get into their car without even waiting to be asked.[82]

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[75] COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES, COMM'N REP. 28 (1972).

[76] *Id.* at 28.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 71.

[81] *Id.*

[82] *Id.* at 83.

Whereas work conditions and the unfair doling out of tickets helped generate the enactment of the California statute, in New York it was the excesses of police culture and corruption that necessitated statutory prohibitions on quotas. In the ensuing decades, many states would pass laws that drew on one or more of these rationales.

Concerns about the work environment of police inspired the enactment of a few statutes. Democratic State Representative Perry Bullard introduced Michigan's statute in 1988 after speaking with police officers who described how the pressure to comply with quotas diminished their ability to fight crime.[83] During testimony for the bill, Jack Brown, executive director of the Fraternal Order of Police, lamented, "One of the most disgusting things we have as police officers is these quotas."[84] Wisconsin, led by Republican State Assemblyman DuWayne Johnsrud, passed its bill more than a decade later in 1998.[85] Before the bill's passage, Johnsrud said, "[a]ny time an officer has to work under a quota, he has to make decisions with a hammer hanging over his head."[86] Reflecting on the bill fifteen years after its passage, Johnsrud's rationale was the same. He explained that the bill came at the wishes of the State Patrol Troopers Union, which was concerned that officers were writing tickets at the expense of other safety-related work.[87] In Utah, Republican State Senator Howard Stephenson helped the state pass its bill in 2018.[88] Stephenson noted his opposition to police operating as revenue generators and claimed, "I don't believe policemen should be looking to meet a quota on bad behavior. What if there isn't enough bad behavior? Do you just have to make it up?"[89] The various statutes, passed in states spanning the east coast to the west coast, demonstrate the public safety-interested, police officer-protecting nature of quota prohibitions.

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[83] *See* Jim Mitzfield, *Ticket Quotas Cost Undeserving Drivers: Police*, S. BEND TRIB., Sept. 1, 1987, at B2; MICH. COMP. LAWS ANN. § 257.750 (West, Westlaw through P.A. 2020, No. 256 of 2020 Reg. Sess.).

[84] Mitzfield, *supra* note 83.

[85] *Police Banned from Using Speeding Ticket Quotas*, J. TIMES (Mar. 25, 1998), https://journaltimes.com/news/national/police-banned-from-using-speeding-ticket-quotas/article_a6faa127-90da-566f-a702-d46300ecf88f.html.

[86] Reid Magney, *Officials Say Standards Are Needed for Police*, LA CROSSE TRIBUNE, Jan. 8, 1998, at A6.

[87] Adam Schrager, *Legislators: State Patrol Policy Lists Quota, is 'Against the Law*,' CHANNEL3000 (Dec. 28, 2018, 1:32 AM), https://www.channel3000.com/legislators-state-patrol-policy-lists-quota-is-against-the-law.

[88] *See* Ben Winslow, *Utah Could Soon Ban Police Quotas in Traffic Stops*, FOX 13 (Feb. 5, 2018, 11:58 PM), https://www.fox13now.com/2018/02/05/utah-could-soon-ban-police-quotas-in-traffic-stops.

[89] *Id.*

Racial controversy has also inspired some states' prohibitions on police quotas. After the killing of Michael Brown exposed Ferguson's police practices, then-state congressman and future Republican Attorney General Eric Schmitt shepherded Missouri's legislation. Schmitt said that he authored the bill to "ensure that our citizens wouldn't simply be used as ATMs to fill municipal government coffers."[90] The police killing of Walter Scott, an unarmed Black motorist, likely led to the enactment of South Carolina's statute. After thirty-three-year-old officer Michael Slager stopped fifty-year-old Scott for a broken taillight, Scott fled, and Slager shot him in the back.[91] Slager claimed that he struggled with Scott over his taser and shot him out of fear.[92] Video evidence taken by a bystander later revealed that Scott was seventeen feet away when the officer shot him and that Slager had dropped his taser near him in "an attempt to plant evidence and skew the investigation."[93] Justin Bamberg, a civil rights attorney who represented the Scott family and serves as a Democratic Representative in the South Carolina General Assembly, subsequently authored the bill.[94] After Tennessee passed its quota bill in June 2020, Democratic Representative Rick Staples noted that quotas lead to Black people being frisked by police officers, and said that the "legislation will limit unnecessary contact between the two."[95] The existence of bipartisan and multi-constituent opposition to quotas is apparent from the widespread enactment of these statutory prohibitions.

2. *Types of Quota Prohibitions*

This subsection details the different types of anti-quota laws. The varying types of legislation make straightforward generalizations

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[90] *Missouri's Attorney General Sues City of Marshfield for Illegal Traffic Ticket Quota Scheme*, KY3 (Dec. 9, 2019, 4:06 PM), https://www.ky3.com/content/news/Missouris-attorney-general-sues-city-of-Marshfield-for-illegal-traffic-ticket-quota-scheme-565986731.html.

[91] *See* Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html.

[92] *Id.*

[93] *Id.*

[94] Grace Beahm, *Haley Signs Bill Banning Law Enforcement Ticket Quotas*, POST & COURIER (June 9, 2016), https://www.postandcourier.com/politics/haley-signs-bill-banning-law-enforcement-ticket-quotas/article_7449a3c5-b4ff-509f-b716-7bd7b72a38c7.html (reporting on Bamberg's representation of the Scott family and his sponsorship of the bill).

[95] Tyler Arnold, *Criminal Penalties for Issuing Police Ticket Quotas Passes Tennessee House*, CENTER SQUARE (June 11, 2020), https://www.thecentersquare.com/tennessee/criminal-penalties-for-issuing-police-ticket-quotas-passes-tennessee-house/article_eb5a2f34-ac0e-11ea-b5cc-6fd6b8293d42.html.

tricky. Indeed, the difficulty of offering a general framework might help explain the scholarly gap on police quotas. Some of these laws are either poorly drafted or cover a small amount of activity. Consider two examples. Florida's statute simply states: "a traffic enforcement agency may not establish a traffic citation quota."[96] This prohibition does not define what a quota is or whether it has to be numerically specific in order to fall under the scope of the statute. Such interpretative tasks are left to courts, assuming that allegations of quotas get that far.

Utah's statute, passed in 2018, is a bit more specific. It defines quotas as "any requirement or minimum standard regarding the *number or percentage* of citations or arrests."[97] But this provision still does not specify whether the prohibited "requirement" or "standard," must be formal.

The shortcomings of Utah and Florida's statutes are representative of the many limitations of anti-quota laws. Most statutes only cover some aspects of quota-based policing, and each statute is different. What one state considers an illegal quota, another state may find permissible. Most basically, anti-quota laws vary on how formal or numerically specific quotas must be to fall under the statute. All statutes prohibit departments from requiring officers to issue a certain amount of citations or traffic violations. Some laws go further and include arrests, while others cover precursory law enforcement activities such as stops and warnings. Most focus on whether the failure to meet a quota leads to some kind of employment action.

Formality: As Figure 1 demonstrates, state statutes vary in their language and their characterization of quotas as formal and/or informal. "Direct" and "indirect" are also words used to capture formality. For example, Nebraska only prohibits law enforcement from "directly" requiring an officer to meet a quota.[98] Informal pressure put on a police officer to improve their numbers is not covered. Pennsylvania's statutory language, by contrast, forbids any law enforcement agency from establishing or maintaining any policy "directly or indirectly."[99] Other jurisdictions, like New Jersey, are silent on which communicative mechanisms are forbidden and state that law enforcement may not "establish any quota for arrests or cita-

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[96] FLA. STAT. ANN. § 316.640 (West, Westlaw through Ch. 184 of 2020 2d Reg. Sess.).

[97] UTAH CODE ANN. § 77-7-27 (West, Westlaw through 2020 6th Spec. Sess.) (emphasis added).

[98] NEB. REV. STAT. ANN. § 48-235 (West, Westlaw through end of 2020 2d Reg. Sess.).

[99] 71 PA. STAT. AND CONS. STAT. ANN. § 2001 (West 2020).

tions."[100] This might include direct or indirect quotas, or encapsulate only formal quotas. Since many of these statutes are under-litigated, the available language is crucial for parties seeking to bring a claim that an agency violated the prohibition.

FIGURE 1. FORMALITY AND QUOTA STATUTES

Silent	**Formality**	**Informality**
No language on level of formality (e.g., New Jersey)	Prohibits only direct or formal impositions of quotas (e.g., Nebraska)	Prohibits informal/indirect quota requirements and formal and direct requirements (e.g., Pennsylvania)

Quantification: Numerical requirements are also present in some state prohibitions. Michigan's statute is typical in that it bars agencies from requiring a "predetermined or specified number of citations."[101] Some states, like Florida, do not make any reference to numbers, which could simply mean that a number is implied in the definition of quota but could also leave room for the use of averages, which some departments use to circumvent quota prohibitions.[102]

FIGURE 2. QUANTIFICATION AND QUOTA STATUTES

Generic	**Numerically Specific**
(Prohibits implementation of quotas; no statutory definition of amount; e.g., Florida)	(Prohibits requiring a specific average or number of citations/violations or arrests; e.g., New York)

Law Enforcement Activity: All statutes specify which law enforcement activities cannot be subject to a quota. Seventeen states prohibit

[100] N.J. STAT. ANN. § 40A:14-181.2 (West, Westlaw through L.2020, c.136 and J.R. No. 2).

[101] MICH. COMP. LAWS ANN. § 257.750 (West, Westlaw through P.A. 2020, No. 256 of 2020 Reg. Sess.).

[102] *See* Sparrow, *supra* note 34.

quotas for citations and traffic violations.[103] Nine states include citations, traffic violations, *and* arrests.[104] Other states are overinclusive or underinclusive when it comes to activity outside of citations, traffic violations, and arrests. Two states, Wisconsin and Rhode Island, include warning notices and investigative stops, respectively.[105] These states seem to recognize that warnings and stops can lead to the kind of law enforcement activity that quota legislation is designed to cover, and accordingly include these preludes into their statutory schemes. Some jurisdictions take the opposite approach. Missouri excludes warnings from its statute,[106] whereas South Carolina and Illinois make *exceptions* for "points of contact."[107] In these three jurisdictions, such precursory activity does not fall under the state statute. All other states are silent on whether these kinds of law enforcement activities are covered by their statutes. Thus, read in whole, American statutes that prohibit quotas focus primarily on citations, traffic violations, and arrests, leaving significant room for penumbral pursuits that are related but do not fall into those specific law enforcement activities.

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[103] These states include Connecticut, Illinois, Florida, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.

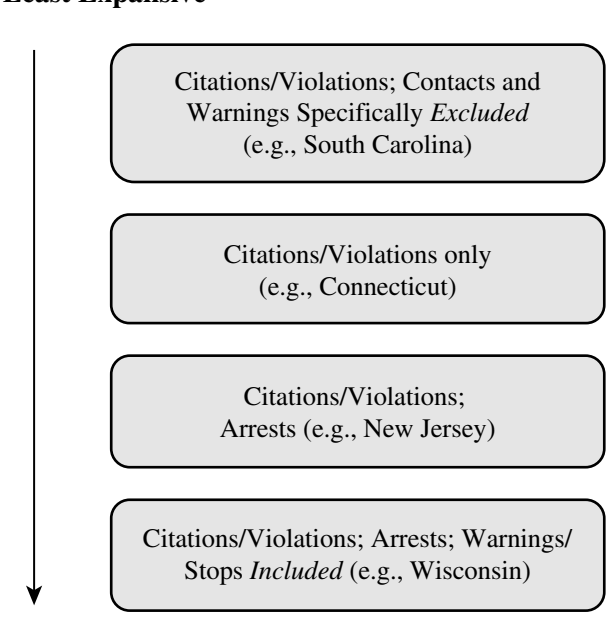
[104] Arkansas, California, Louisiana, Maryland, New Jersey, New York, North Carolina, Rhode Island, and Utah all include citations, tickets, and arrests.

[105] WIS. STAT. ANN. § 349.025 (West, Westlaw through 2019 Act 186); 31 R.I. GEN. LAWS ANN. § 31-27-25 (West, Westlaw through ch. 79 of 2020 2d Reg. Sess.).

[106] MO. ANN. STAT. § 304.125 (West, Westlaw through 2020 2d Reg. Sess.) ("This section shall not apply to the issuance of warning citations.").

[107] S.C. CODE ANN. § 23-1-245 (West, Westlaw through 2020 Sess.); 20 ILL. COMP. STAT. ANN. 2610/24 (West, Westlaw through P.A. 101-651).

FIGURE 3. LAW ENFORCEMENT ACTIVITY AND QUOTA STATUTES



Employment Actions: A few states use specific language prohibiting the use of quotas for incentives and adverse employment actions. Texas, for example, prohibits the use of quotas to "*evaluate*, *promote*, compensate, or discipline" police officers.[108] Some states focus only on adverse employment actions. New York's ban, which has been subject to the most litigation, prohibits "a reassignment, a scheduling change, an adverse evaluation, a constructive dismissal, the denial of a promotion, or the denial of overtime, based in whole or in part on such employee's failure to meet a quota."[109] By specifying the range of employment actions, these statutes supply potential plaintiffs (typically police officers) with the statutory language to bring claims against departments that implement quotas. States like Arkansas, by contrast, are silent on this issue. One could interpret this silence to mean that employment action is impliedly forbidden by the statute or as an intentional omission by the legislature.

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[108] TEX. TRANSP. CODE ANN. § 720.002 (West, Westlaw through end of 2019 Reg. Sess.) (emphasis added).

[109] N.Y. LAB. LAW § 215-a (McKinney, Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 387).

FIGURE 4. EMPLOYMENT ACTIONS AND QUOTA STATUTES

Silent (No language on Type of Employment Action; e.g., Arkansas)	**Adverse Employment Action Only** (e.g., New York)	**Employment Benefits + Adverse Action** (e.g., Texas)

Additional Features: Two statutes have unique features that are worth noting. First, Illinois has a provision that attempts to address potential funding complications that may arise from prohibitions.[110] Its statute states that the prohibition on quotas "shall not affect the conditions of any federal or State grants or funds awarded to the municipality and used to fund traffic enforcement programs."[111] Second, Tennessee amended its prohibition in July 2020 and made violation of the statute a Class B misdemeanor subject to a fine.[112] Since it is a new amendment, time will tell if this will successfully deter police brass attempting to implement quotas. The shortcomings of each of these different types of state quota prohibitions often interface with other legal obstacles and shape litigation outcomes. That will be the topic of the next Part.

II
POLICE QUOTA LITIGATION

The national patchwork of quota-based statutes has produced a variegated body of caselaw. Police officers are the typical plaintiffs that bring these cases to court. They usually argue that their resistance to or inability to meet a quota led to some adverse employment action. Alternatively, officers claim that they endured retaliation for speaking out about quotas—a claim that usually involves First Amendment issues.

People subject to criminal law enforcement are also common parties in police quota litigation.[113] These individuals fall into two catego-

110 65 ILL. COMP. STAT. ANN. 5/11-1-12 (West, Westlaw through P.A. 101-651).

111 *Id.*

112 Act of July 15, 2020, ch. 801, 2020 Tenn. Pub Acts, https://publications.tnsosfiles.com/acts/111/pub/pc0801.pdf.

113 There are a handful of cases where governments have brought charges against public officials who implemented or conformed to quotas, but these are rare. *See* Becker-Ross v. State, 595 S.W.3d 261 (Tex. App. 2020); Gerwer v. Kelly, 980 N.Y.S.2d 275 (Sup. Ct. 2013).

ries. They can be criminal defendants who argue that their contact with law enforcement was predicated on an officer's compliance with an illegal quota system. In essence, these parties raise the practice of quota-based policing as an affirmative defense. In instances where alleged quota-based contact resulted in dropped charges or the termination of the criminal action, parties have also brought federal civil rights lawsuits under 42 U.S.C. § 1983.[114] In these cases, which sometimes emerge from jurisdictions without anti-quota laws, plaintiffs argue that law enforcement's adherence to police quotas led to a violation of their civil rights.

Whether the party challenging the quota is an officer or a civilian, there are a range of socio-legal, doctrinal, and evidentiary hurdles that litigants must overcome before courts will meaningfully engage with their claims. This subsection briefly describes these hurdles for both groups, then describes the varying outcomes of these cases.

A. Police Speech and the Blue Code

Police officers are the group most likely and best positioned to litigate challenges to quotas, but the "code of silence," which prohibits officers from reporting misconduct, serves as a barrier.[115] This code[116]—which commentators also refer to as "the blue wall of

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[114] 42 U.S.C. § 1983.

[115] *See, e.g.*, Isidoro Rodriguez, *The Plight of the Police Whistleblower*, CRIME REPORT (June 18, 2020), https://thecrimereport.org/2020/06/18/the-plight-of-the-police-whistleblower (quoting Seth Stoughton, law professor and former police officer, saying "[t]here is tremendous pressure in policing, a cultural pressure, to not expose fellow officers to either professional or physical threats").

[116] *See* SANJA KUTNJAK IVKOVIC, FALLEN BLUE KNIGHTS: CONTROLLING POLICE CORRUPTION 20 (2005) (describing the code as "the informal prohibition within police culture of reporting misconduct by fellow officers—binds police together"); *see also* Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1285–92 (2011) (describing the code as an anti-snitching norm rooted in ideas about group loyalty and family); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 487 (1992) ("The code of silence does more than prevent testimony. It mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoing be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged."). Courts have also recognized the code in § 1983 actions. *See* Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 239, n.16 (1998) (listing cases). *See generally* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 18 (2000) (exploring the police "code of silence" as an unconstitutional police practice under § 1983). In the context of quotas, the blue code could be understood in two ways. First, it could be understood as a prohibition against one officer revealing another officer's compliance with an illegal quota (a form of misconduct) to a perceived outsider (i.e. the public, the media). Alternatively, it could apply to an officer who reveals that law enforcement leadership is enforcing quotas. At its core, the code is about a brotherhood in which some police officers might not include management. Put another way, there is an

silence," "blue cocoon," "blue shield," or "blue curtain"[117]—has been a problem in American policing for almost a century.[118] One police misconduct attorney explains how a breach of this code can be consequential: "while police officers may feel that a fellow officer has acted wrongfully, they fear that they will lose their job, or be subject to ridicule, ostracization, and physical reprisals from their comrades if the truth is told."[119] The same applies to speaking out about quotas. The case of Adrian Schoolcraft is telling. Schoolcraft worked for the NYPD and secretly recorded superiors discussing illegal quotas or, as some officials described it, "paying the rent."[120] Three weeks after he made misconduct allegations, a dozen officers, led by a deputy chief, went to his apartment.[121] A tape recording of the event revealed that the deputy chief Mike Marino, who has been described as a devotee of NYPD's numbers-driven policing,[122] warned Schoolcraft, "they are going to treat you like an EDP [emotionally disturbed person] . . . . Now, you have a choice. You get up like a man and put your shoes on and walk into that bus, or they're going to treat you as an EDP and

argument that the blue code is about protecting not police leadership, but rank and file. But actual instances involving police officers revealing the existence of quotas suggest that leadership is considered part of the code. *See generally* Radley Balko, Opinion, *The Blue Wall: Stronger than Ever*, WASH. POST (Sept. 4, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/09/04/the-blue-wall-stronger-than-ever (describing instances of police officers who have revealed the existence of quotas and allege retaliation from their peers and leadership).

117 *See* Chin & Wells, *supra* note 116, at 237 n.15 (describing the different terms for the code).

118 *See* Craig B. Futterman, Chaclyn Hunt & Jamie Kalven, *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 182 (noting that "over the last eighty-five years, at least nine different commissions around the nation have identified the police code of silence as a serious problem that prevents accountability" and listing all of the reports).

119 G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 758 (1999); *see also* Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 247–48 ("Scholarship on policing amply shows that police officers enforce the code of silence with social ostracism, refusals to answer calls for backup, denials of promotion, reassignments to less desirable postings, and threats of violence.").

120 Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (May 4, 2010), https://www.villagevoice.com/2010/05/04/the-nypd-tapes-inside-bed-stuys-81st-precinct.

121 *See* Graham Rayman, *NYPD Tapes Update: Queens DA Richard Brown's Report on Whistleblower Cop Raises More Questions than It Answers*, VILLAGE VOICE (Dec. 13, 2012), https://www.villagevoice.com/2012/12/13/nypd-tapes-update-queens-da-richard-browns-report-on-whistleblower-cop-raises-more-questions-than-it-answers.

122 *See* Graham Rayman, *Deputy Chief Michael Marino in Stop-and-Frisk Trial: 'Do Your Job or Suffer the Consequences*,' VILLAGE VOICE (Mar. 25, 2013), https://www.villagevoice.com/2013/03/25/deputy-chief-michael-marino-in-stop-and-frisk-trial-do-your-job-or-suffer-the-consequences.

that means handcuffs."[123] Schoolcraft was subjected to the latter and forcibly committed to a psychiatric ward.[124] After six days in the ward, he was discharged and suspended and continued to receive visits from police officers.[125] Ultimately, he made the tapes public and sued the NYPD for retaliation.[126] The NYPD settled.[127] Since the incident, the City has not "released one report, document or even scrap of paper which explains the NYPD's handling of the episode or details the department's conclusions about Schoolcraft's allegations."[128] While this is one of the more spectacular examples of what happens when the code of silence is breached, it highlights its retaliatory nature.[129] As some of the cases discussed in this Article show, the threat of retaliation can determine whether quota cases make it to courts and, if they do, the posture in which they enter the legal system.

The code of silence bleeds into First Amendment issues involving police speech. The Supreme Court in *Garcetti v. Ceballos* ruled that public employees who speak pursuant to their job duties have no First Amendment protection from retaliation for such speech.[130] If an officer speaks about a quota in their official capacity, then a First Amendment retaliation claim cannot succeed. The only way such a claim could prevail is if the officer demonstrates that she spoke as a citizen and not as an employee. Post-*Garcetti*, federal district and appeals courts have rejected retaliation claims brought by police officers who argued that they were subject to an adverse employment action due to their complaints about police quotas.[131] Considering the

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123 Graham Rayman, *NYPD Tapes 4: The WhistleBlower, Adrian Schoolcraft*, VILLAGE VOICE (June 15, 2010), https://www.villagevoice.com/2010/06/15/nypd-tapes-4-the-whistleblower-adrian-schoolcraft.

124 *Id.*

125 *Id.*

126 Goodman, *supra* note 26.

127 *Id.*

128 Graham Rayman, *Adrian Schoolcraft: The Other NYPD Scandal in the Room*, VILLAGE VOICE (Apr. 20, 2011), https://www.villagevoice.com/2011/04/20/adrian-schoolcraft-the-other-nypd-scandal-in-the-room.

129 Roberta Ann Johnson, *Whistleblowing and the Police*, 3 RUTGERS J.L. & URB. POL'Y 74, 83 (2005) ("The threat of retaliation against whistleblowers has a chilling effect. The threat prevents officers from coming forward to expose corrupt and abusive practices and it prevents serious wrongdoing from being addressed in-house.").

130 547 U.S. 410, 424 (2006).

131 *See, e.g.*, Taylor v. Pawlowski, 551 F. App'x 31, 31 (3d Cir. 2013) (ruling that officer's statements to his superiors about the illegality of a quota system for traffic stops were not protected speech under the First Amendment, and that he was acting as a public employee speaking pursuant to his duties); Cid v. Bd. of Cnty. Comm'rs, No. 18-4012, 2019 WL 161495, at *7 (D. Kan. Jan. 9, 2019) (rejecting a First Amendment retaliation claim brought by a terminated officer because he "directed his speech to his immediate supervisors and others in his chain of command—but no one outside that chain of command" and did not make a showing that his speech "involve[d] a matter of public concern and not merely a

inadequacy of whistleblower laws, which often fail to cover police officers and impose technical requirements, *Garcetti* presents a quagmire.[132] Officers concerned about quota-based policing in their departments can keep their objections in-house and follow typical grievance procedures. However, this process typically requires the grievant to inform a chain of command (e.g., their immediate supervisor, then chief of police, then the city manager).[133] The grievance process can subject the officer to the hazards of retaliation for breaking the code of silence, and under *Garcetti*, the officer may not be protected. The officer could also go public, as some have recently done,[134] but that option can be similarly, if not more, antagonizing to colleagues and lead to resignations that are difficult to remediate.[135] These social and legal constraints provide some insight into why statutes prohibiting quotas are infrequently litigated.

B. Evidentiary Challenges for Civilians

Challenges to quota-based policing brought by civilians raise many of the evidentiary problems discussed in "access to justice" scholarship. This body of work describes how infidelity to discovery rules, strict pleading standards, and the judicial hostility to the enforcement of civil rights make courts inaccessible to civilians.[136] As a threshold matter, discovery disputes can preclude parties from demonstrating that quota-based policing exists. For example, in cases

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personal issue internal to the workplace"); Whitehead v. City of New York, 953 F. Supp. 2d 367, 375 (E.D.N.Y. 2012) ("[P]laintiff's refusal to comply with the quota policy is not protected by the First Amendment because he confined his opposition to and criticism of the quota policy within the NYPD and never attempted to communicate his complaints to the public."). *But see* Matthews v. City of New York, 779 F.3d 167, 176 (2d Cir. 2015) (finding that officer spoke as a citizen when he spoke to his commanding officers about its arrest policy).

132 Whistleblower laws sometimes lack statutory coverage for municipal and county employees (categories police officers often fall in) and have various technical requirements for coverage (e.g., mandated initial disclosure to supervisors for protection to attach). *See* Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 26–31 (2018).

133 *See* LARRY K. GAINES & JOHN L. WORRALL, POLICE ADMINISTRATION 344–45 (2012) (describing grievance procedures).

134 *See infra* note 330; *supra* notes 37, 44, 65, 120–29.

135 *See* Huq & McAdams, *supra* note 119, at 247–48 (suggesting that harassment that forces an officer to resign should be understood as a constructive discharge and noting "the well-known reality is that it remains difficult or impossible to prove constructive discharge in any individual case, given the code of silence").

136 *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015).

involving criminal defendants who were charged with driving while intoxicated and sought arrest data to prove the existence of police quotas, some courts have ruled that such information is not relevant or would not bear any material information.[137]

Some civil rights plaintiffs have unsuccessfully brought legal actions arguing that quota-satisfying officers violated their rights. For example, in *D.H. v. City of New York*, a group of women of color were arrested and charged with loitering for the purposes of prostitution.[138] They brought a § 1983 suit against the City of New York and their arresting officers. The plaintiffs challenged the constitutionality of the loitering statute and argued that they were discriminated against on the basis of their race, gender, and gender identity.[139] The plaintiffs also argued that the arrests were products of quota-based policing.[140] To support their claim, they relied on statistical evidence and a statement from a former police officer who noted that arrest quotas led cops to go after "black, . . . Hispanic, . . . [and] LGBT communit[ies]."[141] Notwithstanding this evidence, New York's anti-quota statute,[142] and the NYPD's documented struggles with quotas,[143] the court found their arguments unpersuasive. The court granted the defendants' motion to dismiss and ruled that the plaintiffs had failed to show that "one of *these* defendants needed to make these arrests to meet his or her performance goals and arrest quotas, assuming such goals and quotas existed."[144] By requiring this kind of evidence at the pleading stage, particularly in a jurisdiction that has

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137 *See, e.g.*, Mayes v. City of Oak Park, No. 05-CV-74386-DT, 2007 WL 9751967, at *1 (E.D. Mich. Sept. 28, 2007), *aff'd*, 285 F. App'x 261 (6th Cir. 2008) (ruling that the plaintiff, a former public safety officer who claimed his termination was based on race and disability discrimination, was not entitled to racial data on arrests and tickets in Oak Park because it was not relevant to his claim); Page v. State, 7 S.W.3d 202, 206 (Tex. App. 1999) (rejecting defendant's request for DWI task force information, which he argued was material and could be used to impeach the arresting officer since a DWI quota directive would have given the officer a motive to falsify his report); County of Nassau Police Dep't v. Judge, 654 N.Y.S.2d 174, 175 (App. Div. 1997) (ruling that motorist was not entitled to production of internal police directives and orders that allegedly established DWI quota system because the respondent did not demonstrate that any information would be relevant or exculpatory).

138 309 F. Supp. 3d 52, 63 (S.D.N.Y. 2018).

139 *Id.* at 64.

140 *Id.* at 76.

141 *Id.* at 75.

142 N.Y. LAB. LAW § 215-a (McKinney, Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 387).

143 *See* Bronstein, *supra* note 21 (arguing that the New York anti-quota statute has largely failed to rectify the negative practices of the NYPD).

144 *D.H.*, 309 F. Supp. 3d at 76 (emphasis added).

been the poster-child for police quotas, the court created a high bar for future civil rights plaintiffs seeking to challenge this practice.

Many of the same problems arise in federal cases out of jurisdictions that do not have quota legislation. Before Tennessee passed its legislation, a federal court in that state heard a case brought by Terry Wynn, a Black physician who was stopped by the police after speeding to a hospital to help deliver a patient's baby.[145] Despite the intervention of a hospital supervisor who came to the hospital parking lot to inform the arresting officer that Wynn was indeed a doctor, the officer prepared a criminal summons against Wynn for speeding, felony evading arrest, resisting arrest, and a host of other violations.[146] A local prosecutor dropped the charges.[147] Meanwhile, the officer was suspended for a month for what the police chief described as a failure of judgement.[148] Wynn brought a § 1983 suit, arguing that the officer and the City had violated her Fourth and Fourteenth Amendment rights.[149] She argued that the City of Pulaski had a quota that required law enforcement to obtain "10 'traffic or custodial arrests' per month as a work performance goal," citing the arresting officer's own testimony as evidence.[150] The court ruled that this testimony was not indicative of a "hard-and-fast policy of the department."[151] If it was a formal policy, the court added, "municipal liability cannot attach in the absence of showing some link between the quota and the allegedly false arrest of, and use of excessive force on, Dr. Wynn."[152] Ultimately, in the federal tribunals where non-officers bring their challenges to quotas, courts demand tight causal links between the alleged quota and the constitutional violation. These evidentiary demands, along with different statutory conceptions of quotas, have likely stunted the development of case law in this area.

C. Wins and Losses

Challenges to quotas that get beyond these hurdles have had mixed success. This subsection describes the few wins that plaintiffs have achieved when litigating police quotas, as well as the many losses.

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145 Wynn v. City of Pulaski, No. 11-0025, 2013 WL 527154 (M.D. Tenn. Feb. 11, 2013).
146 *Id.* at *3.
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.* at *13.
151 *Id.*
152 *Id.*

Some criminal defendants have persuaded appellate tribunals that quotas governed their arrests and were not adequately considered by trial courts. In Pennsylvania, for example, various courts have interpreted the state's anti-quota law as creating an affirmative defense if defendants can prove a violation of the statute by a preponderance of the evidence.[153] In *Commonwealth v. Greene*, a Pennsylvania court reversed a speeding conviction after the defendant produced a memo from a sergeant to patrol supervisors imploring them to increase their citations from 168 to 450 a month and insisting that they "get the numbers up."[154] The court ruled that the defendant met his burden, and interpreted the memo as creating an impermissible quota.[155]

A Texas appeals court came to a similar conclusion, reversing the DWI conviction of a defendant who was precluded from cross-examining the arresting officer about a departmental quota for DWI arrests, even though the officer was the state's sole witness and had testified that a quota existed.[156] The appellate court ruled that the trial court had abused its discretion and deprived the appellant of his Sixth Amendment right to confrontation.[157] A cross-examination that revealed the existence of a DWI quota would also play a role in a Louisiana court's decision to vacate a conviction.[158]

Police officers who exposed the existence of quotas have also successfully brought retaliation claims against police departments. These decisions were not per se challenges to the alleged quota system, but they remain important because they contribute to the small body of litigation that addresses quotas, shed light on the existence of the practice, and demonstrate the stakes for police officers who complain about this kind of policing. Many of these challenges were First Amendment retaliation cases, decided before *Garcetti* ruled out employee claims of retaliation for things they said while on duty.[159] Other cases, decided before and after *Garcetti*, did not hinge on First Amendment claims, and involved officer complaints about quotas and

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153 *See, e.g.*, Woolston v. Cutting, 474 A.2d 698, 701 (Pa. 1984) (holding that in authoring the anti-quota statute, the legislature intended it to function as an affirmative defense rather than a civil cause of action).

154 Commonwealth v. Greene, 32 Pa. D. & C.3d 48, 52–53 (Ct. Com. Pl. 1984).

155 *Id.* at 53–54.

156 Alexander v. State, 949 S.W.2d 772, 773–74 (Tex. App. 1997).

157 *Id.* at 775. *But see* Hollier v. State, No. 14-99-01348-CR, 2001 WL 951014, at *7 (Tex. App. Aug. 23, 2001) (rejecting a similar claim because, unlike in *Alexander*, the appellant could not show that the arresting officer was operating under a quota at the time of arrest).

158 *See* State v. Sampia, 696 So. 2d 618, 620 (La. Ct. App. 1997).

159 *See, e.g.*, Begg v. Moffitt, 555 F. Supp. 1344, 1365 (N.D. Ill. 1983) (finding a violation under the First Amendment); Ruhlman v. Barger, 435 F. Supp. 447, 450 (W.D. Pa. 1976) (same).

police misconduct. Two are noteworthy. *Iglesias v. City of Hialeah*, the more modest and recent of the two, took place in a small city outside of Miami.[160] Juan Iglesias, an officer in the City's police department,[161] sent letters to the City's police chief and mayor protesting the enforcement of illegal ticket quotas.[162] Nevertheless, he received multiple disciplinary notices for not meeting traffic enforcement standards.[163] He used the state's whistleblower law to argue that the City had illegally retaliated against him for complaining about the quotas.[164] The trial court awarded him lost wages but precluded him from seeking noneconomic damages—a decision that the appellate court reversed.[165]

Martinez v. Village of Mount Prospect is the most noteworthy court victory involving a police challenge to a quota.[166] The case involved a Latinx police trainee, Martinez, who brought a national origin employment discrimination claim against the Village of Mount Prospect, a community outside of Chicago.[167] He argued that police leadership directed officers to target Latinx drivers to meet ticket quota requirements; to support his claim, he presented evidence highlighting the disproportionate number of traffic tickets given to Latinx drivers.[168] A federal district court entered an approximately $1.1 million settlement for Martinez[169] and enjoined the Village from "directing, suggesting, ordering or otherwise communicating that any police officer should focus, concentrate, target, profile, or otherwise modify law enforcement efforts in any way on the sole basis of the national origin of any person."[170] Finally, the presiding judge sent a letter, included in the opinion, to the Department of Justice.[171] The

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160 Iglesias v. City of Hialeah, No. 3D18-639, 2019 WL 3309040 (Fla. Dist. Ct. App. July 24, 2019).

161 *Id.* at *1.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id*. at *2. This dispute spawned a separate ongoing case involving Iglesias's sergeant, Paul DiPietro. In his testimony for Iglesias's case, DiPietro was reprimanded for failing to adequately discipline Iglesias, and then in Iglesias's civil suit, gave testimony that contradicted the City's position that there was no traffic quota. He argued that he was retaliated against by reassignment to a far location and then terminated. DiPietro brought his own claim into federal court, which the parties settled in 2020. *See* Joint Stipulation for Dismissal With Prejudice at 1, DiPietro v. City of Hialeah, No. 19-cv-23212 (S.D. Fla. Sept. 10, 2020), ECF No. 50.

166 92 F. Supp. 2d 780 (N.D. Ill. 2000).

167 *Id.* at 781.

168 *Id.*

169 *Id.*

170 *Id.* at 782.

171 *Id.*

letter highlighted the interface of the quota policy and racial profiling and encouraged the agency to investigate the Village for civil rights violations.[172]

Martinez represents one of the more significant rulings on police quotas, but when cases are decided on the merits, it is much more common for plaintiffs to lose. Judicial rebuffs come in a variety of forms. Sometimes courts, relying on *Garcetti*, rule that officer objections to police quotas do not constitute protected speech, which often ends the analysis.[173] Sometimes courts are unpersuaded by evidence that points to the existence of quotas.[174] Sometimes the claims are outright unpersuasive, as in *Gravitte v. N.C. Division of Motor Vehicles*,[175] where the Fourth Circuit rejected claims brought by a police officer and a police union who argued that North Carolina's quota policy violated officers' right to equal protection because the policy operated in some districts but not others.[176]

Two litigation losses are particularly instructive for thinking about quota-based policing in the future. Both cases, brought by police unions, reveal how departments and jurisdictions can work around statutory prohibitions. The first concerns Camden, New Jersey, which has been at the center of police reform for its drastic reboot of its police department.[177] In *Fraternal Order of Police, Lodge 1 v. City of Camden*, the Fraternal Order of Police challenged the City's implementation of a "directed patrol" program that required

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172 *Id.*

173 *See, e.g.*, Whitehead v. City of New York, 953 F. Supp. 2d 367, 375 (E.D.N.Y. 2012) (holding that the plaintiff officer's objections to the quota were not protected by the First Amendment because refusing to comply with the quota does not constitute expressive conduct).

174 *See, e.g.*, Statewide Univ. Police Ass'n v. Bd. of Trs. of Cal. State Univ., B290293, 2020 WL 2213040, at *5–6 (Cal. Ct. App. May 7, 2020) (finding no violation of the state's quota statute where personal evaluation "comment cards" offering feedback on the lack of parking enforcement citations were not punitive in nature); Oliverio v. Butler Univ., No. 15-cv-01630, 2017 WL 1650501, at *9 (S.D. Ind. May 2, 2017) (rejecting plaintiff's invocation of the respondent's quota requirement for parking tickets as not relevant because he was arrested for battery); Matarazzo v. Safir, 689 N.Y.S.2d 494, 495 (App. Div. 1999) (dismissing claim because petitioners gave no indication of how many tickets petitioners had to write and the only evidence offered was from two supervising officers from two different precincts who directed the individual petitioners to perform duties, during their meal breaks, that were likely to result in the issuance of tickets); Commonwealth v. McClellan, 45 Pa. D. & C.3d 627, 628 (C.P. Chester 1987) (rejecting defendant's affirmative quota defense because he only offered budget statements that showed projected revenues, which the court argued did not establish the existence of a quota system).

175 33 F. App'x 45, 47 (4th Cir. 2002).

176 The plaintiffs also raised relatively unpersuasive claims under the Due Process clause, the Privileges and Immunities clause, and the Fourth Amendment. *See id.* at 47, 49.

177 *See* Fussell, *supra* note 31.

police officers to "engage" people whether or not they were suspected of wrongdoing.[178] The directed patrol program consisted of "a structured 15–20 minute deployment into a targeted area to accomplish a specific patrol or crime reduction function."[179] The contacts were to be tracked and recorded, and officers on regular patrol were expected to perform a minimum of eighteen contacts.[180] According to plaintiffs, failure to comply with these numerical requirements was cause for disciplinary action.[181] The City argued that the program was not a quota because it required police-civilian interactions and not arrests or citations.[182] The Third Circuit relied on the text of the statute and, in a short analysis, agreed.[183] *Fraternal Order* is a paradigmatic example of how a police department can circumvent a statutory prohibition on quotas by focusing on precursory activity such as stops and contacts.

Another failed litigation challenge highlights the sophisticated ways through which police departments can subvert quota statutes. In *Phillipsburg Policemen's Benevolent Ass'n Local No. 56 v. Township of Phillipsburg*, a local police union challenged a township's "self-directed patrol index policy," which created a point system to evaluate police officers.[184] The index assigned different values to different kinds of arrests and citations:

- 4 Points - Narcotics arrests (4 points per subject arrested)
- 4 Points - Burglary and theft arrests
- 3 Points - Warrant arrests (1 subject, multiple warrants = 3 points)
- 2 Points - All moving motor vehicle summonses
- 2 Points - Quality of life summonses (e.g., excessive noise, alcohol related offenses, and animal offenses)
- 2 Points - Other arrests (e.g., disorderly conduct, domestic violence offense; 2 points per subject)
- 2 Points - Unsecured business found (report completed)
- 1 Point - All other town ordinance violations
- 1 Point - Hazardous conditions reported (report must be completed for incident)
- 1 Point - All parking tickets

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178 842 F.3d 231, 236 (3d Cir. 2016).

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.* at 237.

183 *Id.* at 239.

184 Phillipsburg Policemen's Benevolent Ass'n Local No. 56 v. Twp. of Phillipsburg, A-5016-12T3, 2014 WL 8765463, at *1 (N.J. Super. Ct. App. Div. May 5, 2015).

- 1/2 Point - For every two individual community policing contacts per tour of duty (4 contacts = 2 points, 6 contacts = 3 points, etc.)[185]

Officers who received an index of two or more points received an exceptional performance evaluation.[186] The union argued that the policy undermined the state's prohibition on quotas, and the trial court agreed.[187]

The appellate court struggled because the statute's language only prohibited traffic violations and arrests and, according to the Township, officers could achieve an excellent evaluation without resorting to either.[188] The court acknowledged that the policy "does not, on its face, require quotas" but went on to find that the "defendants cannot avoid the statutory prohibition by crafting a carefully worded policy that does not, when read literally, violate a statutory mandate, but does so when implemented."[189] It added, "if it looks like a duck, quacks like a duck, then it probably is a duck."[190] Notwithstanding the court's acknowledgment of possible subterfuge, it reversed the trial court's conclusion that the policy constituted an illegal quota.[191] As I explain in more detail in Part IV, decisions like *Fraternal Order* and *Phillipsburg* are more than simple losses for police unions. They demonstrate how quota statutes can be evaded in ways that harm the public and frustrate efforts to reign in police malfeasance.

D. Settlements

Social norms, legal hurdles, and an unfavorable jurisprudential landscape are features of quota litigation, but so are settlements. Government settlements with officers and civilians have touched various parts of the country—from small cities to big cities—and have ranged from five-figure to eight-figure payouts.[192] Though settlements often come with the qualification that they are not admissions of guilt, they provide a provisional glimpse behind the "blue wall" that quotas sometimes operate behind. Settlements typically come after courts reject motions by governments to dispense with litigation, leaving a body of law that may be useful for future challenges. At a bare min-

185 *Id.*
186 *Id.*
187 *Id.* at *2.
188 *Id.* at *3.
189 *Id.*
190 *Id.*
191 *Id.* at *4.
192 *See supra* note 26.

imum, settlements reveal how much a jurisdiction wants to avoid litigating their public insistence that they do not use quotas.

New York City, the jurisdiction with the country's largest police force,[193] has struggled with quota allegations and doled out the most in settlements. Adrian Schoolcraft—the involuntarily committed officer discussed above—survived a motion for summary judgment after a federal judge ruled that his speech was protected because he spoke as a citizen. Shortly thereafter, the City of New York settled with Schoolcraft for $600,000.[194] That same year, the City settled with Craig Matthews, an NYPD officer who complained that his Bronx precinct had competitions for who could make the most arrests, conduct the most stop-and-frisks, and issue the most summonses.[195] The Second Circuit ruled that Matthews's speech was protected by the First Amendment and the City subsequently settled with Matthews for $280,000 to avoid further litigation.[196]

A little less than a year later, after a federal judge certified a class of defendants subject to quota-based policing and subsequently imposed sanctions on the NYPD for destroying relevant evidence, the City of New York settled with the class for $75 million.[197] Under the settlement, the City agreed to reiterate its policy that quotas were illegal and that supervisors who implemented them could be subject to discipline.[198] In *Floyd v. City of New York*, the famous "stop and frisk" decision, quotas were a significant theme.[199]

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193 SHELLEY S. HYLAND & ELIZABETH DAVIS, BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL 3 (2019), https://www.bjs.gov/content/pub/pdf/lpd16p.pdf (noting that in 2016, New York City had the largest local police department with more than three times the number of employees than any other department).

194 Goodman, *supra* note 26.

195 Matthews v. City of New York, 779 F.3d 167, 169 (2d Cir. 2015); *see also* Christopher Mathias, *NYC to Pay $280,000 Over Cop Who Exposed City's Quota System*, HUFFPOST (Dec. 7, 2015, 3:48 PM), https://www.huffpost.com/entry/craig-matthews-nypd-quotas_n_5665cab8e4b072e9d1c6d86b.

196 Mathias, *supra* note 195.

197 *See* Stinson v. City of New York, No. 10 Civ. 4228, 2016 WL 54684, at *2–3 (S.D.N.Y. Jan. 5, 2016) (describing how the City failed to issue a litigation hold until three years after the complaint was filed, maintained a policy that provided for the destruction of evidence, destroyed materials related to CompStat meetings, destroyed activity reports, failed to preserve text messages, produced few responsive documents, was "grossly negligent," and acted in "bad faith"); Benjamin Weiser, *New York City to Pay Up to $75 Million Over Dismissed Summonses*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/nyregion/new-york-city-agrees-to-settlement-over-summonses-that-were-dismissed.html.

198 Weiser, *supra* note 197.

199 Floyd v. City of New York, 959 F. Supp. 2d 540, 596–602 (S.D.N.Y. 2013) (analyzing the pressure that quotas impart on officers to increase their stop numbers); *see also* Jenn Rolnick Borchetta, *Continuing to Reform the NYPD's Stop and Frisk Practice*, DEMOS (Feb. 16, 2016), https://www.demos.org/blog/continuing-reform-nypds-stop-and-frisk-practice (noting the NYPD norm of officers being judged "on how many stops they do").

On the other side of the country, the City of Los Angeles has paid millions in settlements to police officers who claim that the Los Angeles Police Department (LAPD) illegally required them to comply with ticket quotas. All of the settlements derive from allegations that Captain Nancy Lauer ordered officers to write at least eighteen traffic tickets each shift and required that eighty percent of citations be for major violations.[200] Officers who did not comply would be denied overtime or receive undesirable work assignments.[201] Despite the City's claim that the number was a goal and not a mandate, a jury awarded two officers over $1 million in damages.[202] Two years later, the City agreed to pay a settlement of almost $6 million to eleven police officers in a separate lawsuit over the same quota system.[203] In 2016, the City paid $950,000 to a former officer who also claimed that he was retaliated against for not participating in a ticket quota system.[204] Most recently, the City of Whittier, located in Los Angeles County, settled for $3 million with six officers who refused to participate in an arrest quota scheme.[205]

Miami Gardens, which has the largest Black population in Florida and has been called the "stop-and-frisk capital of America,"[206] has produced two settlements tied to quota-based policing. The first involved Earl Sampson, a Black man who was stopped more than four hundred times between 2008 and 2013, often for trespassing at his place of work.[207] Sampson led a class of Black and Latinx defendants who sued the City of Miami Gardens, arguing that the City's police department violated their constitutional rights by adhering to a racialized system of quota-based policing that led officers to selectively stop and frisk Black males ages fifteen to thirty.[208] A few weeks after a

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200 Joel Rubin & Catherine Saillant, *LAPD to Pay $10 Million in Traffic Ticket Quota Controversy*, L.A. TIMES (Dec. 10, 2013, 12:00 AM), https://articles.latimes.com/2013/dec/10/local/la-me-ln-ticket-quota-20131210.

201 *Id.*

202 Special Verdict, Chan v. City of Los Angeles, No. BC 418750 (Cal. Super. Ct. Apr. 11, 2011); Andrew Blankstein & Joel Rubin, *LAPD Officers Who Complained About Ticket Quotas Are Awarded $2 Million*, L.A. TIMES (Apr. 12, 2011, 12:00 AM), https://www.latimes.com/local/la-xpm-2011-apr-12-la-me-ticket-quotas-20110412-story.html.

203 Rubin & Saillant, *supra* note 200.

204 Branson-Potts & Reyes, *supra* note 26.

205 Sprague, *supra* note 26; *see also* Rivera v. City of Whittier, No. BC574443, 2017 WL 3579659, at *1 (Cal. Super. Ct. July 7, 2017) (evaluating the six plaintiffs' claims that they had been retaliated against for whistleblowing the existence of an illegal quota).

206 Meg O'Connor, *Inside 'The Stop-and-Frisk Capital of America*,' APPEAL (Feb. 21, 2019), https://theappeal.org/inside-the-stop-and-frisk-capital-of-america.

207 *Id.*

208 Sampson v. City of Miami Gardens, No. 13-CV-24312, 2015 WL 11202372, at *1 (S.D. Fla. May 27, 2015).

federal court declined a motion for summary judgment on those issues, the City settled with the plaintiffs for an undisclosed amount.[209]

During the litigation and subsequent settlement, a dispute about the use of quotas took place inside the police department. Wanda Gilbert, a Black crime analyst responsible for the police department's statistics, grew concerned about dubious arrests and quota-based policing that she claimed were tied to five percent yearly raises.[210] She corroborated the testimony in the *Sampson* litigation and claimed that the Black police chief, Matthew Boyd, directed officers "to stop all Black males between the ages of 15 and 30 years old."[211] She also described how "boys as young as seven," and adolescents "riding their bikes home from school" were accosted by police.[212] Gilbert wrote multiple memos to Boyd and met with City administrators, who told her not to put her concerns in writing because they would become public record.[213] She was fired after she wrote a final memo in 2011 protesting the department's practices. After Gilbert's own protracted legal battles, which made their way to the Eleventh Circuit, the City settled with her for approximately $1 million.[214]

Quota-based policing can also be fatal, as was the case in Atlanta when police officers killed an elderly woman during an illegal raid of her home. Officers in the Atlanta Police Department's narcotics unit, operating under a quota, pulled a gun on a man they had previously arrested, planted marijuana on him, and demanded that he tell them where they could find drugs.[215] He made up an address, which happened to be the residence of ninety-two-year-old Kathryn Johnston and had a wheelchair ramp in the front.[216] The officers made false statements to a magistrate judge to secure a no-knock search warrant.[217] They could not kick down the security gate, so they used a pry bar and a battering ram during the nighttime raid.[218] Johnston lived

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209 *See* Order and Notice of Settlement, Sampson v. City of Miami Gardens, No. 13-CV-24312 (S.D. Fla. June 23, 2015), ECF No. 228.

210 *See* Charles Rabin, *She Was Fired After Speaking Out About Bad Arrests. She Sued and Just Won $1 Million*, Miami Herald (Dec. 4, 2018, 6:01 PM), https://www.miamiherald.com/news/local/crime/article222442315.html.

211 Heather Dunhill, *Retired Crime Analyst Wanda F. Gilbert on Police Reform and Growing Up in Segregated South Florida*, Sarasota Mag. (Aug. 17, 2020, 11:42 AM), https://www.sarasotamagazine.com/news-and-profiles/2020/08/wanda-f-gilbert.

212 *Id.*

213 *Id.*

214 Rabin, *supra* note 210.

215 Radley Balko, *The Militarization of America's Police Forces*, 11 Cato's Letter 1, 1–2 (2013).

216 Ted Conover, *A Snitch's Dilemma*, N.Y. Times Mag. (June 29, 2012), https://www.nytimes.com/2012/07/01/magazine/alex-white-professional-snitch.html.

217 *Id.*

218 *Id.*

alone in a dangerous neighborhood, where an elderly neighbor was recently raped.[219] She fired one shot, which provoked 39 shots by the officers, some of which ultimately killed her.[220] After the shooting, the officers searched the home, found no drugs, and subsequently planted three bags of marijuana they had seized earlier that day in Johnston's basement.[221] Afterward, the officers conspired to fabricate a story that they then shared with homicide investigators.[222] An FBI investigation found that the narcotics unit had a performance quota of nine arrests per month.[223] In her sentencing of the three officers, U.S. District Judge Julie Carnes concluded that the pressure to adhere to the quotas played a role in the killing.[224] The City of Atlanta ultimately awarded a $4.9 million settlement to the family of Kathryn Johnston.[225]

It would be a mistake to understand quota settlements as a big city phenomenon. Some of these settlements have surfaced in small towns across the country. Local governments have settled cases involving allegations of quota-based policing in the City of Mendham in central New Jersey,[226] Smyrna, Delaware,[227] Lehighton, Pennsylvania,[228] Novi, Michigan,[229] Byrnes Mills, Missouri,[230] and the central California city of Paso Robles.[231] Financially, law professors Joanna Schwartz and John Rappaport have explained how these kinds

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219 *Id.*

220 *Id.*

221 *Third Atlanta Police Officer Pleads Guilty in Fatal Shooting of Elderly Woman*, DEPT. OF JUST. (Oct. 30, 2008), https://www.justice.gov/archive/opa/pr/2008/October/08-crt-972.html.

222 *Id.*

223 Bill Rankin, *Ex-Cops Get 5–10 Years for Drug Raid – Judge Agrees Atlanta Police Quotas Influenced Officers' Behavior*, ATLANTA J.-CONST., Feb. 25, 2009, at C1.

224 *Id.*

225 Ernie Suggs, *City to Pay Slain Woman's Family $4.9 Million*, ATLANTA J.-CONST. (Aug. 11, 2012), https://www.ajc.com/news/local/city-pay-slain-woman-family-million/GWqsgDArzmOhvpb7iPY6FI.

226 *See* Wright, *supra* note 26.

227 *ACLU Reaches Settlement with Smyrna Police over Wrongful Arrests*, ACLU (Feb. 19, 2015), https://www.aclu.org/press-releases/aclu-reaches-settlement-smyrna-police-over-wrongful-arrests.

228 *See* Hall, *supra* note 49.

229 *See* Phillips, *supra* note 26.

230 *See* Robert Patrick & Jeremy Kohler, *Former Byrnes Mill Police Chief Stole $12,800 from Suspects, Feds Say*, ST. LOUIS POST-DISPATCH (Apr. 20, 2017), https://www.stltoday.com/news/local/crime-and-courts/former-byrnes-mill-police-chief-stole-from-suspects-feds-say/article_faa278bd-25ef-5a8d-953a-534bc11f62c0.html.

231 *See* Scott Brennan, *City Pays $125,000 to Settle Lawsuit over Ticket Quotas*, PASO ROBLES DAILY NEWS (Mar. 24, 2014, 8:23 PM), https://pasoroblesdailynews.com/city-pays-125000-settle-lawsuit-ticket-quotas/15896.

of settlements can be consequential for smaller jurisdictions.[232] Socially, such settlements—which circulate in mainstream media outlets as well as in local papers of the day—can lead to the kinds of distrust in police that exists in bigger cities. The crucial difference is that many of these localities are not freighted by the same racial politics of large urban cities.[233] The geographical diversity of these settlements highlights how disputes about quota-based policing impact not only racial minorities—the presumed subjects of mass incarceration—but a broader and unassuming public.

Overall, one can glean a few themes from the legal challenges to police quotas discussed in this Part. First, many hurdles preclude these cases from being meaningfully heard by courts. Some obstacles reflect the general "closing of the courthouse doors" to civil rights litigants and criminal defendants.[234] Other impediments, like the code of silence, are specific to police culture and jurisprudence. Second, cases that do make it to a trial on the merits are still unlikely to win. Third, and relatedly, quota litigation is especially likely to settle. Settlements sit alongside victories, allegations, memoirs, police recordings, and criminological scholarship that all point to the existence of police quotas. With the definitional, statutory, and jurisprudential landscape sketched out, the Article will now turn to consider policy considerations both for and against the practice of police quotas.

III
The Theoretical Contours of Police Quotas

Most observers of the criminal justice system typically understand quotas through a pejorative lens. In scholarly literature, robust defenses of quotas are relatively rare. The closest thing to a defense is the claim by criminology scholars and law enforcement officials that police need to be evaluated and monitored in some way. This Part begins by considering the best possible rationales for why quotas

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[232] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539, 1565–66 (2017) (describing how large municipalities have "broad tax bases and big budgets" that allow them "to absorb the shock of large judgments and settlements that might seriously damage a smaller city"); *see also* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1174 (2016) ("Smaller jurisdictions will presumably feel the financial effects of lawsuits more acutely.").

[233] *See* Kim Parker et al., Pew Rsch. Ctr., What Unites and Divides Urban, Suburban, and Rural Communities 4 (2018), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2018/05/Pew-Research-Center-Community-Type-Full-Report-FINAL.pdf (describing the racial makeup and attitudes across different types of geographical communities).

[234] *See* Chemerinsky, *supra* note 136 (describing how the Supreme Court's decisions have resulted in restricted access to the courts for those hoping to enforce their constitutional rights).

might be desirable and defensible. Despite the normative position this Article adopts, it is analytically unsatisfying to oppose police quotas without confronting possible arguments.

Although some of the arguments in favor of quotas are weighty, Section III.B contends there are more compelling reasons on the side of prohibiting them. This Section builds on arguments that have been raised by opponents by offering a more comprehensive view of why quotas constitute bad policy. Moreover, it situates these objections within the definitional, statutory, and jurisprudential context described in Parts I and II. In doing so, Section III.B lays the groundwork for Part IV's normative claims.

A. Defenses

There are at least four possible defenses of quotas that surface in criminology, in the media, and in public statements made by law enforcement officials. The first is that quotas protect against police shirking and idleness. The second is that quotas make the police more productive (e.g., through "performance targets," "goals," "expectations"). Both of these defenses assume that there is a specific amount of illegal activity occurring in the world, and that officers should respond to some portion of it. The third defense involves the evaluative utility of quotas and maintains that quotas provide an ostensibly neutral way to assess police performance. The final defense of quotas is rare and accepts the profit-generating nature of policing.

1. Police Idleness

The cultural stereotype of lazy, underactive police officers is tied to a longstanding anxiety about police productivity. Concerns about shirking invoke basic agency theory where police officers act as agents for the principal. It is assumed that police officer-agents, "will shirk their responsibilities when given half a chance."[235] If they are not "sufficiently monitored or bonded, agents will be lazy or irresponsible—or at least not entirely selfless in their motivations."[236] Quotas are an attempt to reduce the agency costs that come with police administration. Although concerns about shirking exist across many organizations,[237] these worries have unique expressions in policing. In 1909, Leonhard Fuld, one of the earliest scholars of American urban

235 Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 276–77 (1998).

236 *Id.*

237 *See generally* JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC (1997) (studying shirking in federal, state, and local bureaucracies in order to debunk the concept of the "lazy bureaucrat").

policing, observed that "the policeman's life is a lazy life . . . as much of his time is spent doing nothing."[238] Fuld also noted that police are different because "[t]he authority with which they are invested . . . create in them an inordinate desire to shirk their work or, as they themselves express it, 'to take it easy.'"[239] NYPD spokesman Al O'Leary captured this sentiment in the 1990s. When six transit cops donned nooses at a news conference to protest their "bondage" to quotas, O'Leary lambasted: "If the union is suggesting we should go back to the days of coffee-drinking, doughnut eating, do-nothing cops, then they're way out of sync with policing today."[240]

Most defenses of quotas reject the formal label but embrace the idea of evaluating officers because of a concern about laziness. When Atlanta Police Chief Richard Pennington rejected the idea that his department utilized quotas, he conceded to maintaining a related euphemism and admitted, "Yes, we have performance measures in the Atlanta Police Department. We have to have performance measures because if we don't have them, the officers would come in every day with nothing on their sheets."[241] Departments certainly cannot eliminate shirking, but quotas can address this concern by demanding a minimum amount of law enforcement activity while utilizing employment sanctions to ensure compliance. Considering the significant amount of money spent on policing,[242] it is reasonable to expect some minimum output level, whether in the seemingly mundane realm of traffic enforcement or the more serious world of arrests.[243]

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238 LEONHARD FELIX FULD, POLICE ADMINISTRATION: A CRITICAL STUDY OF POLICE ORGANISATIONS IN THE UNITED STATES AND ABROAD 91 (2d ed. 1910).

239 *Id.* at 48–49.

240 Dean Chang, *Tix Quota No Token Rule: TA Cops*, N.Y. DAILY NEWS, Nov. 17, 1992, at 15.

241 Brenda Goodman, *Atlanta's Mayor Defends Chief Against Misconduct Accusations*, N.Y. TIMES (May 1, 2007), https://www.nytimes.com/2007/05/01/us/01atlanta.html.

242 *See* Niall McCarthy, *How Much Are U.S. Cities Spending on Policing in 2020?*, FORBES (June 12, 2020, 5:21 AM), https://www.forbes.com/sites/niallmccarthy/2020/06/12/how-much-are-us-cities-spending-on-policing-in-2020-infographic (stating that police budgets run as high as billions of dollars in several major cities in the United States, including New York ($5.61 billion), Los Angeles ($1.73 billion), and Chicago ($1.68 billion)).

243 *See generally* CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (describing the impact of police stops on racial disparities and perceptions of citizenship in the United States); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (examining the consequences of arrests and the implicit fusion of arrests and guilt); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016) (arguing against the outsized role arrests play in policing); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (examining how arrests are systematically used as a regulatory tool outside of the criminal justice system).

2. Productivity

Ensuring sufficient police activity is another rationale for quotas.[244] While related to idleness, this defense is premised on the idea that there is a certain amount of illegal activity in the world (i.e., traffic violations or criminal offenses) and that officers should attend to some portion of it.[245] Lieutenant Colonel Kelly of Chesterfield County, located outside of Richmond, Virginia, captured this sentiment when he stated, "Our officers are on the road 12 hours a day, so, if in a 12-hour period of time they stop three cars, I don't think that's unfairly targeting our citizens."[246] Productivity rationales also ostensibly ensure the fair distribution of work within a police force.[247] An officer in Georgia recently recounted how one of his colleagues refused to answer calls or provide backup to other officers, and admitted that the department would "need a quota system to get a guy like that moving or he'd just park his car and sleep."[248]

To make this productivity rationale more concrete, consider the case of drunk driving. Although Americans generally agree that driving while drunk is wrong and dangerous, many still tolerate it.[249] Setting aside real and often consequential issues of implementation,[250] as a general matter, one might argue that the careful dedication of police resources to drunk driving is uncontroversial. It would also be

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244 *See* Bronstein, *supra* note 21, at 551–53.

245 *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., 2 MANUAL FOR POLICE TRAFFIC SERVICES PERSONNEL PERFORMANCE EVALUATION SYSTEM 1 (1977) ("Productivity is not another name for 'quotas.' Productivity refers to measures of job performance to be used in comparison to expected levels of performance.").

246 Melissa Hipolit, *Former Police Officer Exposes Chesterfield's Ticket Quota Goals*, WTVR (July 15, 2014, 6:04 AM), https://wtvr.com/2014/07/14/chesterfield-quota-investigation.

247 *See* ATLANTA CITIZEN REV. BD., STUDY AND INQUIRY INTO THE ATLANTA POLICE DEPARTMENT'S INVOLVEMENT IN THE DEATH OF MS. KATHRYN JOHNSTON 24 (2010) ("A manager must ensure that officers are working and the work is fairly distributed.").

248 Bill Torpy, *Did DeKalb's Cops Have Arrest and Ticket Quotas?*, ATLANTA J.-CONST. (Oct. 2, 2016), https://www.ajc.com/news/local/bill-torpy-large-did-dekalb-cops-have-arrest-and-ticket-quotas/GxkflThnOJIuaFTSQ5Fd7N.

249 *See generally* BARRON H. LERNER, ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900 (2011) (tracing the history of drunk driving and efforts to stop it); JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA (1989) (analyzing Americans' drunk driving problem and anti-drunk driving policies); Fredrick Kunkle, *Americans Are Still Way Too Tolerant of Drunken Driving*, WASH. POST (Aug. 31, 2016, 8:02 AM) https://www.washingtonpost.com/news/tripping/wp/2016/08/31/americans-are-still-way-too-tolerant-of-drunk-driving-safety-advocates-say (discussing the problem of drunk driving in the United States today).

250 Implementation questions are related but not necessarily fatal to this rationale; instead such administrative issues—which unavoidably implicate questions of race, poverty, gender, and sexual orientation—can be attended to by training, oversight, and compliance.

reasonable to expect results, particularly in places where drunk driving is likely to occur (e.g., large sporting events) or during times of the year when people may be more willing to drink and drive (e.g., holidays). The absence of a numerical goal or a threat of adverse employment action would render this enforcement priority an empty mandate. For supporters of this defense, ticket quotas raise the stakes.

3. Evaluation

One might also argue that quotas can be useful for evaluative purposes. Various arguments are available on this front. First, as a general matter, employment-based, numerical expectations are unremarkable. In its discussion of quotas, the Atlanta Citizen Review Board explained, "Production quotas are a common part of modern life. Almost all of us work at jobs were [sic] we have explicit or implicit numerical goals."[251] The power to arrest and a legally sanctioned monopoly over violence differentiate police from typical employees, but it is not obvious that these extraordinary powers should exempt law enforcement from standard models of employer evaluation. In fact, such an exemption might add another layer to "police exceptionalism," much to the chagrin of criminal justice reformers.[252] Defenders of quotas might argue that numbers-based imperatives should not be the *only* standards for evaluating police officers, but they would certainly include quotas among them. They would likely point to the fact that many statutes expressly prohibit law enforcement from relying exclusively on numbers when assessing officers.[253] This argument for the evaluative utility of quotas focuses on the standard nature of numbers-based evaluations in the employment world and highlights the need to consider numbers alongside other factors.

Besides the normalcy of quantitative requirements in work settings, evaluation-based defenses of quotas also focus on their perceived tangibility and neutrality. On the former, Joe Giacalone, a former New York City law enforcement officer who defends the use

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251 ATLANTA CITIZEN REV. BD., *supra* note 247, at 22.

252 *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1843 (2015) ("Policing agencies—for that is what they are, agencies of executive government—fail to play by the rules of administrative governance.").

253 *See, e.g.*, N.J. STAT. ANN. § 40A:14-181.2 (West, Westlaw through L.2020, c.126 and J.R. No. 2) ("The department or force shall not use the number of arrests or citations issued by a law enforcement officer as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the department or force."); N.C. GEN. STAT. ANN. § 20-187.3 (West, Westlaw through S.L. 2020-97 of 2020 Reg. Sess.) ("Pay and promotions of members of the Highway Patrol shall be based on their overall job performance and not on the basis of the volume of citations issued or arrests made.").

of quantitative benchmarks, claims that "[t]here are very few ways we can evaluate police officers' activity."[254] Since it is impossible to "count how many times [police officers] shake someone's hand on the street," Giacalone is unbothered by critiques of quotas and insists that "it's written in the job description to make arrests and write summons."[255] Alongside this results-oriented approach to policing is the idea that quotas are straightforward and empirically superior to subjective assessments. Indeed, criminologists have acknowledged that quotas are sometimes justified because "such numbers are easy to calculate and compare."[256] Some describe these quantitative metrics as less vulnerable to the idiosyncrasies of police management.[257]

The idea of objectivity is significant because promotion in policing is notoriously nepotistic and subject to interpersonal politics.[258] Quotas, it could be argued, provide a more impersonal way to assess employee productivity and address longstanding concerns about diversity in law enforcement.[259]

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254 George Joseph, *NYPD Commander's Text Messages Show How the Quota System Persists*, APPEAL (Dec. 12, 2018), https://theappeal.org/nypd-commanders-text-messages-show-how-the-quota-system-persists.

255 *Id.*

256 STEVEN M. COX, SUSAN MARCHIONNA & BRIAN D. FITCH, INTRODUCTION TO POLICING 243–44 (3d ed. 2017).

257 *See* FRANK J. LANDY, PERFORMANCE APPRAISAL IN POLICE DEPARTMENTS 6 (1977) ("One of the major issues in performance measurement is the nature of the information gathered . . . . Most critics of subjective or judgmental performance evaluation imply that the judgment made by the supervisor is more related to personal idiosyncrasies than to the behavior of the person being rated.").

258 *See* THOMAS J. GRADEL & DICK SIMPSON, CORRUPT ILLINOIS: PATRONAGE, CRONYISM, AND CRIMINALITY 136 (2015) (discussing how a Chicago police officer failed to receive a promotion for failing to follow the directions of a corrupt local politician); STEVEN LEINEN, BLACK POLICE, WHITE SOCIETY 136 (1984) (discussing how promotion for detectives in the NYPD relied on both quantitative factors (number of arrests), and the leveraging of personal connections ("having 'sponsors' or 'personal contacts' on the job")); Andrea Shalal & Jonathan Landay, *Black Cops Say Discrimination, Nepotism Behind U.S. Police Race Gap*, REUTERS (July 2, 2020, 10:28 AM), https://www.reuters.com/article/us-minneapolis-police-blackofficers/black-cops-say-discrimination-nepotism-behind-u-s-police-race-gap-idUSKBN2432T8 (stating that discrimination in hiring and promotion has hampered Black representation in police forces in the United States).

259 On diversity, see MANGAI NATARAJAN, WOMEN POLICE IN A CHANGING SOCIETY: BACK DOOR TO EQUALITY (2008) (describing the development of women police over the past twenty years); DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY: AN AMERICAN STORY (2018) (describing the role that social, political, and economic relationships have played in the historical development of the police); *see generally* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006) (describing the recent dramatic shift in the demographics of police departments).

4. Revenue Generation

The image of mercenary police officers seizing civilians to meet quantitative goals is unsavory and makes explicitly revenue-based defenses of quotas rare. However, administrative practices across the country reveal an undeniable fact: law enforcement helps generate money for municipal coffers. This stark reality became clear in Nevada a few years ago, when state legislators vigorously protested the decriminalization of traffic tickets.[260] They argued that such an action would lead to an annual loss of $33 million in the counties of Washoe and Reno.[261]

The profitability of law enforcement also helps explain why cities get nervous when police officers engage in purposeful work slow downs. Public safety is an issue, but so is money. "Cops not writing summonses is usually very effective" and garners immediate attention "because it affects the city finances greatly."[262] Perhaps the most obscene version of policing for profit was the well-documented debacle in Ferguson, Missouri, where the federal government found that revenue, rather than public safety needs, shaped the city's racially discriminatory policing.[263] Defenders of revenue-based policing might concede that profit-motivated arrest quotas are indefensible and instead limit their defense to quotas for traffic tickets and violations, which represent the core feature of all anti-quota statutes and pending bills.[264]

A revenue-based defense of police quotas would highlight the fact that, in many jurisdictions, revenue from traffic violations helps finance socially valuable goods. Pennsylvania imposes a two-dollar surcharge on traffic violations that goes to its Access to Justice Account, which funds civil legal services in the state.[265] A recent California law imposes a four-dollar fee on moving violations to support emergency air medical services.[266] In a driver-friendly state with

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260 James DeHaven, *Do Traffic Tickets Unfairly Hurt the Poor? Nevada Lawmakers Eyeing Traffic Law Reforms*, RENO GAZETTE-J. (Dec. 21, 2017, 4:42 PM), https://www.rgj.com/story/ news/politics/2017/12/21/do-traffic-tickets-unfairly-hurt-poor-nevada-lawmakers-again-eyeing-traffic-law-reforms-despite-city/975423001.

261 *Id.*

262 Haven Orecchio-Egresitz, *Police Have Traditionally Protested Anti-Police Rhetoric by Making Fewer Arrests. Right Now That's Exactly What the Public Wants*, INSIDER (June 16, 2020, 1:41 PM), https://www.insider.com/police-have-historically-protested-by-making-fewer-arrests-its-become-2020-6.

263 *See* Ferguson Report, *supra* note 17.

264 *See infra* Appendices A & B.

265 42 PA. STAT. AND CONS. STAT. ANN. § 3733.1(c)(3) (West, Westlaw through 2020 Reg. Sess. Act 95).

266 *Governor Signs Bipartisan Bill to Extend Funding for Emergency Air Medical Services*, PR NEWSWIRE (Oct. 8, 2019, 2:42 PM), https://www.prnewswire.com/news-

the country's largest population, this surcharge directly helps the critical victims of automobile accidents[267] and improves services to rural residents who need critical care in urban centers.[268] Surcharges for traffic violations in New Jersey fund research on spinal cord repair, brain injury, and autism treatment.[269] In Michigan during the 2017-2018 fiscal year, penal fine revenues, including fines from traffic tickets, generated approximately $24.6 million, with $24.2 million distributed to public libraries and $392,800 distributed to law libraries.[270] Notably, all of these states have quota prohibitions on the books.[271] Government benefits derived from traffic violations, defenders would argue, are not extraordinary.

With this reality of government-generated profit in mind, a defender of quotas would argue that the remaining issue is whether quotas are an ideal way to actualize the subsidies that flow out of traffic laws. This is a question of tradeoffs.

Many jurisdictions rely on these kinds of cross-subsidies because of the legislative and electoral unpopularity of raising taxes. Jeff Cumins, a political scientist and expert in state budgets, captures this problem: "Legislators can get creative in ways to find revenue. Particularly in the last decades we've been in an anti-tax orientation, and so this is one way to raise money for legislators' pet projects and programs."[272] Funding by traffic violations is particularly salient in rural parts of the country as well as states in the southeast, where research has shown that jurisdictions have an unusually high reliance on fees and fines.[273] These localities have small property tax bases and collect fewer sales taxes than their urban counterparts because of relatively lower commerce.[274] Thus, "[e]ven when the ethical and fiscal problems with financing government through fines are apparent,

releases/governor-signs-bipartisan-bill-to-extend-funding-for-emergency-air-medical-services-300934138.html; CAL. GOV'T CODE § 76000.10(c)(1) (West, Westlaw through ch. 372 of 2020 Reg. Sess.).

267 § 76000.10(e)(1).

268 *Governor Signs Bipartisan Bill to Extend Funding for Emergency Air Medical Services*, *supra* note 266.

269 Laura Herzog, *We Paid $405M in Tickets Last Year; See Where the Money Went*, NJ.COM (Jan. 16, 2019), https://www.nj.com/news/2016/05/where_your_ticket_payment_money_goes_funds_new_jer.html.

270 MICHIGAN HOUSE OF REPRESENTATIVES FISCAL AGENCY, FISCAL BRIEF: TRAFFIC CITATION REVENUE 5 (2019), https://www.house.mi.gov/hfa/pdf/alpha/fiscal_brief_traffic_citation_revenue.pdf.

271 *See infra* Appendix A.

272 Liz Gonzalez, *Special Report: Why Traffic Tickets in California Are So High*, FOX26 NEWS (Apr. 29, 2019), https://kmph.com/news/local/special-report-why-traffic-tickets-in-california-are-so-high.

273 *See* Maciag, *supra* note 5.

274 *Id.*

viable alternatives remain hard to find."[275] Defenders of quota-based policing would contend that such regimes are just one part of a larger set of tradeoffs when policymakers are considering how to diversify money streams. They would argue that this version of policing should be openly debated and carefully considered instead of categorically rejected based on grotesque examples. Implementation and the specter of discrimination still loom, but defenders of quotas would maintain that these issues are analytically distinct and correctable.[276]

B. Counterarguments

Law enforcement, scholars of policing, critics of the police, and the media have all offered insights that quickly dispense with some of these rationales for quotas. This subsection supplements these insights with new objections. It offers a point-by-point refutation of the above-described defenses of quotas—some of which are compelling at first glance but suffer from practical and empirical problems.

1. The Allure of Activity

First, quota-based policing does not guard against shirking. Quotas may produce law enforcement activity, but officers who want to shirk will still find ways to cut corners even when there are quotas in place designed to keep them productive.[277] Consider the cases of Blaine Morgan and Michael Baker, two police officers in Charleston, South Carolina. Both officers disclosed that they falsified traffic tickets in an effort "to boost their respective citations totals" and subsequently resigned.[278] Their scam involved writing bogus traffic tickets without motorists' knowledge.[279] The officers had the tickets dismissed because they had no intention of following through on them in court. But, as one news article said at the time, "one of the officers apparently slipped up. He did not dismiss a ticket in time for court

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[275] Matt Ford, *The Problem with Funding Government Through Fines*, ATLANTIC (Apr. 2, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387.

[276] *See supra* note 249.

[277] *See* TOM BARKER, POLICE ETHICS: CRISIS IN LAW ENFORCEMENT 131 (3d ed. 2011) ("Supervisors who impose quotas . . . increase the risks that officers will cut corners or bend the laws . . . to meet the quotas . . . ."); ROGER G. DUNHAM & GEOFFREY P. ALPERT, CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 207 (7th ed. 2015) ("Management practices may encourage corruption by imposing pressures for arrest quotas or make it acceptable to cut corners to effect arrests.").

[278] Michael Majchrowicz, *2nd Charleston Police Officer Who Falsified Traffic Tickets Resigns from Department*, POST & COURIER (Sept. 14, 2019), https://www.postandcourier.com/news/2nd-charleston-police-officer-who-falsified-traffic-tickets-resigns-from-department/article_16b6279e-a334-11e9-a925-87076f916396.html.

[279] *Id.*

and the driver was notified."[280] After Officer Morgan resigned; the Charleston Police Department admitted that Morgan artificially inflated the number of tickets written in an attempt to conceal the fact that he was not actively and appropriately patrolling his area.[281] This statement casts doubts on whether quotas can mitigate shirking and highlights the perverse incentives they invite.

A similar case involving the termination of a ticket-falsifying, quota-fulfilling officer made it to the Supreme Court of Mississippi. The state fired officer Sammy William Ray for writing "ghost tickets."[282] In a sworn statement, he confessed, "During the time I have been employed with the [Mississippi Department of Public Safety], I have written 20–25 tickets that may or may not be factual tickets . . . . This was done to increase my ticket activity."[283] In an interview where he was questioned about his motives, he unambiguously added, "I was just trying to play a numbers game. You know, just trying to stay out of hot water."[284]

A massive overtime abuse scandal in Massachusetts also injects doubt into whether police quotas actually make officers more productive. The overtime scandal dated back to 1996 and involved more than twenty officers in the now-defunct Troop E of the Massachusetts State Police (MSP), which patrolled the Massachusetts Turnpike.[285] Prosecutors claimed that officers were "expected to issue a minimum of 8-10 citations" for each shift.[286] Inability to meet this requirement "had to be explained to supervisors and command staff," and "[r]epeated failures to meet this quota often resulted in a trooper being blocked from receiving [such] overtime opportunities."[287]

Because MSP received federal funding, the Department of Justice became involved and ultimately charged and convicted eight people of

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280 Anne Emerson, *CPD Chief: Full-Scale Investigation into Unwarranted Ticket Writing*, ABC4 NEWS (July 11, 2019), https://abcnews4.com/news/local/cpd-chief-full-scale-investigation-into-unwarranted-ticket-writing.

281 *Id.*

282 Ray v. Miss. Dep't of Pub. Safety, 172 So. 3d 182, 184 (Miss. 2015).

283 *Id.* at 186.

284 *Id.* at 185.

285 Matt Rocheleau, *State Police Overtime Scheme, Illegal Ticket Quota Was Devised by Higher-Ups 20 Years Ago, Former Trooper Says*, BOS. GLOBE (Feb. 6, 2020, 8:56 PM), https://www.bostonglobe.com/2020/02/07/metro/state-police-overtime-scheme-ticket-quota-system-stretches-back-20-years-former-trooper-says.

286 Scott J. Croteau, *Were Mass. State Police Troopers in OT Scandal Told to Fill Ticket Quotas? Agency Denies New Allegation in Federal Court Filing*, MASS. LIVE (Mar. 20, 2019), https://www.masslive.com/news/2019/03/were-mass-state-police-troopers-in-ot-scandal-told-to-fill-ticket-quotas-agency-denies-new-allegation-in-federal-court-filing.html.

287 *Id.*

various embezzlement-related charges.[288] Quotas were a motivating factor in the overtime scheme. According to one of the Department of Justice's sentencing announcements, the officers "admitted that they had been paid for hours they did not work, and for overtime shifts from which they left early."[289] The scheme was so elaborate that the federal judge directed prosecutors to revisit whether the parties should be charged with conspiracy.[290]

Elsewhere, quota-based policing has led officers to plant crack on innocent people,[291] lazily dump summonses on clearly abandoned cars,[292] cite fictitious drivers,[293] and ticket dead people.[294] Such malfeasance is not only in the domain of individual decisionmaking but can shape organizational culture. Police supervisors who require officers to meet quotas are also beholden to numbers in ways that encourage the aforementioned forms of misconduct.[295] The absence of empirical scholarship on quota-based shirking, coupled with the exis-

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[288] *See, e.g.*, U.S. Attorney's Office, District of Mass., *Former Massachusetts State Trooper Sentenced to Three Months in Prison for Overtime Fraud* (Mar. 26, 2019), https://www.justice.gov/usao-ma/pr/former-massachusetts-state-trooper-sentenced-three-months-prison-overtime-fraud.

[289] Press Release, U.S. Attorney's Office: District of Mass., Two Massachusetts State Troopers Sentenced in Overtime Abuse Investigation (June 4, 2019), https://www.justice.gov/usao-ma/pr/two-massachusetts-state-troopers-sentenced-overtime-abuse-investigation.

[290] Matt Rocheleau, *Judge Orders Federal Prosecutors to Explore Whether State Police OT Scandal Was a 'Conspiracy*,' BOS. GLOBE (Jan. 30, 2020, 3:45 PM), https://www.bostonglobe.com/2020/01/30/metro/judge-wolf-orders-federal-prosecutors-explore-whether-state-police-overtime-scandal-was-conspiracy.

[291] *See* Oren Yaniv, *Ex-Cop Jason Arbeeny Cries for Judge, Gets Probation; Judge Gustin Reichbach Could Have Given Him 4 Years*, N.Y. DAILY NEWS (Feb. 3, 2012), https://www.nydailynews.com/new-york/ex-cop-jason-arbeeny-cries-judge-probation-judge-gustin-reichbach-4-years-article-1.1016083; Press Release, Drug Policy Alliance, Former NYPD Detective Testifies that Police Regularly Plant Drugs on Innocent People to Meet Arrest Quota (Oct. 12, 2011), https://www.drugpolicy.org/news/2011/10/former-nypd-detective-testifies-police-regularly-plant-drugs-innocent-people-meet-arres; Jim Dwyer, *The Drugs? They Came from the Police*, N.Y. TIMES (Oct. 13, 2011), https://www.nytimes.com/2011/10/14/nyregion/those-drugs-they-came-from-the-police.html.

[292] ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS 112 (1983).

[293] Tom Jackman, *Md. Trooper Wrote DWI Tickets to Fictitious Drivers, Pleads Guilty to Perjury*, WASH. POST (Aug. 6, 2020, 6:33 AM), https://www.washingtonpost.com/crime-law/2020/08/06/md-trooper-wrote-dwi-tickets-fictitious-drivers-pleads-guilty-perjury.

[294] Paul Pizzuto, *Ex-NYPD Officer, Says He Ticketed Dead People to Meet Quotas*, HUFFPOST (Sept. 7, 2012, 11:17 AM), https://www.huffpost.com/entry/paul-pizzuto-ex-nypd-officer-ticketed-dead-people-quotas_n_1864310.

[295] *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 n.32 (1996) ("[P]olice supervisors, driven by the same crime control and quota pressures that drive field officers, actively encourage testilying.").

tence of widespread evidence of police corruption,[296] leads to the reasonable conclusion that these requirements do not incentivize diligent policing and instead contribute to the scourge of wrongful convictions.[297]

2. *Arbitrariness*

Arbitrariness and inattention to quality foil the expectation that quotas will enhance police productivity. It bears noting that how one measures productivity depends on how one envisions the function of police. The purpose of law enforcement is usually tied to standard conceptions of crime control, public safety, and private property protection. But many critics of the criminal justice system attribute other, less uplifting goals, to the police, including enforcement of the racial order and oversight of the poor. There is much evidence to support the latter understanding.[298] However, this Section's analysis will proceed, for argument's sake, with the former, good-faith conception of the police.

Even assuming that police serve the socially beneficial purpose of protecting life and property, numbers will not be completely impeachable and have a role in how this division of government is evaluated. But per se quotas are blunt objects that do not neatly get at public

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296 *See* IVKOVIC, *supra* note 116; Rudovsky, *supra* note 116; Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1133 (2013); Carroll Seron, Joseph Pereira & Jean Kovath, *Judging Police Misconduct: "Street-Level" Versus Professional Policing*, 38 L. & SOC'Y REV. 665 (2004) (surveying New York City residents' accounts of instances where police officers engaged in prohibited behavior such as use of unnecessary force and abuse of authority).

297 *See* JESSICA S. HENRY, SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED 66 (2020) ("Quotas result in no-crime wrongful convictions because they motivate the police to arrest people for crimes that never happened and cause innocent people to plead guilty [to them] so they can go home.").

298 *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH (2015); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); NEIL WEBSDALE, POLICING THE POOR: FROM SLAVE PLANTATION TO PUBLIC HOUSING (2001); Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. (1999).

safety. Scholars and legislative supporters have noted their arbitrariness,[299] but there is more to unearth.

The arbitrariness of police quotas is highlighted by their overinclusive and underinclusive nature. Unreasonably high quotas can extract officers' time and prevent them from addressing more serious threats that, if attended to, could lead to greater public safety benefits.[300] When quotas are low, as supporters claim, public safety benefits are questionable.[301] A quota of two arrests every six weeks led one cop to offer the following query: "Suppose the officer makes two arrests the first two weeks? What does he do the next four?"[302] If the productivity rationale governs, the officer could technically coast. Ultimately, the productivity defense for quotas is rife with incoherence. It can be irresponsive to public safety by serving as a distraction from more serious criminal wrongdoing. This rationale can also be insensitive to public safety by only scratching the surface of illegality and allowing officers to satisfy a minimal threshold quota that may not correspond with actual criminal offending.

3. Thin Evaluations

It is undeniable that law enforcement leadership needs some method to evaluate officers, but quotas are subpar instruments for such assessments. Critics of quotas inside and outside of law enforcement have taken the laziness rationale and deployed it against supervisors, with one online commenter arguing that "[q]uotas are management's lazy attempt to make a very few lazy employees pick up the pace."[303] But a simpler, less loaded critique is available: Quotas poorly capture the qualitative dimensions of policing and misguidedly

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[299] *See, e.g.*, Bronstein, *supra* note 21, at 545; Mitch Smith, *New Law Bans Police Use of Ticket Quotas*, CHI. TRIB. (June 16, 2014), https://www.chicagotribune.com/news/ct-xpm-2014-06-16-chi-quinn-signs-into-law-bill-banning-police-ticket-quota-20140615-story.html (noting support for Illinois's quota statute and quoting one legislator who stated, "Arbitrary quotas on the number of tickets that have to be issued by police officers undermines the public trust in the police departments' priorities . . . [b]y eliminating these quotas, we can restore that trust and ensure that police officers are free to do their job protecting the public").

[300] David I. Dewar, *Goal Displacement*, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 193, 196 (David Andrew Schultz & James A. Beverly eds., 2004).

[301] *See id.*

[302] Athelia Knight & Benjamin L. Weiser, *Street Cops*, WASH. POST (July 12, 1982), https://www.washingtonpost.com/archive/politics/1982/07/12/street-cops/68359866-8b67-4514-a6a2-3aa39b4a1b38.

[303] Stephen Cain, Comment to *Ticket Quota for Ypsilanti Police Officers Is Illegal, Arbitrator Finds*, ANN ARBOR NEWS (Feb. 5, 2010, 6:04 AM), http://www.annarbor.com/news/ticket-quota-for-ypsilanti-police-officers-is-illegal-arbitrator-finds.

privilege quantity. The insights of criminologist Malcolm Sparrow are helpful here. Professor Sparrow writes:

> Some departments set targets for functional outputs, including enforcement activities such as arrests, stops, searches and traffic citations. This . . . should never be the default position or become normal practice. If you want quality work from a carpenter, it makes no sense to demand that he or she drill a certain number of holes or hammer a quota of nails. The essence of craftsmanship involves mastery of all the tools and the ability to select among them based on a clear understanding of the specific task in hand. Functional quotas make little sense in this context.[304]

The obsession with quantity sacrifices a long list of qualitative concerns that are relevant to policing, namely good judgment, fairness, reasonableness, and legality.[305] Defenders of quotas may point to statutes that prohibit exclusive consideration of citations and arrests and require evaluations to be holistic. Nevertheless, the constellation of case law, settlements, officer testimony, and media accounts described in this Article suggests that, at a bare minimum, holistic evaluation of police is not a typical practice.[306]

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304 Sparrow, *supra* note 34, at 18.

305 *Id.* at 18–20; *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 601 (S.D.N.Y. 2013) ("For the purposes of performance review, an unconstitutional stop is no less valuable to an officer's career than a constitutional one—because the two are indistinguishable."); Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why it Matters*, 54 WM. & MARY L. REV. 1865, 1875–80 (2013) (describing rightful policing, which focuses on the fairness of police conduct, as opposed to the traditional emphases on lawful or efficient policing). The obsession with numbers is not unique to policing: Scholars have criticized how prosecutors, too, overemphasize convictions and their win-loss records at the expense of fair criminal justice outcomes. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 992, 987 (2009) (suggesting that "prosecutors view their jobs as maximizing convictions" and, along the lines of Professor Sparrow, noting how "conviction statistics ignore other important outcomes, such as declinations, sentences, and victim satisfaction"); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009) ("Prosecutors may feel the need to be able to point to a record of convictions and long sentences if they want to be promoted or to land high-powered jobs outside the government."); Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 28 (2008) (remarking that most of the prosecutors the author, a criminal procedure scholar and former director of the D.C. Public Defender Service, engaged with "seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim").

306 STAMPER, *supra* note 22, at 3 ("In fact, many supervisors believe that counting and recapping activity is the only way to evaluate police performance.").

4. Tradeoffs and Revenue-Based Defenses

Finally, it should go without saying that the police should not be tasked with generating revenue. Though such a normative claim may seem obvious, it chafes against the entrepreneurial realities of American policing. "Economic sanctions," Beth Colgan explains, "constitute the most common form of punishment in the United States."[307] If the profit-based defense of police quotas rests on a question of tradeoffs—that is, tickets allow localities to generate revenue when they cannot raise taxes—then the tradeoffs at least need to be named and assessed.

Fortunately, empiricists are beginning to name the costs of for-profit policing. Many of their studies focus on the disproportionate racial effects of policing for profit.[308] But even when measured only in terms of the public-safety purpose of policing, quotas come with considerable costs. Rebecca Goldstein and her colleagues have studied how municipal reliance on fees, fines, and forfeitures, as opposed to taxes, produce "undesirable outcomes that may not have been anticipated by policymakers aiming simply to cover a revenue shortfall."[309] Relying on census data that collected the revenue and expenditure data of approximately 90,000 local governments, they found that reallocating police resources to money-generating activity was "associated with neglect of other important police functions, namely, the investigation of violent crimes."[310] This revenue-based orientation ultimately "compromises their ability to perform their traditional functions."[311] According to the study, a one percent increase in the share of revenues from fees, fines, and forfeitures is associated with a 3.7 per-

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[307] Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1537 (2020).

[308] *See generally*, Akheil Singla, Charlotte Kirschner & Samuel B. Stone, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments*, 56 URB. AFFS. REV. 1132 (2020); Allison P. Harris, Elliott Ash & Jeffrey A. Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY, & POL. 450 (2020), https://doi.org/10.1017/rep.2020.10; Kelsey Shoub, Leah Christiani, Frank R. Baumgartner, Derek A. Epp & Kevin Roach, *Fines, Fees, Forfeitures, and Disparities: A Link Between Municipal Reliance on Fines and Racial Disparities in Policing*, 0 POL'Y STUD. J. 1 (Aug. 7, 2020), https://doi.org/10.1111/psj.12412.

[309] Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 24 (2018); *see also* Michael D. Makowsky & Thomas Stratmann, *Political Economy at Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 510 (2009) (finding in empirical study that "the likelihood and dollar amounts of fines [for speeding tickets] are decreasing functions of local property tax revenue" and also that "the likelihood of receiving a speeding fine is higher in towns that are in a fiscal crunch caused by a rejected increase in the property tax limit").

[310] *Id.*

[311] *Id.*

centage point decrease in the clearance rate for violent crimes.[312] Economist Anna Harvey has similarly concluded that "fiscal incentives can distort the allocation of law enforcement effort[s]" in ways that have distributional consequences for public safety.[313] Notwithstanding empirical work that highlights the compromising cost of profit-based policing, there are a host of other constituent-specific problems with police quotas.

C. Additional Objections

It is essential to not let defenses of quotas and counterarguments to them totally consume how quotas are understood. This subsection offers a series of additional reasons why quotas constitute lousy policy. To highlight the unique possibility for building consensus on prohibiting quotas, this subsection focuses specifically on three constituents: law enforcement, the general public, and racial minorities.

1. Law Enforcement Objections

Police officers and police unions have been some of the most prominent opponents of quotas. Two criticisms often offered by unions stand out. The first concerns how quotas curtail the discretion of officers.[314] Patrick Lynch, head of the Police Benevolent Association, the police union for the NYPD, has been vocal on this issue. In an op-ed that was relatively dismissive of the racial dimensions of police-citizen encounters, Lynch argued that quotas were the source of New York City's policing woes.[315] Such requirements, he complained, "risk turning officers into automatons."[316] The Illinois Fraternal Order of Police Labor Council, which supported Illinois's quota statute, echoes a similar sentiment on its website, stating that "[q]uotas turn police officers into tax collection machines instead of

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312 *Id.*

313 Anna Harvey, *Fiscal Incentives in Law Enforcement*, 22 AM. L. & ECON. REV. 173, 173 (2020). In his support for Illinois's statute, Chicago State Senator Bill Cunningham relevantly noted, "Policing should not be used as a revenue enhancement strategy by municipalities. . . . Officers will no longer be distracted from their regular law enforcement duties in order to meet ticket quotas." *See Cunningham Bill Signed into Law*, BEVERLY REV. (Aug. 28, 2018), https://www.beverlyreview.net/news/community_news/article_618a47fe-aae8-11e8-9a28-872a66178e5c.html; *see also* Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 189 (2019) (finding in empirical study "that revenue-driven law enforcement can distort police behavior and decision-making, . . . altering the quantity, type, and racial composition of arrests").

314 *See* Bronstein, *supra* note 21, at 550.

315 Patrick J. Lynch, *The Real Fix for Stop-and-Frisk*, N.Y. DAILY NEWS (Oct. 7, 2013, 4:20 AM), https://www.nydailynews.com/opinion/real-fix-stop-and-frisk-article-1.1476893.

316 *Id.*

professional law enforcement officers. It distracts police officers in the exercise of their day-to-day law enforcement activities."[317]

Quotas are legal in Arizona, but the Tucson Police Officers Association has advocated for a statutory prohibition. Jason Winsky, government affairs director for the union, declared, "We're just philosophically opposed to any kind of quota . . . . It's a morale issue for us because the officer no longer has discretion."[318] In Washington, where quotas are also legal, retired Spokane police officer and Washington State Senator Jeff Holy sponsored a bill prohibiting the practice.[319] For Holy, "[a]n officer's ability to make an independen[t] decision allows them to apply the level of enforcement action they believe to be appropriate for the situation. An officer being *directed* to apply enforcement action to comply with an employer policy or ticket quota reflects badly on law enforcement."[320] These discretion-based objections are organized around the belief that quotas lead officers to be ruled by numbers instead of common-sense judgment.

Curtailed discretion bleeds into the second major criticism offered by police: that quotas limit the scope of their work. This critique works in two different directions. On one end is a concern that quotas prevent officers from attending to more serious crimes. Quantitative studies of law enforcement priorities lend support to this idea.[321] On the other end is a concern that quotas disincentivize police from engaging in socially beneficial activity that is less penal and harder to quantify. "If I break up a fight between two boys and send them home, I don't get credit," an officer explained.[322] "If I help deliver a baby in an emergency, I get no credit. But I score points if I issue a seat belt summons . . . ."[323]

When quotas distract from serious crimes and preclude the ostensible services that law enforcement holds itself out as offering (officers

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317 Brenda Schory, *New Law to End Ticket Quotas; Locally, Most Local Police Agencies Say They Never Had Them Anyway*, KANE CNTY. CHRON. (July 31, 2014, 10:48 PM), https://www.kcchronicle.com/2014/07/29/new-law-to-end-ticket-quotas-most-local-police-agencies-say-they-never-had-them-anyway/afzdt5z.

318 Yoohyun Jung, *Police Union Calls for Elimination of Traffic-Ticket Quota*, ARIZ. DAILY STAR (Oct. 9, 2014), https://tucson.com/news/blogs/police-beat/police-union-calls-for-elimination-of-traffic-ticket-quota/article_2cde50a7-10a0-5e18-8908-7335510ce811.html.

319 *New WA Bill Would Discourage Traffic-Ticket Quotas for Officers*, MYNORTHWEST (Feb. 17, 2020, 2:44 PM), https://mynorthwest.com/1723060/ticket-quotas-officers-washington.

320 *Senate Passes Holy Bill that Seeks to Discourage Traffic-Ticket Quotas for Officers*, WASH. STATE SENATE REPUB. CAUCUS (Feb. 17, 2020) (emphasis added), https://jeffholy.src.wastateleg.org/tag/sen-jeff-holy.

321 *See supra* text accompanying notes 309–13.

322 POLICE REFORM ORG. PROJECT, *supra* note 14, at 3.

323 *Id.*

pledge to protect and *serve*), the nature of police work narrows, and public safety is compromised. Of course, quotas are not diametrically opposed to public safety, but they create scenarios where the public safety objective is deprioritized. Adherence to quotas leads police officers to be more concerned about obtaining a reward or avoiding a penalty.[324] Many officers are unbothered by this state of affairs and play the numbers game, but some disapprove. Their objections supply a powerful internal critique.

It is critical to understand that police unions are not typically torchbearers of criminal justice reform. In many ways, they have impeded reform.[325] As organizations tasked with ensuring optimal work conditions for their members, union concerns about quotas are far from selfless. Officers who protest quotas in their individual capacities typically do so as a response to employment grievances rather than altruistic civil rights concerns. These sobering realities do not, however, mean that the police's insights on quotas are bankrupt. In fact, their complaints are consonant with scholarly observations and warrant meaningful consideration.

2. Racial Vulnerability

Vulnerability to violent police encounters, and the racial subjugation that has been a feature of policing, make racial minorities foreseeable critics of quotas. This opposition is well warranted. Officers have confessed to using racial minorities to fulfill their quotas and pad their statistics.

In New Jersey, one officer described quota compliance as a sport that took place in minority communities. "Guys were going out. They were competing for how many tickets each guy could get," he revealed.[326] "They're saying they're going out hunting. You go to traffic court and you see the impact. 90% of the people you see there are blacks and latinos."[327] The practice of "hunting" occurred in New York, too. In an affidavit in one of many cases involving police quotas, former NYPD officer Christopher LaForce said that he had decided

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[324] Molly Davis, *Why the Utah Legislature Banned Police Quotas*, LIBERTAS INST. (Mar. 19, 2018), https://libertasutah.org/op-eds/why-the-utah-legislature-banned-police-quotas.

[325] *See* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1340–46 (2020) (describing the critiques of police unions); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747–56 (2017) (discussing how police unions have been obstacles to criminal justice reform); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1191 (2017) (arguing that internal disciplinary procedures developed by police unions during the collective bargaining process can hinder criminal justice reform).

[326] Wallace, *supra* note 44.

[327] *Id.*

to retire because of the fatigue that quota-inspired racial profiling induced. "I got tired of hunting Black and Hispanic people because of arrest quotas," he complained.[328] In addition to civilians, quotas also impact minority officers. These officials, who some hold out as a solution to racist policing, are sometimes forced to comply with a practice that facilitates discrimination and jeopardizes police relations with minority communities.[329] Additional empirical evidence suggests that minorities bear the brunt of the kinds of revenue-based policing that sometimes informs quota regimes.

On the federal level, Immigration and Customs Enforcement (ICE) has long had formal arrest quotas that impact the undocumented population and the predominantly Latinx community that is subject to ICE raids.[330] The Department of Justice's investigation into the City of Ferguson led it to conclude that "[F]erguson's police and municipal court practices both reflect and exacerbate existing racial bias," and specifically recommended that the Ferguson Police Department "[p]rohibit the use of ticketing and arrest quotas, whether formal or informal."[331]

The vulnerability of racial minorities to being targeted by quotas can lead to unnecessary, and sometimes violent, contact with the police. Recall that South Carolina passed its quota statute in response to a police officer's killing of Walter Scott, an unarmed Black man. The defense team argued that the encounter stemmed from the officer's attempt to fulfill his department-mandated quota of three minor violations every shift.[332] A desire to decrease unnecessary police and citizen contact also motivated Tennessee's recent quota

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328 Joseph Goldstein & Ashley Southall, *'I Got Tired of Hunting Black and Hispanic People*,' N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2019/12/06/nyregion/nyc-police-subway-racial-profiling.html.

329 *See id.*; CRIME + PUNISHMENT, *supra* note 68; Sklansky, *supra* note 259 (discussing how the diversification of police departments affects their relationships with the communities they serve).

330 *See* Diaz-Bernal v. Myers, 758 F. Supp. 2d 106, 114 (D. Conn. 2010); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 560–61 (2011); Michael J. O'Brien, *"Widespread" Uncertainty: The Exclusionary Rule in Civil-Removal Proceedings*, 81 U. CHI. L. REV. 1883, 1898–99 (2014).

331 Ferguson Report, *supra* note 17, at 2, 91.

332 Cynthia Roldan, *Ticket Quota Limit Proposal for Law Enforcement Heads for Senate Floor*, POST & COURIER (Nov. 2, 2016), https://www.postandcourier.com/politics/ticket-quota-limit-proposal-for-law-enforcement-heads-for-senate/article_14f44c11-d0f2-57c0-91b1-69b23bd536c8.html.

statute,[333] which levies criminal fines on law enforcement officials who impose quotas.[334]

A pause is necessary here, lest causal mechanisms get confused. Quotas do not cause police brutality and killings. Rogue officers and legal cultures of impunity are better explanations. But quotas can create the conditions for violent or even lethal interactions. Quotas figured prominently in an almost 200-page decision where a federal judge painstakingly described how the NYPD maintained a racist stop-and-frisk policy that flouted constitutional rules.[335] That policy encouraged officers to "crush the fucking city," and indiscriminately stop Black and Latinx people without any legal reason because they "'can always articulate' some basis for a stop after the fact."[336] Testimonies given to the Center for Constitutional Rights, which litigated the Floyd case, described how stops often resulted in excessive use of force by police against minorities who were slapped, thrown against walls, tasered, and brutalized.

Moreover, quotas subject racial minorities to police interactions that are often devoid of legal remedies and exacerbate their marginalization. Devon Carbado's insights into the relationship between racial vulnerability and police misconduct are clarifying. "The more vulnerable a group is to predatory policing, the greater that group's police contact and thus the greater the exposure to the possibility of violence."[337] Such predation "trades on and compounds the marginalization of an already marginalized group" and "facilitates police violence by increasing the frequency [of minority contact] with the police."[338]

An intersectional analysis further reveals how quotas exacerbate social inequality and make marginalized groups easy targets for police misconduct. Women of color, low-income people, and members of the LGBTQ community are particularly susceptible to being targeted by quota-fulfilling police officers. Police whistleblower Adhyl Polanco explains:

> [W]hen you go hunting, when you put any type of numbers on a police officer to perform, we are going to go for the most vulnerable. Of course, we're going to go for the LGBT community, we're

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333 *See* Arnold, *supra* note 95.

334 Act of July 15, 2020, ch. 801, 2020 Tenn. Pub. Acts, https://publications.tnsosfiles.com/acts/111/pub/pc0801.pdf.

335 Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

336 *Id.* at 598–99.

337 Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 561 (2017).

338 *Id.*

> going to the black community, we're going to those that have no vote, that have no power.[339]

Quotas exacerbate social vulnerability and make marginalized groups easy targets for police misconduct. When set against the larger context of police corruption, the predatory nature of quotas demonstrates why the practice constitutes bad policy.

3. The General Significance of Quotas

Police quotas should concern the general population. Some people may be undisturbed or feel unaffected by the problems police quotas invite either because they occupy a demographic group that is not a posterchild for mass incarceration or because they imagine themselves as law-abiding and invulnerable to quota-based policing. Criminal law theorist Doug Husak invites skepticism of such beliefs.[340] He observes that "[o]ffenses are so far-reaching that almost everyone has committed one or more at some time or another; the criminal law no longer distinguishes 'us' from 'them.'"[341] Going a step further, Professor Husak estimates that "over 70% of living adult Americans have committed an imprisonable offense at some point in their life."[342] Thus, the average person should be concerned about quotas because they likely engage in activities that come under the purview of this kind of policing.

Quotas can also lead to routine violations of constitutional rights and civil liberties. An officer who is forced to comply with a quota "will find it difficult to be sympathetic to procedural due process guidelines which stand in the way of filling his quota."[343] In addition to due process issues, quotas invite equal protection problems, implicate Fourth Amendment issues related to unconstitutional police stops, and raise First Amendment concerns involving a police officer's ability to speak out about quotas without fear of retaliation. Constitutional problems with quotas have arisen in large, diverse metropolitan areas like New York, Chicago, and Los Angeles as well as small cities like Mount Enterprise, Texas (with a population of approximately 450

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339 Sarah Wallace, *More NYPD Officers Say There's Proof of Quota-Driven Arrests*, NBC N.Y. (Apr. 1, 2016, 8:48 PM), https://www.nbcnewyork.com/news/local/nypd-officers-arrest-quota-exclusive-interview-pressure-numbers.

340 *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 24 (2008).

341 *Id.*

342 *Id.*

343 Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 31 (1978).

people) and racially homogenous states like Utah (approximately ninety percent white).[344]

James Spadola, a former Delaware officer who has advocated for anti-quota legislation in his state, argues that "quotas transform civilians into a performance measure and potential arrest statistic, as opposed to an American with constitutional rights and protections that should be served and protected by the police."[345] The availability of more sanitized euphemisms (e.g., performance standards, targets, activity) and the lack of rigorous investigations into quotas keep the general public from realizing how common they are in law enforcement. In a country that is only beginning to understand the problems of over-policing, quotas are a poorly understood practice that compromise an already fragile body of constitutional law.

For conservatives and liberals who believe that the police serve a public safety function, quotas are distortive and jeopardize the legitimacy of law enforcement. These distortive features may be of particular concern to law-and-order conservatives. John Eterno, a criminologist who spent two decades as an officer and retired as a captain in the NYPD, explains how quotas pervert police goals in his book *The Crime Numbers Game: Management by Manipulation*.[346] Eterno and his co-author Eli Silverman (also a criminologist) argue that quotas encourage police to focus on less difficult crimes "at the expense of more significant and arduous arrests."[347] In a society where consensual crimes like drug trafficking leave no discernible complainant, murders often go unsolved, sexual assault is underreported, and white-collar crimes go unpunished. This should be a cause of concern for fiscal conservatives, law-and-order advocates, and supporters of victims' rights.

Deeper questions of legitimacy also abound, as quotas undermine liberal concerns about procedural justice and the rule of law. Laurie Robinson, who was responsible for developing recommendations after the Department of Justice's Ferguson investigation, explained how quotas and numbers-policing can shape public opinion: "If citizens believe that tickets are being issued or arrests are being made for rea-

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344 *Mount Enterprise, Texas Population 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/mount-enterprise-tx-population (last visited Jan. 9, 2020); *Utah Population 2020*, WORLD POPULATION REV., https://worldpopulationreview.com/states/utah-population (last visited Dec. 20, 2020).

345 James Spadola, *Delaware Should Ban Police Quotas*, DEL. ONLINE (July 28, 2017, 11:45 AM), https://www.delawareonline.com/story/opinion/contributors/2017/07/28/delaware-should-ban-police-quotas-james-spadola/519661001.

346 JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION (2017); *see also* Bronstein, *supra* note 21, at 555–56.

347 ETERNO & SILVERMAN, *supra* note 346, at 11.

sons other than the goal of law enforcement," she contends, "then their trust in the legitimacy of the system is really eroded."[348] Others have echoed this view.[349] As liberal reformers and some conservative allies work to repair a criminal justice system riddled with imperfections, they need to address how quotas influence internal enforcement priorities and shape public conceptions of fairness.

Skeptics of incremental criminal justice reform—a group in which I find membership—may believe that reforming the practice of police quotas fails to confront the incorrigible nature of American policing. The strongest version of this critique would likely come from abolitionists who resist reformist reforms that tinker at the edges of the criminal justice system, as opposed to non-reformist reforms, which "have as their end goal the eventual dismantling of that system and are understood to be individual elements or steps in a larger strategy of structural transformation."[350] This is a valid concern. Eliminating police quotas cannot solve the problems of white supremacy and poverty management that are central to the criminal justice system, but there are at least three reasons why abolitionists and radicals should care about police quotas. These reasons are theoretical, tactical, and temporal.

First, addressing the problem of quotas can be an important interim step toward reducing the imprint of the penal state, which is one goal of abolitionism.[351] Enforcing quota statutes and stamping out the practice elsewhere could shift the police away from understanding civilians as "stats to be harvested" and reduce unnecessary police encounters.[352] Taken one step forward, addressing quotas could also turn out to be especially necessary if the previously unorthodox, but increasingly recognizable, goal of defunding the police is achieved.[353] There is a strong reason to believe, based on the Camden example,

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348 Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015, 4:47 AM), https://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers.

349 *See* Smith, *supra* note 299; Jonathan Banks, *Thing Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RSRV. L. REV. 931 (2016).

350 Marina Bell, *Abolition: A New Paradigm for Reform*, LAW & SOC. INQUIRY 1, 14 (2000).

351 *See, e.g.*, *Abolition Can't Wait*, 8 TO ABOLITION, https://www.8toabolition.com/why (last visited Jan. 9, 2020); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration.

352 *The Big Reason Tampa Police Write So Many Tickets: They're Told To*, TAMPA BAY TIMES (Dec. 16, 2015), https://www.tampabay.com/news/publicsafety/crime/theres-a-big-reason-tampa-police-write-so-many-tickets/2252912.

353 *See* Peter Simek, *What 'Defunding' the Dallas Police Department Could Look Like*, D MAG. (June 12, 2020, 11:14 AM), https://www.dmagazine.com/frontburner/2020/06/what-defunding-the-dallas-police-department-could-look-like.

that quotas could become more prominent in police forces with reduced personnel.[354]

Finally, quotas speak directly to an emerging discourse about the *purpose* of police. As this Article has shown, quota-based policing applies sharp pressure to common-sense assumptions about the public safety, crime-fighting conception of law enforcement. Attacking quotas—which have demonstrable connections to financial exploitation and racial subjugation—is at least consonant with the abolitionist insistence on rethinking punishment and reimagining the state's relationship to vulnerable communities and the general population.

IV
Normative Paths Forward

What is one to do with these descriptive and definitional insights? This Part offers some recommendations on how to curb police quotas. Before beginning, I want to stress two things. First, any solution to the problem of police quotas cannot be strictly legal. A gauntlet of obstacles—white supremacy,[355] some jurisdictions' narcotic addiction to profit-based policing,[356] judicial hostility to the enforcement of civil rights in federal courts,[357] and many others—are too mountainous for any set of neat positive law or policy prescriptions. Any attempt to curb quotas must be multi-pronged and multi-disciplinary.

Second, I do not try to propose *better* mechanisms for evaluating or incentivizing the police. I resist that normative move because it has already been taken up by criminologists[358] but more importantly because strategies for better policing dangerously invert the analysis. Almost half of American states have legislatively determined that police quotas are impermissible, and a few others have pending bills. The crucial normative issues are not about substitute incentives or evaluation metrics, but instead about how existing statutory schemes can be improved and how they can be introduced to jurisdictions that have not yet recognized the imprudence of police quotas.

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354 *See supra* text accompanying notes 177–88; Fussell, *supra* note 31; Rushin & Michalski, *supra* note 30.

355 *See* FBI, White Supremacist Infiltration of Law Enforcement 4 (2006), https://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf; Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 Lewis & Clark L. Rev. 205, 211 (2019).

356 *See* Maciag, *supra* note 5.

357 *See supra* note 136 and accompanying text.

358 *See* Sparrow, *supra* note 34; Nat'l Inst. of Just., Perspectives on Research and Evidence-Based Policing 15–20 (2020); Gul & O'Connell, *supra* note 13, at 51–98.

A. A Prospective Research Program

Legal scholars must scrutinize police quotas as a critical component of the criminal justice system and as a practice that interacts with other areas of law. Police quotas matter because they animate and intersect with issues that legal scholars wrestle with, wrangle over, and consider to be fundamental to ideas about quality and justice. Traditionally, legal scholars have relinquished the study of quotas to criminologists who have a different set of intellectual interests and commitments. Instead of engaging directly with quotas, legal scholars have either overlooked them, subsumed them within other categories (e.g., broken windows policing), or given no more than pat acknowledgment of their existence. This Article supplies a framework for understanding how police quotas work, how they are defended, and why they are indefensible, but these formulations are only initial steps.

The demonstrated existence of police quotas abrades core understandings of criminal law and constitutional procedure. What does it mean when criminalization is not a product of wrongdoing, but is instead spawned by police attempts to thwart employment sanctions or garner occupational rewards? On the procedural side, the existence of race-based police quotas has been verified by federal courts, police officers, and sponsors of legislative prohibitions. How can this reality be reconciled with our country's frail Equal Protection jurisprudence[359] or with an exception-riddled Fourth Amendment[360] that makes satisfying quotas at the expense of minorities fairly straightforward?

For civil rights scholars, litigation involving police quotas highlights the disparity between actual government practices and stingy judicial interpretations of what constitutes a custom or policy under § 1983. Civilians are not the only aggrieved subjects of quota-based policing. Most of the relevant statutes are about work conditions. Criminal justice scholars are increasingly devoting their attention to labor law and employment law, and police quotas fit neatly into such considerations.[361] Examining the issue of police quotas may provide a new entry point into thinking about live controversies in criminal justice administration and civil rights more generally.

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[359] *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154 (2016) (discussing how "the Supreme Court has steadily diminished the vigor of the Equal Protection Clause").

[360] *See* RIC SIMMONS, SMART SURVEILLANCE: HOW TO INTERPRET THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 174 (2019).

[361] *See supra* text accompanying note 324.

Quotas also showcase intragovernmental tensions that matter to local government law scholars and legislative experts. In states where they are prohibited, law enforcement leadership often imposes quotas to demonstrate productivity.[362] Scholars who study how governments work could provide fruitful insights on how to enforce anti-quota statutes and how to counteract pathologies that stand in the way. Tax law scholars could also help clarify the relationship between local tax policy and policing for profit—which often serves as a substitute for increased taxing.[363] Police quotas are often the mechanisms for such "taxation by citation"[364] and make critical tax law scholars relevant interlocutors.[365]

Outstanding empirical questions remain. Besides litigation outcomes and settlements, scholars and the general public do not have any empirical data on the efficacy of quota statutes. It would be helpful to know how jurisdictions with prohibitions compare to jurisdictions where quotas are permissible. Scholars should examine how prohibitions affect a jurisdiction's incidence of police misconduct, the size of its misdemeanor docket, clearance rates, its reliance on legal financial obligations (e.g., fees and fines), and the satisfaction of its citizens. The results could help shed light on issues specific to criminal justice as well as broader questions at the intersection of law and inequality.

B. Investigative Agendas and Public Awareness

The media should continue to play an important role in uncovering and publicizing the existence of police quotas. As Justice Brennan correctly observed, "[c]ommentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."[366] Interestingly, Justice Brennan's comments were in a decision that involved media reporting on a murder trial. This felony-centric, trial-oriented understanding of criminal justice does not represent the bulk of cases

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362 *See* NATAPOFF, *supra* note 298, at 59.

363 *See supra* notes 308, 312; Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POLITICS 1090 (2017).

364 DICK M. CARPENTER, KYLE SWEETLAND & JENNIFER MCDONALD, INST. FOR JUST., THE PRICE OF TAXATION BY CITATION 5 (2019), https://ij.org/wp-content/uploads/2019/10/Taxation-by-Citation-FINAL-USE.pdf.

365 *See* Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 Nw. J.L. & SOC. POL'Y 206, 254 (2014); Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1196 (2008) (discussing the concept of tax equity and its applications).

366 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976).

that are currently churned through the system. Slapdash misdemeanor processing better approximates the criminal justice system.[367] Nevertheless, Justice Brennan's observations maintain relevance. Journalism still "contribute[s] to the public's understanding of . . . the . . . criminal justice system" and can address some of its failures.[368]

The task of local news outlets and investigative journalists is to look beyond trials and examine police conduct and practices. This is not a simple task, but our current political climate is ripe for such scrutiny. First, many news outlets are increasingly reexamining their longstanding fidelity to police accounts. They are more willing to disbelieve how police describe criminal justice administration.[369] This reconsideration is undoubtedly influenced by social protest movements and video evidence of brutality that often contradicts initial police accounts. This journalistic skepticism should apply to the longstanding insistence of police leaders that they do not administer quotas despite evidence suggesting otherwise.[370] Second, the current legal landscape will also enable journalistic investigation into police quotas. The Court's First Amendment jurisprudence, which generally does not protect officers from retaliation if they object to quotas in their employee capacity, essentially funnels their speech into the public sphere. Many of the litigated quota cases involve officers who leaked information to the media.[371] Finally, the general public's increasing recognition of the bias and brutality of American law enforcement is creating space for a more receptive audience to journalistic accounts of police quotas.[372]

Local news, mainstream media, and nonprofit investigative reporters are well-situated to more robustly examine police quotas. In places like Charleston, Rhode Island, and Damascus, Arkansas, media reporting on police quotas have led to the ACLU sending letters to all

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367 NATAPOFF, *supra* note 298 at 218 (describing the misdemeanor process, which represents the bulk of criminal justice cases, as "sloppy, inaccurate, unpredictable and disrespectful").

368 Nebraska Press Ass'n, 427 U.S. at 587.

369 *See* Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance on a Longtime Source: The Police*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/lifestyle/media/journalists-are-reexamining-their-reliance-on-a-longtime-source-the-police/2020/06/30/303c929c-b63a-11ea-a510-55bf26485c93_story.html (discussing how some journalists are now unwilling to take the police's account of events "at face value").

370 *See supra* text accompanying notes 35, 240, 245.

371 *See* CRIME + PUNISHMENT, *supra* note 68; Rayman, *supra* note 120; Rayman, *supra* note 121; Rayman, *supra* note 122; Tracy Oppenheimer, *Auburn Cop Fired for Resisting Quotas Gets Online Support; City Officials Deny Deny Deny*, REASON (July 26, 2013, 10:45 AM), https://reason.com/2013/07/26/online-community-comes-to-whistle-blower.

372 *See* Cohn & Quealy, *supra* note 8.

police chiefs in the state reminding them of the illegality of quotas[373] and the loss of the right to issue tickets,[374] respectively. Mainstream news outlets like the socialist *Jacobin*,[375] the moderate *New York Times*,[376] the libertarian *Reason*,[377] and the conservative *Washington Examiner*[378] have all reported on police quotas and done so in unfavorable terms. The same is true for criminal justice-specific outlets such as *The Marshall Project*[379] and *The Appeal*.[380]

All of these organizations have the infrastructure to probe how police quotas operate. They know how to gather difficult-to-obtain documents and data like evaluation reports that demonstrate the existence of quotas and testimonial evidence.[381] Drawing from these sources, the media can shape public understanding by giving coverage to officers and civilians who have persuasive evidence that they have been governed by or subject to police quotas. Since, as discussed in Part II, many allegations of police quotas do not make it to courts or get quietly settled, journalistic accounts can be crucial to encouraging policy changes or legislative reform.

Reporters can also probe the connections between quotas and other pathologies. In states that do not have prohibitions on quotas, journalists—armed with a deeper understanding of how quotas operate—could examine how this practice is tied to police misconduct, policing for profit, and racial profiling. In states that have legislated against police quotas, reporters should consider these requirements within the larger category of police corruption that has been of interest to journalists. Overall, the public has traditionally understood

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373 Patrick Anderson, *RI ACLU to Police Departments: Traffic Ticket Quotas Are Illegal*, PROVIDENCE J. (Nov. 28, 2017, 4:38 PM), https://www.providencejournal.com/news/20171128/ri-aclu-to-police-departments-traffic-ticket-quotas-are-illegal.

374 Debra Hale-Shelton, *Arkansas Town's Bid to Lift Speed-Trap Sanctions Denied: Still Can't Write Tickets*, ARKANSAS DEMOCRAT-GAZETTE (May 17, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/may/17/damascus-bid-denied-still-can-t-write-t.

375 *See* Nick Tabor, *The Mayor Who Cracked Down on Baltimore*, JACOBIN (May 14, 2015), https://www.jacobinmag.com/2015/05/omalley-baltimore-clinton-democratic-primary-president.

376 *See* Goldstein et al., *supra* note 309.

377 *See* Oppenheimer, *supra* note 371.

378 *See* Editorial, *Arrests Should Be Based on Crimes, Not Quotas*, WASH. EXAMINER (June 6, 2006, 12:00 AM), https://www.washingtonexaminer.com/editorial-arrests-should-be-based-on-crimes-not-quotas.

379 Ken Armstrong, *How to Fix American Policing*, MARSHALL PROJECT (July 13, 2016, 10:00 PM), https://www.themarshallproject.org/2016/07/13/how-to-fix-american-policing.

380 *See* George Joseph, *NYPD Commander's Text Messages Show How the Quota System Persists*, APPEAL (Dec. 12, 2018), https://theappeal.org/nypd-commanders-text-messages-show-how-the-quota-system-persists.

381 *See* DAVID CUILLIER & CHARLES N. DAVIS, THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS 114–26 (2011) (chronicling methods for handling evasive agency responses and noting the success of some news organizations' tactics).

the media as a government watchdog.[382] This oversight function is no different in the area of police quotas.

C. Statutory Reform

The remaining issues concern getting quota provisions enacted in states without them and improving existing statutes. Enacting new statutes is simultaneously straightforward and challenging. It is straightforward because bipartisan support has already helped get quota bills passed in many states and objections to police quotas have been made by interest groups across the ideological spectrum. At the same time, getting quota statutes on the books is not easy, as demonstrated by the nine states that have drafted bills but have not been able to convert them to enacted legislation; some of these bills were drafted more than a decade ago.[383] Police chiefs and politicians worry that these bills will hamper their ability to evaluate officers.[384] The research and investigative agendas mentioned above could engender more public awareness, whereas intentional partnerships could move the legislative ball forward. South Carolina, Missouri, and Tennessee—all states that recently adopted statutes—did so by considering and representing that quotas impacted a cross-section of diverse interests.[385]

The other task is to shore up existing statutes. Most anti-quota laws have appreciable shortcomings, including ambiguity about whether they apply to informal requirements, and loopholes for stops and warnings. To this end, the Appendix includes the skeleton of a model statute addressing some of these shortcomings and collating the best features of existing legislation.[386] It is far from comprehensive since this Article cannot supply answers to critical questions about future implementation. But, it is a starting point for statutory amendments as well as consideration of new anti-quota laws.

The model statute also proposes an additional provision that is not found in existing quota statutes and requires explanation: Pension forfeiture should be a consequence of violating the statute. This may

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382 *See* JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 12 (2005).

383 *See infra* Appendix B.

384 *See, e.g.*, N.J. STATE ASS'N OF CHIEFS OF POLICE, LEGISLATIVE POSITION PAPER: OPPOSITION TO S1105 / A2126 (2016), https://www.njsacop.org/Files/NJSACOP%20Position%20Paper%20-%20Opposition%20to%20S1105%20%20A2126.pdf (opposing amendments to state anti-quota law).

385 *See supra* Section I.B.

386 *See infra* Appendix C.

sound like an extraordinary ramification.[387] But many states already have laws that either revoke, reduce, or suspend the pensions of public employees who have been convicted of a felony[388] or any crime related to their public employment.[389] West Virginia's pension forfeiture law is arguably the most liberal, simply stating that "honorable service is a condition to receiving any pension, annuity, disability payment or any other benefit under a retirement plan."[390] The efficacy of quota statutes is still an open empirical question, but it is clear from the litigation discussed in Part II that police continue to implement police quotas even in states that prohibit them. Where judicial avenues for redress are limited, pension forfeiture can be a potential deterrent. The measure has been proposed by police abolitionists,[391] and economists have tentatively found that states with stronger pension forfeiture laws experience lower rates of police misconduct.[392] Adding a pension forfeiture provision could add teeth to existing statutes and help stamp out stubborn police quotas.

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387 James Jacobs and his colleagues have analyzed arguments for and against pension forfeiture and conclude that imprisonment and fines would be better sanctions. This suggestion might be subject to concerns about "progressive punitivism" that uses incarceration to advance social justice goals. Jacobs and his colleagues do suggest a model for pension revocation that would be less harsh than some states' schemes. *See* James B. Jacobs, Coleen Friel & Edward O'Callaghan, *Pension Forfeiture: A Problematic Sanction for Public Corruption*, 35 AM. CRIM. L. REV. 57, 89–91 (1997); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 201–02 (2020).

388 *See, e.g.*, 40 ILL. COMP. STAT. ANN. 5/2-156 (West, Westlaw through P.A. 101-651); VA. CODE ANN. § 51.1-124.13 (West, Westlaw through 2020 Reg. Sess.); OHIO REV. CODE ANN. § 2929.192 (West, Westlaw through File 60 of 133d Gen. Assemb. 2019-2020); N.C. GEN. STAT. ANN. § 135-18.10 (West, Westlaw through S.L. 2020-97 of 2020 Reg. Sess.).

389 MASS. GEN. LAWS ANN. ch. 32, § 15(4) (West, Westlaw through ch. 226 of 2020 2d Ann. Sess.) ("In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance."); GA. CODE ANN. § 47-1-21(b) (West, Westlaw through 2020 Legis. Sess.) ("If a public employee commits a public employment related crime . . . in the capacity of a public employee and is convicted for the commission of such crime, such employee's membership in any public retirement system shall terminate on the date of final conviction and such employee shall not at any time thereafter be eligible for membership in any public retirement system."); *see also* ALASKA STAT. ANN. § 37.10.310 (West, Westlaw through ch. 32 of 2020 2d Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 17062 (West, Westlaw through 2019 2d Reg. Sess.); N.J. STAT. ANN. § 43:1-3.1(b)(17) (West, Westlaw through L.2020, c.127 & J.R. No.2); 43 PA. STAT. AND CONS. STAT. ANN. § 1313(a) (West, Westlaw through 2020 Reg. Sess. Act 95); 36 R.I. GEN. LAWS ANN. § 36-10.1-3 (West, Westlaw through ch. 79 of 2020 2d Reg. Sess.).

390 W. VA. CODE ANN. § 5-10A-1 (West, Westlaw through 2020 Reg. Sess.).

391 *See Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE, https://www.criticalresistance.org/wp-content/uploads/2020/08/CR_NoCops_reform_vs_abolition_REV2020.pdf (last visited Dec. 30, 2020).

392 *See* D. Bruce Johnsen & Adam David Marcus, *Pension Forfeiture and Police Misconduct*, 14 J.L. ECON. & POL'Y 1, 30 (2017).

Conclusion

Although police quotas have escaped serious in-depth scrutiny, a diverse cross-section of the public rejects their use and believes that criminal sanctions should not be tied to law enforcement statistics or incentives. This Article provides descriptive insights into how police quotas work and why they are a pressing criminal justice issue. Moving forward, interim and long-term strategies must confront the reality that, across the country, quotas are a basic feature of policing.

APPENDIX A. STATE STATUTES

Statutory Prohibitions on Police Quotas		
State	Statute Title	Statute Overview
Arkansas	ARK. CODE ANN. § 12-6-302 (West, Westlaw through 2020 1st Extraordinary Sess. and 2020 Fiscal Sess.)	No state or local agency employing law enforcement officers engaged in the enforcement of any motor vehicle traffic laws of this state or any local ordinance governing motor vehicle traffic may establish any policy requiring any law enforcement officer to meet an arrest quota . . . .
California	CAL. VEH. CODE § 41602 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.)	No state or local agency . . . may establish any policy requiring any peace officer or parking enforcement employees to meet an arrest quota.
Connecticut	CONN. GEN. STAT. ANN. § 7-282d (West, Westlaw through 2020 Reg. Sess.) Imposition of traffic ticket quotas prohibited	• No municipal police department may impose any quota with respect to the issuance of . . . summonses for motor vehicle violations upon any policeman in such department. • "Quota" means a specified number of . . . summonses for motor vehicle violations to be issued within a specified period of time. • Nothing in this section shall prohibit such department from using data concerning the issuance of . . . summonses in the evaluation of an individual's work performance provided such data is not the exclusive means of evaluating such performance.
Florida	FLA. STAT. ANN. § 316.640 (West, Westlaw through Ch. 184 of 2020 2d Reg. Sess.)	8(b): A traffic enforcement agency may not establish a traffic citation quota.
Illinois	20 ILL. COMP. STAT. ANN. 2610/24 (West, Westlaw through P.A. 101-651) State Police quotas prohibited	The Department may not require a Department of State Police officer to issue a specific number of citations within a designated period of time.
	65 ILL. COMP. STAT. ANN. 5/11-1-12 (West, Westlaw through P.A. 101-651) Quotas prohibited	• A municipality may not require a police officer to issue a specific number of citations within a designated period of time. This prohibition shall not affect the conditions of any federal or State grants or funds awarded to the municipality and used to fund traffic enforcement programs. • A municipality may not, for purposes of evaluating a police officer's job performance, compare the number of citations issued by the police officer to the number of citations issued by any other police officer who has similar job duties. • Nothing in this Section shall prohibit a municipality from evaluating a police officer based on the police officer's points of contact.

Louisiana	LA. STAT. ANN. § 40:2401.1 (West, Westlaw through 2020 2d Extraordinary Sess.) Prohibition against quotas	No municipality or any police department . . . shall establish or maintain, formally or informally, a plan to evaluate, promote, compensate, or discipline a law enforcement officer on the basis of the officer making a predetermined or specified number of any type or combination of types of arrests or require or suggest to a law enforcement officer, that the law enforcement officer is required or expected to make a predetermined or specified number of any type or combination of types of arrests within a specified period.
Maryland	MD. CODE ANN. PUB. SAFETY § 3-504 (West, Westlaw through 2020 Reg. Sess.)	(a) In this section, "quota" means the mandating of a finite number of arrests made or citations issued that a law enforcement officer must meet in a specified time period. (b) A law enforcement agency may not: (1) establish a formal or informal quota for the law enforcement agency or law enforcement officers of the agency; or (2) use the number of arrests made or citations issued by a law enforcement officer as the sole or primary criterion for promotion, demotion, dismissal, or transfer of the officer. (c) This section does not preclude a law enforcement agency from: (1) using quantitative data for arrests, citations, and other law enforcement activities as management tools or in evaluating performance; (2) collecting, analyzing, and applying information concerning the number of arrests and citations in order to ensure that a particular law enforcement officer or group of law enforcement officers does not violate an applicable legal obligation; or (3) assessing the proportion of the arrests made and citations issued by a law enforcement officer or group of law enforcement officers.
Michigan	MICH. COMP. LAWS ANN. § 257.750 (West, Westlaw through P.A. 2020, No. 256 of 2020 Reg. Sess.)	• A police officer shall not be required to issue a predetermined or specified number of citations for violations of this act or of local ordinances substantially corresponding to provisions of this act, including parking or standing violations. • A police officer's performance evaluation system shall not require a predetermined or specified number of citations to be issued.
Minnesota	MINN. STAT. ANN. § 169.985 (West, Westlaw through 2020 Reg. Sess.)	A law enforcement agency may not order, mandate, require, or suggest to a peace officer a quota for the issuance of traffic citations, including administrative citations authorized under section 169.999, on a daily, weekly, monthly, quarterly, or yearly basis.
Missouri	MO. ANN. STAT. § 304.125 (West, Westlaw through 2020 2d Reg. Sess.)	No political subdivision or law enforcement agency shall have a policy requiring or encouraging an employee to issue a certain number of citations for traffic violations on a daily, weekly, monthly, quarterly, yearly, or other quota basis. This section shall not apply to the issuance of warning citations.

Nebraska	NEB. REV. STAT. ANN. § 48-235 (West, Westlaw through end of 2020 2d Reg. Sess.)	A state agency or political subdivision shall not directly require a law enforcement officer employed by the state agency or political subdivision to issue a certain number or percentage of traffic citations, police citations, memoranda of traffic violations, memoranda of faulty equipment, or any other type of citation on any periodic basis.
New Jersey	N.J. STAT. ANN. § 40A:14-181.2 (West, Westlaw through L.2020, c.136 and J.R. No. 2)	• A State, county or municipal police department . . . shall not establish any quota for arrests or citations. • The department or force shall not use the number of arrests or citations issued by a law enforcement officer as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the department or force.
New York	N.Y. LAB. LAW § 215-a (McKinney, Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 387) Discrimination against employees for failure to meet certain ticket quotas	No employer or his or her duly authorized agent shall transfer or in any other manner penalize or threaten . . . based in whole or in part on such employee's failure to meet a quota . . . .
North Carolina	N.C. GEN. STAT. ANN. § 20-187.3 (West, Westlaw through S.L. 2020-97 of 2020 Reg. Sess.) Quotas prohibited	• The Secretary of Public Safety shall not make or permit to be made any order, rule, or regulation requiring the issuance of any minimum number of traffic citations, or ticket quotas . . . . • Pay and promotions of members of the Highway Patrol shall be based on their overall job performance and not on the basis of the volume of citations issued or arrests made.
Pennsylvania	71 PA. STAT. AND CONS. STAT. ANN. § 2001 (West, Westlaw through 2020 Reg. Sess. Act 95)	No political subdivision or agency of the Commonwealth shall have the power or authority to order, mandate, require or in any other manner, directly or indirectly, suggest to any police officer . . . that said police officer . . . shall issue a certain number of traffic citations, tickets or any other type of citation on any daily, weekly, monthly, quarterly or yearly basis.
Rhode Island	31 R.I. GEN. LAWS 31-27-25 (West, Westlaw through ch. 79 of 2020 2d Reg. Sess.) Ticket quotas prohibited	• No state or municipal agency engaged in the enforcement of any motor vehicle traffic or parking laws of this state, or any local ordinance governing motor vehicle traffic or parking, may establish or maintain any policy, formally or informally, requiring any officer to meet a quota. • "Quota" means any requirement regarding the number of arrests or investigative stops made, or summonses or citations issued, by an officer regarding motor vehicle traffic or parking violations. • Nothing contained herein shall preclude a local or municipal agency from using data concerning arrests or investigative stops made, or summonses or citations issued, and their disposition in the evaluation of an officer's work performance, provided such data is not the exclusive means of evaluating such performance.

South Carolina	S.C. CODE ANN. § 23-1-245 (West, Westlaw through 2020 Sess.)	• A law enforcement agency, department, or division may not require a law enforcement officer employed by the agency, department, or division to issue a specific amount or meet a quota for the number of citations he issues during a designated period of time. • An employee of a law enforcement agency, department, or division who files a report with an appropriate authority alleging a violation of the provisions contained in this section is protected by the provisions contained in Chapter 27, Title 8. (D) As contained in this section: (1) "law enforcement agency, department, or division" includes, but is not limited to, municipal police departments, sheriff departments, the Highway Patrol, SLED, and other agencies that enforce state and local laws; (2) "quota" means a fixed or predetermined amount; (3) "points of contact" means a law enforcement officer's interaction with citizens and businesses within their jurisdictions and the law enforcement officer's involvement in community-oriented initiatives. • Nothing in this section shall prohibit a law enforcement agency, department, or division from evaluating an officer's performance based on the officer's points of contact.
Tennessee	TENN. CODE ANN. § 39-16-516 (West, Westlaw through end of 2020 2d Extraordinary Sess.) Traffic offense citation quotas — Performance standards Replaced by Act of July 15, 2020, ch. 801, 2020 Tenn. Pub Acts, https://publications.tnsosfiles.com/acts/111/pub/pc0801.pdf. *See also* TENN. CODE ANN. § 50-1-304 (West, Westlaw through end of 2020 2d Extraordinary Sess.) (Whistleblower Act)	• A public official or employee shall not establish or maintain, formally or informally, a plan to evaluate, promote, compensate, or discipline a law enforcement officer solely by the issuance of a predetermined or specified number of any type or combination of types of traffic citations. • A public official or public employee shall not require or suggest to a law enforcement officer that the law enforcement officer is required or expected to issue a predetermined or specified number of any type or combination of types of traffic citations within a specified period. • Nothing in this section shall prohibit a municipal corporation, a political subdivision or any agency of this state, from establishing performance standards for law enforcement officers that include issuance of traffic citations, but do not require issuance of a predetermined or specified number or any type or combination of types of citations as the sole means of meeting such performance standards.

Texas	TEX. TRANSP. CODE ANN. § 720.002 (West, Westlaw through end of 2019 Reg. Sess.) Prohibition on Traffic-Offense Quotas	• A political subdivision or an agency of this state may not establish or maintain, formally or informally, a plan to evaluate, promote, compensate, or discipline a peace officer according to the officer's issuance of a predetermined or specified number of any type or combination of types of traffic citations . . . . • A political subdivision or an agency of this state may not require or suggest to a peace officer, a justice of the peace, or a judge of a county court, statutory county court, municipal court, or municipal court of record . . . that the peace officer is required or expected to issue a predetermined or specified number of any type or combination of types of traffic citations within a specified period.
Utah	UTAH CODE ANN. § 77-7-27 (West, Westlaw through 2020 6th Spec. Sess.) Quotas for arrest, citation prohibited	A political subdivision or law enforcement agency employing a peace officer may not require or direct that a peace officer meet a law enforcement quota. Subsection (2) does not prohibit a political subdivision or law enforcement agency from including a peace officer's engagement with the community or enforcement activity as part of an overall determination of the peace officer's performance.
Wisconsin	WIS. STAT. ANN. § 349.025 (West, Westlaw through 2019 Act 186) Quotas relating to the enforcement of traffic regulations prohibited	No state agency or political subdivision of this state may require a law enforcement officer to issue a specific number of citations, complaints or warning notices during any specified time period for violations of traffic regulations.

APPENDIX B. STATE BILLS

State Bills on the Prohibition of Police Quotas		
State	Bill Title	Bill Overview
Arizona	H.R. 2410, 52d Leg., 1st Reg. Sess. (Ariz. 2015)	Prohibits municipalities, police departments, boards of supervisors, sheriffs and DPS from: • implementing or establishing a traffic complaint quota for peace officers (officers) employed by a police department, sheriff's department or DPS; • basing the determination of an officer's rank or classification on the number of traffic complaints the officer issues; or • consider[ing] the number of traffic complaints an officer issues as a factor when determining the officer's rank or classification.
Colorado	S. 84, 67th Gen. Assemb., 2nd Reg. Sess. (Colo. 2010)	16-2.5-311. Arrest Quotas. • An employing agency may not establish any policy requiring any peace officer to meet an arrest quota. • An employing agency may not use the number of arrests or citations issued by a peace officer as the sole criteria for promotion, demotion, reprimand . . . .
District of Columbia	Sense of the Council in Support of Enhanced Metro Transit Police Department Oversight Resolution of 2020, 67 D.C. Reg. 14611 (Dec. 1, 2020)	• Finding that "some MTPD officers had created and were participating in a 'game' in which officers were rewarded for making arrests and issuing citations." • Establishing an independent review body to address officer complaints.
Georgia	H.R. 738, 2009 Gen. Assemb., Reg. Sess. (Ga. 2009) 2009 Bill Text GA H.B. 738	• No local governing authority, law enforcement unit, or peace officer shall by influence or demand require that peace officers employed by a law enforcement unit meet quotas for arrests or the issuance of citations or otherwise increase or maintain the number of arrests or citations for the purpose of providing or increasing revenue. • No local governing authority shall withhold or decrease or threaten, suggest, or imply that such local governing authority will withhold or decrease any funding, revenues, or the operation budget for a law enforcement unit that fails to meet quotas for arrests or the issuance of citations or otherwise fails to increase or maintain the number of arrests or citations for the purpose of maintaining or increasing revenue.

Nevada	S. 390, 1999 Leg., 70th Sess. (Nev. 1999)	[A] state or local law enforcement agency in this state shall not: • establish or carry out a policy that requires or encourages, either directly or indirectly, a police officer employed by the law enforcement agency to meet a quota for issuing citations or making arrests. • consider the number of citations issued or arrests made by police officers employed by the law enforcement agency when determining the needs of the agency with respect to equipment, funding or staffing.
Virginia	H.R. 1376, 2015 Sess. (Va. 2015)	A sheriff shall not . . . • establish a formal or informal quota that requires a deputy to make a specific number of arrests or issue a specific number of summonses within a designated period of time. • use the number of arrests made or summonses issued by a deputy as the sole criterion for evaluating a deputy's job performance.
Washington	S.R. 6316, 66th Leg., Reg. Sess. (Wash. 2020)	The number of citations issued by a law enforcement officer for traffic infractions, or the amount of penalties assessed from the issuance of such citations, may not be considered in any performance review, evaluation, rating, assessment, salary, promotion, or assignment of the law enforcement officer.
West Virginia	1992 Bill Tracking W. Va. H.R. 4037 Prohibiting the use of ticket writing quotas by the Department of Public Safety H.B. 2984 (W. Va. 2000) Prohibiting arrest quotas	Any state or local agency . . . • May not establish policy or expectations requiring any officer to meet an arrest quota or use the number of arrests or citations issued by an officer as the criterion for promotion, demotion, dismissal or the earning of any benefit provided by the agency. • May not use the number of arrests or citations issued by their officers as the criterion for funding, staffing or equipment needs.

Appendix C. Model Statute

No political subdivision or law enforcement agency employing a law enforcement officer shall require or suggest, directly or indirectly, that a law enforcement officer should follow a quota.

"Quota" means a specified average, percentage, or number of warnings, stops, citations, or arrests to be issued on any daily, weekly, monthly, quarterly or yearly basis.

No political subdivision or law enforcement agency employing a law enforcement officer shall use the number of warnings, stops, citations, or arrests issued by a law enforcement officer as the sole or primary criterion for an officer's demotion, penalization, transfer, termination, constructive dismissal, promotion, or earning of any benefit.

Any officer penalized for failing to adhere to a quota system shall be fully compensated and shall be provided an avenue of legal remedy beyond the unit's internal complaint system.

A violation of this section is a Class B misdemeanor, subject to pension forfeiture only.

A court of this State shall enter an order of pension forfeiture pursuant to this section immediately upon a finding of guilt by the trier of fact or a plea of guilty entered in any court of this State unless the court, for good cause shown, orders a stay of the pension forfeiture pending a hearing on the merits at the time of sentencing.

Nothing in this section shall be deemed to preclude the authority of the board of trustees of any State or locally-administered pension fund or retirement system created under the laws of this State from ordering the forfeiture of all or part of the earned service credit or pension or retirement benefit of any member of the fund or system for misconduct occurring during the member's public service.

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ATTACHMENT 2.

Arrest Quotas Update Memorandum from Charles Clarke, February 19, 2024 to the City of Berkeley Police Accountability Board and Director of Police Accountability

Arrest Quotas Update

Memorandum from Charles Clarke, February 19, 2024 To the City of Berkeley Police Accountability Board and Director of Police Accountability

My earlier *Arrest Quotas* memorandum[1] reported absence of quantitative evidence for the operation of an alleged arrest quota among the members of the Berkeley Police Department (BPD) Bike Unit (formerly known as the DTF, Downtown Task Force). The presence of *qualitative* evidence, mainly intra-Bike Unit/DTF text messages, prompted my recommendation that this Board and the Director continue their investigation of the alleged arrest quota.

One issue of potential interest to this Board that I identified in my earlier memorandum concerned arrest *quality*, not just quantity:[2]

> 4. The arrest *quantities* reported in this memorandum are separate from their *quality*, most notably their adequacy for prosecution by the Alameda County District Attorney (ACDA). This Board should seek from ACDA the prosecutorial outcomes for the cases brought by Bike Unit arrests and for the Department as a whole. In particular, charges that ACDA deems *legally insufficient* (possibly indicating inadequate police work) should be distinguished from charges dropped for other reasons such as the exercise of prosecutorial discretion. The consultation of an outside source as to arrest quality would benefit the Board's understanding of BPD arrest activity.

Berkeley Copwatch has recently issued a report on the alleged arrest quotas.[3] Part of Copwatch's effort included publication of a dataset recording Alameda County District Attorney (ACDA) decisions whether to charge BPD arrestees.[4] This update memorandum addresses arrest quality using the data provided by Berkeley Copwatch. **I find the vast majority of dismissed charges may have been more due to pandemic-caused change in ACDA charging practice, than to policing deficiencies.**

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[1] *Arrest Quotas*: Memorandum from Charles Clarke to the City of Berkeley Police Accountability Board and Director of Police Accountability, August 18, 2023
https://drive.google.com/file/d/14oJZkx43301MQxsLYO7oqA_pi3AAxlsi/view

[2] *Arrest Quotas*, supra n. 1, pp. 15-16

[3] *Purging The Poor: Arrest Quotas, Racist Texts and the Role of City Leadership in the 'Textgate' Scandal*, Berkeley Copwatch, January 16, 2024 (accessed February 18, 2024)
https://www.berkeleycopwatch.org/_files/ugd/9faa72_175f75bda71646b983857d0a0e352434.pdf

[4] Filename `combined-arrests-built20230421.xlsx` (accessed February 18, 2024)
https://docs.google.com/spreadsheets/d/148YRpAp2cOvcUjnIqfgS3TYaY0xcHEJO/edit#gid=1464294616

What Are The Data?

ACDA's case management system, DALITE, tracks all phases of a case's prosecutorial lifecycle from intake of an arrestee through electronic filing of charges with the Alameda County Superior Court (ACSC)'s Odyssey criminal case management system.[5] On occasion a case's path is more complicated than basic filing through Odyssey, in which case DALITE records the variance with a *disposition ("T") code*.

The disposition codes are elaborated in a decade-old guide sheet[6] that mentions Odyssey's predecessor system, CORPUS (replaced in 2016). Despite its age the guide sheet seems to document current disposition codes, a sample of which is in Table 1.

Table 1. Sample of Alameda County District Attorney Disposition Codes

Disposition Code	Illustrative Subcodes
T1 – Lack of Corpus	Conduct lawful; Insufficient proof of value
T2 – Lack of Sufficient Evidence	Insufficient corroboration; Insufficient evidence to connect suspect; Insufficient quantity of drugs
T3 – Admissibility Factors	Questionable execution (search warrant); Questionable probable cause for arrest/officer not present; Questionable search and seizure problem
T4 – Victim Factors	Victim credibility issues; Victim uncooperative
T5 – Witness Factors	Necessary witness credibility issues
T6 – Other Cases and/or Counts	Declined in favor of other counts/case
T7 – Interest of Justice	Defendant provided immunity; Exonerating evidence/information revealed; Nature of offense/relationship of parties
T8 – Other	Referred to State Attorney General
T9 – Prosecutor Prefiling Deferral	DA Corrective Intervention Program

Source: *T Series for Refusals*, ACDA, via Berkeley Copwatch. See Exhibit 1.

The Copwatch dataset includes an ACDA disposition code for about four-fifths of BPD arrests in calendar years 2018-2022. Copwatch interprets the remaining one-fifth of recorded arrests lacking a disposition code as having not been dropped by the District Attorney.[7] I concur with this interpretation.

[5] Alameda County Information Technology Department, *Projects: District Attorney's Case Management System DALITE*, https://itd.acgov.org/projects/ (accessed February 18, 2024)
[6] ACDA, *T Series for Refusals: 02/03/2014*, https://drive.google.com/file/d/1Rd8Cy9hsal-Tj1Wh5EaJ5CDz_dYlKvUi/view (accessed February 18, 2024) Attached as Exhibit 1.
[7] *Purging the Poor*, supra n. 3, p. 13

The T Codes. From the perspective of constitutional policing the most troubling reasons for a DA to decline to prosecute an arrestee would be codes **T1** (lack of corpus, meaning lack of legally valid grounds for arrest); **T2** (insufficient evidence of arrestee culpability); and **T3** (evidence admissibility problems). Copwatch has (properly) flagged these codes for scrutiny, given the possibility of unconstitutional police work.

Three other T codes pertain to non-police actors whose actions bear less directly on arrest quality: **T4** (victim factors), **T5** (witness factors), and **T6** (prosecutorial decision to charge an arrestee in a different case or with different counts than those arrested for). Copwatch has (properly) not flagged these codes.

However, Copwatch has also flagged **T7**, a very broad "interest of justice" category encompassing grounds in which (with one exception) the police seem to play no role. The phrase seems to draw upon, for example, the California statute that confers discretion upon a court to dismiss a criminal prosecution, either on its own motion or at the prosecutor's request, "in furtherance of justice."[8] "Interest of justice" seems to be a term of legal art (with a fuzzy meaning to outsiders like myself), so I will henceforth preserve the quotation marks around the phrase "interest of justice."

The one T7 subcode that *does* directly implicate police is subcode T7-K, "Police request no prosecution." California statute allows such a request, for example, in connection with citations for misdemeanors.[9] Unfortunately the T7 *sub*codes are not reported in the Copwatch dataset, so a more specific basis for the DA's declining to prosecute a T7-coded arrest is not known.

In my view, unless contrary evidence becomes known, prosecutions dropped due to code T7 should be viewed as the *District Attorney's exercise of prosecutorial discretion*, not as "unnecessary" arrests by BPD (as Copwatch would have it).[10] **On this view, the disposition codes of greatest concern to the people and police of Berkeley should be T1, T2, and T3, not T7.**

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[8] California Penal Code § 1385(a), *Dismissal of the Action for Want of Prosecution or Otherwise* https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=1385.

[9] California Penal Code § 853.6(j)(3), *Citations for Misdemeanors* ("If…the arresting officer determines that, *in the interest of justice*, the citation or notice should be dismissed, the arresting agency may recommend, in writing, to the magistrate that the charges be dismissed. The recommendation shall cite the reasons for the recommendation and shall be filed with the court.") (italics added) https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PEN&sectionNum=853.6.

[10] *Purging the Poor*, supra n. 3, p. 13

The COVID-19 Pandemic and the "Interest of Justice." This more benign view of the T7 disposition code is grounded in recent history. There is reason to suspect that in early 2020 the ACDA made its charging standards more lenient due to the onset of the COVID-19 pandemic. An April 2020 ACDA press release announced:[11]

> *The DA's Office is only filing cases that involve serious or violent felony crimes.* In fact, our average week's filings since the Shelter in Place Order was given are down nearly 70% from an average week's filing of new cases a year ago. The Court is only open two days a week (Tuesday and Friday) to arraign defendants on new cases. [italics added]

Reduced court availability due to Alameda County's COVID-19 Shelter In Place Order[12] clearly figured in ACDA's limiting its charging to only serious or violent felonies. ACDA did not issue a press release announcing when its pre-pandemic charging standard had been restored, but the Superior Court did announce its gradual reopening over the next two years. Specifically, all courthouses reopened on June 15, 2021,[13] and courtrooms reopened to the public on April 25, 2022.[14] This latter reopening preceded by 10 months the official termination of California's COVID-19 state of emergency on February 28, 2023,[15] but court availability would likely not have constrained ACDA beyond April 2022.

I use the courts' state of reopening as a (very imperfect) proxy for the *timing* of pandemic-related prosecutorial changes. This proxy's main virtue is that courts' reopening is observable and bears some correlation with ACDA's changes. Its main imperfection is the risk of erroneously inferring the District Attorney's *substantive* legal

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[11] Office of the Alameda County District Attorney, "DA O'Malley Makes Statement on Release of Individuals from Santa Rita Jail," April 9, 2020, https://web.archive.org/web/20200628234909/https://www.alcoda.org/newsroom/2020/apr/statement_on_release_from_santa_rita_jail (accessed February 18, 2024) Attached as Exhibit 2.

[12] Order of the [Alameda] County Health Officer to Shelter in Place, March 16, 2020 (accessed February 18, 2024) https://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf Attached as Exhibit 3.

[13] Alameda County Superior Court press release, June 14, 2021 (accessed February 18, 2024) https://www.alameda.courts.ca.gov/system/files/june-14-2021-press-release-re-further-reopening.pdf Attached as Exhibit 4.

[14] Alameda County Superior Court press release, April 14, 2022, (accessed February 18, 2024) https://www.alameda.courts.ca.gov/system/files/april-14-2022-press-release-re-reopening-courtrooms-and-expanded-office-hours-final_1.pdf Attached as Exhibit 5.

[15] Executive Department, State of California, *A Proclamation by the Governor of the State of California Terminating State of Emergency*, February 28, 2023 (accessed February 18, 2024) https://www.gov.ca.gov/wp-content/uploads/2023/02/COVID-SOE-Termination-Proclamation-2.28.23.pdf?emrc=1db54f Attached as Exhibit 6.

decisionmaking from the Superior Court's *scheduling* availability. Therefore I use this proxy solely to demarcate when ACDA likely modified its charging practices in some degree due to the pandemic, but I do not measure that degree.

The Main Hypothesis. Following the reasoning of the previous paragraph my main hypothesis is that the District Attorney dismissed more arrests "in the interest of justice" due to the pandemic between March 17, 2020 (the onset of Shelter In Place) and April 25, 2022 (when public access to courtrooms resumed). **Within this 25-month period I expect more frequent dropping of less serious charges "in the interest of justice" – that is, more frequent appearance of code T7 during the pandemic than before or after it.**

The phased court reopening dates suggest distinguishing the "early" pandemic (after March 2020 but before the June 2021 courthouse reopenings) from the "late" pandemic (after June 2021 but before the April 2022 court*room* reopenings). These phases of the pandemic are associated with increased COVID-19 vaccination rates in Alameda County, which I also expect to be associated with resumption of normal (pre-pandemic) ACDA charging practice. As it happened Alameda County (2020 population: 1.68 million[16]) had administered 1.03 million full vaccination series by June 15, 2021 (61% of the population, up from zero in March 2020) and 1.37 million full vaccination series by April 25, 2022 (82% of population).[17] Leniency due to the pandemic would likely have lost explanatory power by the latter date.

A more sophisticated econometric approach to analyze the ACDA "regime change" in charging decisions due to COVID-19 would be *switching regression,* a well-studied technique that would take more time to implement than the one afternoon I spent to write this memorandum.[18] With this direction for future research in mind, the results I report in this memorandum should be viewed as suggestive – perhaps even strongly suggestive – but not conclusive.

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[16] United States Census Bureau, *Alameda County, California, Populations and People* (accessed February 18, 2024) https://data.census.gov/profile/Alameda_County,_California?g=050XX00US06001#populations-and-people

[17] California Department of Public Health, Statewide COVID-19 Vaccines Administered By County (accessed February 18, 2024) https://data.ca.gov/dataset/covid-19-vaccine-progress-dashboard-data/resource/317f8cd8-7225-4b7e-99d1-6ea441043a51

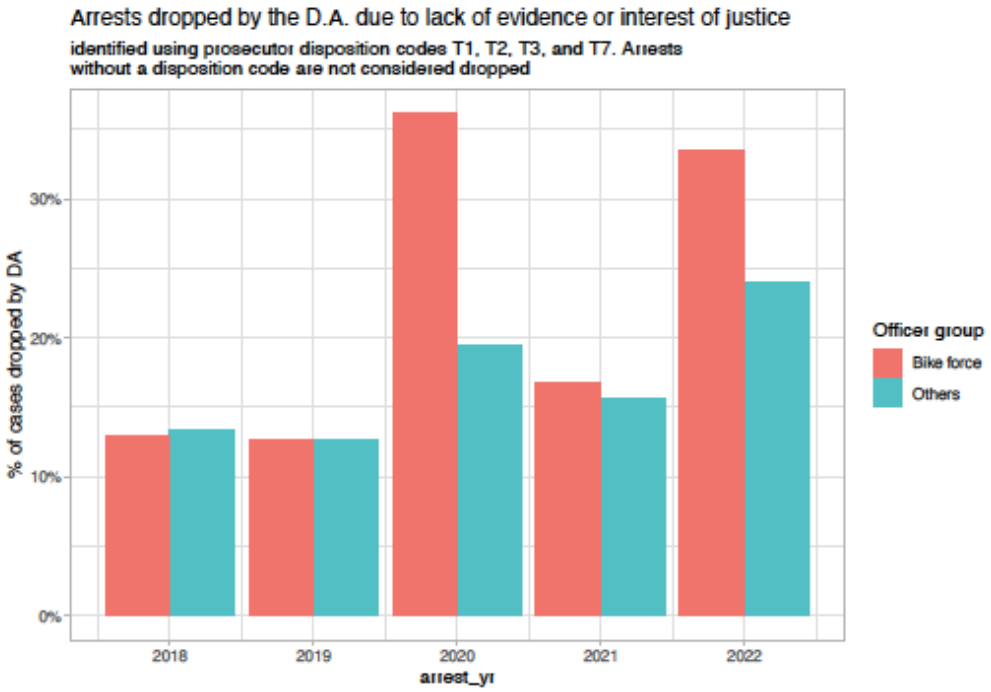
[18] For more on switching regression, see Lung-Fei Lee and Robert H. Porter, "Switching Regression Models with Imperfect Sample Separation Information – With an Application on Cartel Stability," *Econometrica* 52:2 (March 1984), pp. 391-418, https://www.jstor.org/stable/1911495

What Do The Data Say?

The Copwatch dataset contains a slightly different sample of arrests than the one I reported in my August 2023 memorandum. Copwatch has observations on 10,159 BPD arrests across calendar years 2018-2022 whereas my August dataset observed 10,330 arrests over the same period. For this memorandum I analyze the Copwatch sample without investigating this discrepancy further.

It turns out that the Bike Unit had *zero* arrests dropped due to T1 (invalid detention) and T3 (admissibility problem) in the 2018-2022 sample period. The rest of BPD (other than the Bike Unit) had 0.2% of arrests dropped due to T1 and 0.07% due to T3. In view of the paucity of these events I choose to focus on the relative prevalence of codes T2 and T7, which Copwatch has lumped together (unjustifiably, in my view) in their figure below.[19]

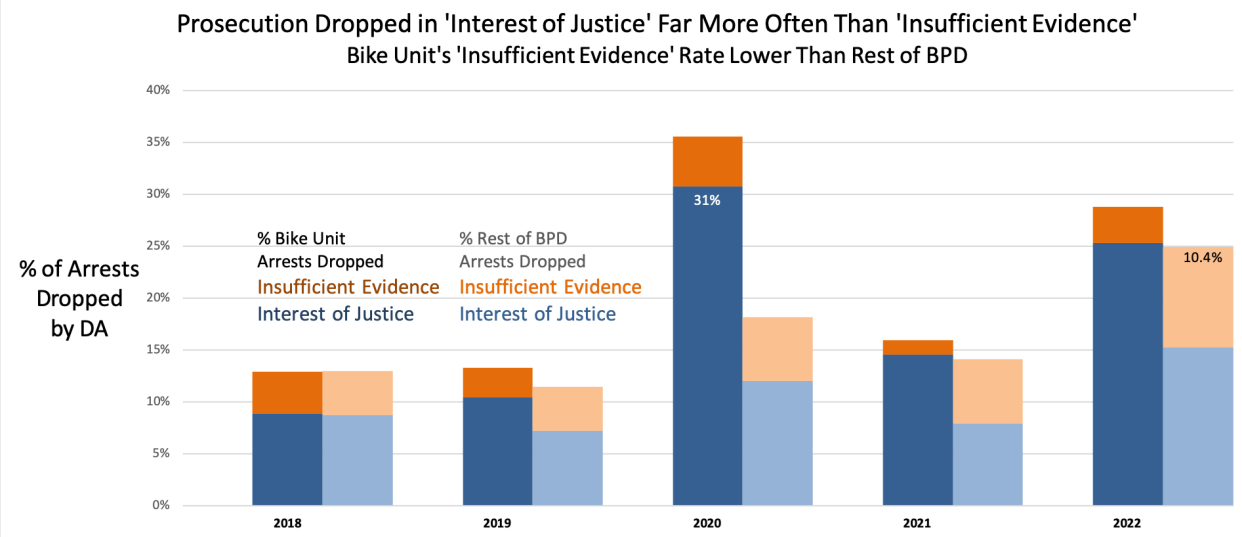
Figure 1. Copwatch's Summary of the Data



A more informative approach would distinguish T2 (insufficient evidence, which raises the possibility of a policing problem) from T7 ("interest of justice," which doesn't) to display their relative prevalence, as in Figure 2 below.

[19] *Purging the Poor*, supra n. 3, p. 13

Figure 2. Distinguishing 'Interest of Justice' from 'Insufficient Evidence'



Source: Author's tabulation of ACDA data via Copwatch

In Figure 2 the left column (colored more vividly) within each year's cluster displays the fraction of Bike Unit arrests dropped by the District Attorney; the right column (colored more mutedly) is the same fraction for the rest of BPD. Each orange bar refers to prosecutions dropped due to insufficient evidence (code T2); each blue bar to prosecutions dropped "in the interest of justice" (code T7).

The most remarkable feature of Figure 2 is the twin spikes of Bike Unit arrests dropped in the "interest of justice" in 2020 (31% of arrests!) and 2022, particularly when compared to the much lower levels exhibited by the rest of the Police Department. This feature seems to be the confluence of (1) the Bike Unit's community-policing orientation that focused on lesser offenses before they became serious[20] and (2) the District Attorney's pandemic-related shift in focus predominately (or exclusively) toward serious or violent felonies.

Mixed support for my main hypothesis comes from the time pattern of prosecutions dropped "in the interest of justice" during the pandemic (both early and late) compared to before the pandemic – the pandemic exhibited more frequent "interest of justice" dismissals, as hypothesized. However, the post-pandemic rate of dismissals did not return to the pre-pandemic rate and, in the case of BPD (excluding

[20] *Arrest Quotas*, supra n. 1, esp. pp. 4-5 ("The Downtown Task Force/Bike Unit Has Met A City Policing Priority") and pp. 9-12 ("Did the Bike Unit Charge Different Violations From the Rest of BPD?")

the Bike Unit), actually increased substantially (from 12.8% to 15.2%). Table 2 summarizes these patterns.

Table 2. Prosecutions Dropped As % Of Arrests, by Pandemic Phase

Disposition Code	Unit	Pre-Pandemic	Early Pandemic	Late Pandemic	Post-Pandemic
Insufficient Evidence T2	Bike Unit	3.5%	3.9%	3.0%	3.0%
	Rest of BPD	4.5%	5.4%	7.7%	10.4%
"Interest of Justice" T7	Bike Unit	16.7%	20.6%	24.7%	22.9%
	Rest of BPD	8.9%	7.9%	12.8%	15.2%

Notes Pre-Pandemic=01/01/2018 to 03/16/2020 Early Pandemic=03/17/2020 to 06/14/2021
Late Pandemic=06/15/2021 to 04/24/2022 Post-Pandemic=04/25/2022 to 12/31/2022

The 2021 "trough" between the twin spikes of Figure 2 is not explicable from the recent history already discussed, thereby illustrating a limitation of using calendar dates of pandemic phases to proxy for ACDA charging policy.

A second remarkable feature of Figure 2 is the much lower incidence of Bike Unit arrests dropped due to insufficient evidence (about 3-4%) compared to the rest of BPD (rising to 10.4% in the post-pandemic period). Although the focus of this memorandum (and its prequel) is the Bike Unit, the higher and increasing proportion of rest-of-BPD arrests dropped for insufficient evidence would be worth explaining, which I cannot do with the time and data now available. Part of the explanation would be greater detail about the circumstances under which ACDA records a T2 code, as well as the Police Department explaining what (if anything) it does in response to ACDA's dropping a prosecution due to insufficient evidence (T2), as well as the association of T2 codes with various statutory violations (charges).

A third remarkable feature of Figure 2 circles back to the reason for its creation: the preponderance of prosecutions dropped "in the interest of justice" relative to those dropped due to insufficient evidence, particularly for the Bike Unit but also (to lesser degree) for the rest of BPD. This feature reinforces the need for greater detail about the circumstances under which ACDA issues a T7 code (starting with the relevant subcode) so as to better understand the operation of the Alameda County criminal justice system and BPD's role within it.

From this cursory analysis of the data obtained thus far, to label any of BPD's arrests as "unnecessary" (as Copwatch does) would be as recklessly premature as declaring them flawless. Two additional analyses support this caution: The first asks

about variation across officers of the Bike Unit (and potentially the rest of BPD). The second asks about variation of prosecutions dropped across the arrestees' races.

Bike Unit and BPD Performance. Table 3 presents the prosecutions dropped due to T2 and T7 for the individual Bike Unit officers, their performance as a whole (which is just the average across officers, weighted by each officer's arrest count), and the performance of the rest of BPD as a whole. Table 3 echoes the earlier analysis that found (1) a much higher proportion of Bike Unit arrests dropped "in the interest of justice" relative to the rest of BPD (nearly double, 20.1% vs. 10.4%), and (2) a much lower proportion (a bit more than one-half, 3.4% vs. 6.2%) of Bike Unit arrests dropped for insufficient evidence, relative to the rest of BPD.

Table 3. Prosecutions Dropped as % of Arrests, DTF/Bike Unit vs. BPD, 2018-2022

Disposition Code	Kacalek	Breaux	Michalczyk	Pickett	Schikore	Seaton	Shedoudy	Stern	DTF/ Bike Unit	Rest of BPD
Insufficient Evidence T2	0%	3%	2%	8%	5%	4%	4%	3%	3.4%	6.2%
"Interest of Justice" T7	10%	18%	26%	12%	23%	17%	17%	31%	20.1%	10.4%

A more thorough analysis than presented here would investigate how consistently ACDA dropped the same offenses across different arresting officers, particularly across the four calendar subdivisions of Table 2. As a polar example, if all arrests for a statutory violation were dismissed during the pandemic but prosecuted before and after the pandemic, then the pandemic-era dismissals should not be ascribed to reduced arrest quality but rather to more lenient ACDA charging policy. Another polar example could posit that if all arrests by exactly one officer were dismissed, but prosecuted for all the other officers, then the quality of that officer's arrests would warrant additional scrutiny.

The variation across individual officers on display in Table 3 represents some combination of the quality of an officer's arrests and the ACDA's policy toward the offenses alleged against an arrestee (which could vary across pandemic phases). Explaining that variation would be a worthy direction for future research.

Race. Table 4 below presents the prosecutions dropped due to T2 and T7 according to the race of the arrestee. To simplify presentation and to avoid diluting non-white groups, I have consolidated arrestees of more than one race/ethnicity with one of the main race/ethnicity groups to which they belong. Thus, *Hispanic* includes Hispanic/White and Hispanic/Other; *Black* includes Black/Hispanic and Black/Other.

Table 4. Prosecutions Dropped as % of Arrests, By Race, DTF/Bike Unit vs. BPD, 2018-2022

Race	Bike Unit		Rest of BPD		All BPD	
	T2%	T7%	T2%	T7%	T2%	T7%
Black	1.5%	8.6%	2.9%	4.7%	2.7%	5.2%
White	1.5%	9.4%	1.6%	3.6%	1.6%	4.3%
Hispanic	0.3%	1.5%	1.2%	1.3%	1.0%	1.3%
Asian	0.0%	0.4%	0.2%	0.2%	0.2%	0.2%
Other	0.1%	0.3%	0.3%	0.6%	0.3%	0.6%
Total	3.4%	20.1%	6.2%	10.4%	5.8%	11.6%

Notes *T2*=Insufficient Evidence, *T7*="Interest of Justice"
Black includes 'Black,' 'Black/Hispanic,' and 'Black/Other'
Hispanic includes 'Hispanic,' 'Hispanic/White,' and 'Hispanic/Other'
Asian includes 'Asian' and 'Asian/Other'
Other includes 'Other and 'White/Other'

Over the entire 2018-2022 sample period the officers of the Bike Unit had prosecutions dropped due to insufficient evidence (code T2) at an equal rate for Black and white arrestees (1.5%), whereas the rest of BPD had a noticeably higher rate for Black arrestees (2.9%) than white arrestees (1.6%). Keeping in mind that insufficient evidence is a possible indicator of inadequate policing, this disparity (as well as the higher rest-of-BPD insufficient-evidence rates) warrants further examination.

The Bike Unit's arrests dropped "in the interest of justice" (code T7) were more heavily weighted toward white arrestees (9.4%) than Black arrestees (8.6%). The proportionately fewer arrests by the rest of BPD dropped "in the interest of justice" were weighted more toward Black arrestees (4.7%) than white arrestees (3.6%).

As I noted in my August memorandum, the Center for Policing Equity has explained such disparities as due to *community factors* (e.g. racially disparate crime rates) and *policing factors* (e.g. officer discretion),[21] now with the added consideration of pandemic-caused change to ACDA charging practice toward certain crimes that could have affected observed outcomes according to race.

[21] *Arrest Quotas*, supra n. 1, p. 13

A more sophisticated analysis would study the variation of disposition codes (T2, T7) across races, during various pandemic phases, taking into account the crime types that had given rise to arrest. As with the earlier discussion of Table 3, explaining the variation in Table 4 would be a worthy direction for further research.

Issues of Potential Interest to the Police Accountability Board

The main finding of this memorandum is the preponderance of BPD, especially Bike Unit, arrests whose prosecution was dropped "in the interest of justice," especially compared to the relative few dropped for lack of sufficient evidence. See Figure 2.

The many Bike Unit arrests dropped "in the interest of justice" seem related to a pandemic-era change in ACDA charging standards. Offenses for which the Bike Unit would likely make arrests would not (and did not) rise to the District Attorney's pandemic-era standard of "serious or violent felony crimes."

I suggest several investigative directions following this analysis:

1. Direct inquiry to the Alameda County District Attorney office about the meaning of the various T codes, particularly T7; the meaning of "in the interest of justice" as it pertains to the dropping of a criminal charge; and whether T7 can be equated with "the exercise of prosecutorial discretion."
2. Request to ACDA for data about the *subcodes* that more specifically identify the basis for declining prosecution.
3. Direct inquiry to the ACDA about the pandemic-related change to the office's charging practice.
4. Request to ACDA of other measures of arrest quality that might exist from the prosecutorial perspective.
5. Elicitation from BPD of its usage, if any, of prosecutorial decisions to evaluate officer performance, especially usage of codes T1, T2, and T3.
6. More detailed analysis of prosecutions dropped due to Insufficient Evidence (code T2), including patterns associated with specific officers, specific offenses, arrestee race, and (for the rest of BPD) its growth over time.

Conclusions

1. A large fraction of Bike Unit arrests has not been prosecuted by the District Attorney "in the interest of justice," especially during the COVID-19 pandemic.

2. The interruption of Superior Court availability during the pandemic may have led the District Attorney to decline to prosecute "in the interest of justice," so these dismissals do not immediately indicate a problem with policing (e.g. "unnecessary" arrests).
3. The fraction of Bike Unit arrests dropped due to insufficient evidence is much smaller than those dropped "in the interest of justice," and proportionately smaller than the rest of BPD.
4. The rest of BPD has had a larger, and growing, fraction of arrests declined prosecution due to insufficient evidence.

I recommend that the Police Accountability Board continue its investigation to ascertain more completely the quality of BPD arrests from the viewpoint of the Alameda County District Attorney. This independent view of BPD performance would be, in my opinion, a valuable perspective for this Board to have.

Exhibit 1 – Alameda County District Attorney Disposition Codes, 02/03/2014
Exhibit 2 – Alameda County District Attorney Press Release, April 9, 2020
Exhibit 3 – Alameda County Health Officer, Shelter In Place Order, March 16, 2020
Exhibit 4 – Alameda County Superior Court Press Release, June 14, 2021
Exhibit 5 – Alameda County Superior Court Press Release, April 14, 2022
Exhibit 6 – Governor of State of California Proclamation Terminating State of Emergency, February 28, 2023

Erratum to August 18, 2023, Memorandum

Footnote 28 (p. 10) misidentified the statute governing possession of drug paraphernalia and of methamphetamine. Those are governed by the *California Health and Safety Code*, specifically the Uniform Controlled Substances Act.
https://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml?tocCode=HSC&division=10.&title=&part=&chapter=&article=&nodetreepath=12

The footnote should have read:

[28] Cal. H&S.C. §§ 11364(A), 11377(A), P.C. § 647(F)

EXHIBIT 1

T Series for Refusals: 02/03/2014

T1 - LACK OF CORPUS	
A	Conduct lawful
B	Insufficient proof of value
C	No jurisdiction
D	Statute of limitations
T2 LACK OF SUFFICIENT EVIDENCE	
A	Aid/Abet evidence insufficient
B	Analysis report negative
C	Insufficient corroboration
D	Insufficient evidence to connect suspect
E	Insufficient quantity of drugs
F	Refusal/failure to locate/disclose informant
T3 ADMISSIBILITY FACTORS	
A	Questionable consent
B	Questionable execution (search warrant)
C	Questionable ID admissibility
D	Questionable PC for arrest/officer not present
E	Questionable search and seizure problem
F	Questionable statement by defendant
T4 – VICTIM FACTORS	
A	Other victim considerations
B	Victim credibility issues
C	Victim requests no prosecutions
D	Victim unable to qualify
E	Victim unavailable
F	Victim uncooperative
T5 - WITNESS FACTORS	
A	Necessary witness credibility issues
B	Necessary witness not available
C	Other witness considerations
D	Witness privilege
T6 – OTHER CASES AND/OR COUNTS	
A	Declined in favor of other counts/case
B	Def. plead/found guilty of other charges/case
C	Other charges filed in different county

T7 – INTEREST OF JUSTICE	
A	Civil remedy appropriate
B	Defendant provided immunity
C	Exonerating evidence/information revealed
D	Interest of Justice - Defendant
E	Interest of Justice - Other
F	Made restitution
G	Nature of offense/relationship of parties
H	No sentence advantage
I	Other agency handling (e.g., CPS, Traffic)
J	Plea to other jurisdiction
K	Police request no prosecution
T8 OTHER (INDICATE REASON IN REMARKS)	
A	Other jurisdictional consideration
B	Refer to law enforcement administration
C	Referred to State Attorney General
T9 – PROSECUTOR PREFILING DEFERRAL	
A	District Attorney Corrective Intervention Program
U2 – REFERRED TO NON-CALIF. JURIS	
A	Referred to military authority
B	Referred to another jurisdiction
C	Referred to U.S. Attorney General
U3 – REFERRED TO PROBATION (CORPUS Entry only)	
U4 – REFERRED TO PAROLE (DALITE Entry only)	
V1A– SENT BACK FI (indicate one DALITE only)	
1	Inadequate ID
2	Insufficient proof of intent
3	Check Alibi
4	Inadequate search evidence
5	Need corroboration
6	Insufficient proof of value
7	Physical evidence - Chain
8	Physical evidence – Need expert
9	Need statement
10	Police Investigation requested (see notes)
11	Lab results pending
12	CALICO

EXHIBIT 2

Office of the Alameda County District Attorney

Nancy E. O'Malley, District Attorney

Press Releases
In the News
Events
Felony Verdicts
Misdemeanor Verdicts
Videos
Newsletter
Past Events
Archives
2020
January
February
March
April
May
June
2019
2018
2017
2016
2015

DA O'Malley Makes Statement on Release of Individuals from Santa Rita Jail

Since the COVID-19 crisis began, this office has worked together with all justice partners to take dramatic steps to reduce the number of individuals detained in custody at Santa Rita Jail. The District Attorney has been working diligently for weeks with the public defender, defense attorneys and the justice partners to systematically release individuals who do not pose a risk of harm to the community or to a victim of crime. We have met at least twice a week, if not more, and remain in constant contact with staff at the Public Defender's Office.

Ultimately, regardless of the actions of the DA or defense, it is the Judge who makes the final decision whether someone will be released.

"The District Attorney's Office is doing everything we can, and should do to address this pandemic. However, we also have the obligation to protect the community from serious and violent offenders," says DA O'Malley "we cannot and will not agree to everyone being released from Santa Rita Jail, as we must also protect the safety of the public. I will also note that it is the constitutional obligation of the District Attorney, which we accept freely, to notify victims of crime if there is a change in circumstances, such as early release. We do all we possibly can to ensure that every victim of a charged crime understands the changes being made and why."

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Press Contact

"This Office takes very seriously the duty to balance a defendant's rights with public safety. It is very disappointing that the Public Defender has chosen this time of crisis to grandstand and to make politically divisive and disingenuous statements when what the circumstances demand of all public officials is unity and collaboration."

Efforts to minimize the jail population are being made on multiple fronts:

The DA's Office is only filing cases that involve serious or violent felony crimes. In fact, our average week's filings since the Shelter in Place Order was given are down nearly 70% from an average week's filing of new cases a year ago. The Court is only open two days a week (Tuesday and Friday) to arraign defendants on new cases. Last Friday, we filed three (3) new serious felony crimes. All other crimes presented to us we filed and set dates 60 days out so the defendants could be released from custody.

Efforts also encompass the setting of bail and the negotiation of sentences, which we are doing with an eye on minimizing the jail population. On April 2, 2020 by agreement with Presiding Judge Tara Desautels of the Alameda County Superior Court, all requests for "release on one's own recognizance" for individuals with pending criminal matters, and all requests for "early release" for individuals who were already serving jail sentences issued by Alameda County Superior Court Judges, would receive "judicial review" by a designated judge before releases would be made. Since that time, Supervising Deputy District Attorneys have worked with the defense bar and agreed with defense requests for "O.R" releases and early sentence releases on appropriate cases, always balancing public safety in this time of "Shelter in Place".

The DA's Office is also agreeing to early release of people who are serving a previously imposed sentence.

On March 19, 2020 the Alameda County District Attorney's Office agreed to the early release of 247 individuals already sentenced by the Alameda County Superior Court with scheduled release dates all the way up to April 30, 2020. By doing so, office effectively agreed to take off up to 80 days of an individual's previous court ordered sentence.

On March 20 and March 27, 2020 the office further agreed to the early release of another 9 individuals deemed by Santa Rita Jail as having "vulnerable health conditions". The office is reviewing a list of people

containing individuals whose sentence would end by the end of May. While the release of “Medically Fragile” individuals is also taking place. Due to HIPAA, the DA cannot know which individuals in the jail are of vulnerable health or compromised immune system. However, without giving any information, on our request ACSO provided a list of individuals who may fall in that category. We agreed to most of those people. However, we did not agree to everyone on the list being released. For example, we did not agree with the release of a woman who repeatedly tortured her 5 year old child.

As of today, April 9, 2020, with the latest information from Santa Rita Jail, the jail population of individuals that are serving out their court ordered sentences is currently at 115 – less than half the number of individuals who have already been released by District Attorney agreement these past three weeks.

Regardless of whether or not a defense attorney makes a request, the District Attorney’s Office continues to look at individuals with less than 60 days left on their sentence and are making recommendations to the reviewing judge that we do not oppose early release in appropriate cases.

The District Attorney has set up a system whereby any defense attorney can contact one of four attorneys in the DA’s Office to ask us to look at a specific case for release, and we are doing that every day. The court has assigned two judges to whom we take cases for consideration of early release.

Review of the cases is vital for public safety; cannot jeopardize the safety of victims or the community by abandoning this duty. We must take the necessary care and precaution to ensure the health of those incarcerated and the staff working at the jail without sacrificing the security of victims or well-being of the county. To do otherwise would be irresponsible.

This office has and will continue to work with all justice partners, including the Superior Court, the Alameda County Sheriff, the Probation Department, the defense bar and the Public Defender’s Office to make effective and smart decisions.

Posted on Apr 9, 2020

1225 Fallon St.
Oakland, CA 94612

Tagalog

H.E.A.T. Watch Toolkit
At School
CALICO

Contact us Directions

EXHIBIT 3

ORDER OF THE HEALTH OFFICER OF THE COUNTY OF ALAMEDA DIRECTING ALL INDIVIDUALS LIVING IN THE COUNTY TO SHELTER AT THEIR PLACE OF RESIDENCE EXCEPT THAT THEY MAY LEAVE TO PROVIDE OR RECEIVE CERTAIN ESSENTIAL SERVICES OR ENGAGE IN CERTAIN ESSENTIAL ACTIVITIES AND WORK FOR ESSENTIAL BUSINESSES AND GOVERNMENTAL SERVICES; EXEMPTING INDIVIDUALS EXPERIENCING HOMELESSNESS FROM THE SHELTER IN PLACE ORDER BUT URGING THEM TO FIND SHELTER AND GOVERNMENT AGENCIES TO PROVIDE IT; DIRECTING ALL BUSINESSES AND GOVERNMENTAL AGENCIES TO CEASE NON-ESSENTIAL OPERATIONS AT PHYSICAL LOCATIONS IN THE COUNTY; PROHIBITING ALL NON-ESSENTIAL GATHERINGS OF ANY NUMBER OF INDIVIDUALS; AND ORDERING CESSATION OF ALL NON-ESSENTIAL TRAVEL

DATE OF ORDER: MARCH 16, 2020

Please read this Order carefully. Violation of or failure to comply with this Order is a misdemeanor punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295, *et seq.*)

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, AND 120175, THE HEALTH OFFICER OF THE COUNTY OF ALAMEDA ("HEALTH OFFICER") ORDERS:

1. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible. When people need to leave their places of residence, whether to obtain or perform vital services, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times reasonably possible comply with Social Distancing Requirements as defined in Section 10 below. All provisions of this Order should be interpreted to effectuate this intent. Failure to comply with any of the provisions of this Order constitutes an imminent threat to public health.

2. All individuals currently living within the County of Alameda (the "County") are ordered to shelter at their place of residence. To the extent individuals are using shared or outdoor spaces, they must at all times as reasonably possible maintain social distancing of at least six feet from any other person when they are outside their residence. All persons may leave their residences only for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses, all as defined in Section 10. Individuals

experiencing homelessness are exempt from this Section, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make such shelter available as soon as possible and to the maximum extent practicable (and to utilize Social Distancing Requirements in their operation).

3. All businesses with a facility in the County, except Essential Businesses as defined below in Section 10, are required to cease all activities at facilities located within the County except Minimum Basic Operations, as defined in Section 10. For clarity, businesses may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home). All Essential Businesses are strongly encouraged to remain open. To the greatest extent feasible, Essential Businesses shall comply with Social Distancing Requirements as defined in Section 10 below, including, but not limited to, when any customers are standing in line.

4. All public and private gatherings of any number of people occurring outside a household or living unit are prohibited, except for the limited purposes as expressly permitted in Section 10. Nothing in this Order prohibits the gathering of members of a household or living unit.

5. All travel, including, but not limited to, travel on foot, bicycle, scooter, motorcycle, automobile, or public transit, except Essential Travel and Essential Activities as defined below in Section 10, is prohibited. People must use public transit only for purposes of performing Essential Activities or to travel to and from work to operate Essential Businesses or maintain Essential Governmental Functions. People riding on public transit must comply with Social Distancing Requirements as defined in Section 10 below, to the greatest extent feasible. This Order allows travel into or out of the County to perform Essential Activities, operate Essential Businesses, or maintain Essential Governmental Functions.

6. This Order is issued based on evidence of increasing occurrence of COVID-19 within the County and throughout the Bay Area, scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically, and evidence that the age, condition, and health of a significant portion of the population of the County places it at risk for serious health complications, including death, from COVID-19. Due to the outbreak of the COVID-19 virus in the general public, which is now a pandemic according to the World Health Organization, there is a public health emergency throughout the County. Making the problem worse, some individuals who contract the COVID-19 virus have no symptoms or have mild symptoms, which means they may not be aware they carry the virus. Because even people without symptoms can transmit the disease, and because evidence shows the disease is easily spread, gatherings can result in preventable transmission of the virus. The scientific evidence shows that at this stage of the emergency, it is essential to slow virus transmission as much as possible to protect the most vulnerable and to prevent the health care system from being overwhelmed. One proven way to slow the transmission is to limit interactions among people to the greatest extent practicable. By

reducing the spread of the COVID-19 virus, this Order helps preserve critical and limited healthcare capacity in the County.

7. This Order also is issued in light of the existence of 15 cases of COVID-19 in the County, as well as at least 258 confirmed cases and at least three deaths in the seven Bay Area jurisdictions jointly issuing this Order, as of 5 p.m. on March 15, 2020, including a significant and increasing number of suspected cases of community transmission and likely further significant increases in transmission. Widespread testing for COVID-19 is not yet available but is expected to increase in the coming days. This Order is necessary to slow the rate of spread and the Health Officer will re-evaluate it as further data becomes available.

8. This Order is issued in accordance with, and incorporates by reference, the March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom, the Declarations of Local Health Emergency issued by the Health Officer on March 1 and 5, the March 10, 2020 Resolution of the Board of Supervisors of the County of Alameda Ratifying the Declarations of Local Health Emergency, and Governor Newsom's March 12, 2020 Executive Order N-25-20.

9. This Order comes after the release of substantial guidance from the County Health Officer, the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials throughout the United States and around the world, including a variety of prior orders to combat the spread and harms of COVID-19. The Health Officer will continue to assess the quickly evolving situation and may modify or extend this Order, or issue additional Orders, related to COVID-19.

10. Definitions and Exemptions.

    a. For purposes of this Order, individuals may leave their residence only to perform any of the following "Essential Activities." But people at high risk of severe illness from COVID-19 and people who are sick are urged to stay in their residence to the extent possible except as necessary to seek medical care.
        i. To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members (including, but not limited to, pets), such as, by way of example only and without limitation, obtaining medical supplies or medication, visiting a health care professional, or obtaining supplies they need to work from home.
        ii. To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others, such as, by way of example only and without limitation, canned food, dry goods, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, and any other household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences.

iii. To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements as defined in this Section, such as, by way of example and without limitation, walking, hiking, or running.
iv. To perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations.
v. To care for a family member or pet in another household.

b. For purposes of this Order, individuals may leave their residence to work for or obtain services at any "Healthcare Operations" including hospitals, clinics, dentists, pharmacies, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, or any related and/or ancillary healthcare services. "Healthcare Operations" also includes veterinary care and all healthcare services provided to animals. This exemption shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined. "Healthcare Operations" does not include fitness and exercise gyms and similar facilities.

c. For purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of "Essential Infrastructure," including, but not limited to, public works construction, construction of housing (in particular affordable housing or housing for individuals experiencing homelessness), airport operations, water, sewer, gas, electrical, oil refining, roads and highways, public transportation, solid waste collection and removal, internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services), provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined this Section, to the extent possible.

d. For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, court personnel, and law enforcement personnel, and others who need to perform essential services are categorically exempt from this Order. Further, nothing in this Order shall prohibit any individual from performing or accessing "Essential Governmental Functions," as determined by the governmental entity performing those functions. Each governmental entity shall identify and designate appropriate employees or contractors to continue providing and carrying out any Essential Governmental Functions. All Essential Governmental Functions shall be performed in compliance with Social Distancing Requirements as defined in this Section, to the extent possible.

e. For the purposes of this Order, covered businesses include any for-profit, non-profit, or educational entities, regardless of the nature of the service, the function they perform, or its corporate or entity structure.

f. For the purposes of this Order, "Essential Businesses" means:
   i. Healthcare Operations and Essential Infrastructure;
   ii. Grocery stores, certified farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, and any other household consumer products (such as cleaning and personal care products). This includes stores that sell groceries and also sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences;
   iii. Food cultivation, including farming, livestock, and fishing;
   iv. Businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals;
   v. Newspapers, television, radio, and other media services;
   vi. Gas stations and auto-supply, auto-repair, and related facilities;
   vii. Banks and related financial institutions;
   viii. Hardware stores;
   ix. Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses;
   x. Businesses providing mailing and shipping services, including post office boxes;
   xi. Educational institutions—including public and private K-12 schools, colleges, and universities—for purposes of facilitating distance learning or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible;
   xii. Laundromats, drycleaners, and laundry service providers;
   xiii. Restaurants and other facilities that prepare and serve food, but only for delivery or carry out. Schools and other entities that typically provide free food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and take-away basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site;
   xiv. Businesses that supply products needed for people to work from home;
   xv. Businesses that supply other essential businesses with the support or supplies necessary to operate;
   xvi. Businesses that ship or deliver groceries, food, goods or services directly to residences;

xvii. Airlines, taxis, and other private transportation providers providing transportation services necessary for Essential Activities and other purposes expressly authorized in this Order;
xviii. Home-based care for seniors, adults, or children;
xix. Residential facilities and shelters for seniors, adults, and children;
xx. Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities;
xxi. Childcare facilities providing services that enable employees exempted in this Order to work as permitted. To the extent possible, childcare facilities must operate under the following mandatory conditions:
    1. Childcare must be carried out in stable groups of 12 or fewer ("stable" means that the same 12 or fewer children are in the same group each day).
    2. Children shall not change from one group to another.
    3. If more than one group of children is cared for at one facility, each group shall be in a separate room. Groups shall not mix with each other.
    4. Childcare providers shall remain solely with one group of children.

g. For the purposes of this Order, "Minimum Basic Operations" include the following, provided that employees comply with Social Distancing Requirements as defined this Section, to the extent possible, while carrying out such operations:
    i. The minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions.
    ii. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

h. For the purposes of this Order, "Essential Travel" includes travel for any of the following purposes. Individuals engaged in any Essential Travel must comply with all Social Distancing Requirements as defined in this Section below.
    i. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses, or Minimum Basic Operations.
    ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
    iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
    iv. Travel to return to a place of residence from outside the jurisdiction.
    v. Travel required by law enforcement or court order.
    vi. Travel required for non-residents to return to their place of residence outside the County. Individuals are strongly encouraged to verify that their transportation out of the County remains available and functional prior to commencing such travel.

i. For purposes of this Order, residences include hotels, motels, shared rental units and similar facilities.

j. For purposes of this Order, "Social Distancing Requirements" includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

11. Pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and all chiefs of police in the County ensure compliance with and enforce this Order. The violation of any provision of this Order constitutes an imminent threat to public health.

12. This Order shall become effective at 12:01 a.m. on March 17, 2020 and will continue to be in effect until 11:59 p.m. on April 7, 2020, or until it is extended, rescinded, superseded, or amended in writing by the Health Officer.

13. Copies of this Order shall promptly be: (1) made available at the County Administration Building at 1225 Oak Street, Oakland, California 94612; (2) posted on the County Public Health Department's website (acphd.org); and (3) provided to any member of the public requesting a copy of this Order.

14. If any provision of this Order to the application thereof to any person or circumstance is held to be invalid, the reminder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

IT IS SO ORDERED:

Dr. Erica Pan
Interim Health Officer of the County of Alameda

Dated: March 16, 2020

EXHIBIT 4

Superior Court of California

COUNTY OF ALAMEDA

Tara M. Desautels, Presiding Judge

Charles Smiley, Assistant Presiding Judge

Chad Finke, Executive Officer

René C. Davidson Courthouse

1225 Fallon Street

Oakland, California 94612

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For more information about this news release, please contact:

Executive Office

pcomments@alameda.courts.ca.gov

510-891-6012

FOR IMMEDIATE RELEASE

Monday, June 14, 2021

OAKLAND, CALIFORNIA: Superior Court of Alameda County announces the physical reopening of all courthouses and restoration of additional in-person services beginning June 15, 2021.

Consistent with Governor Newsom's "Beyond the Blueprint" plan, the Superior Court of Alameda County (Court) announced today that it will reopen all courthouses to the public and restore additional in-person services beginning June 15, 2021.

On March 17, 2020, the start of the COVID-19 pandemic and related shelter-in-place orders required the Court to close its courthouses to the public. Since that date, Court services have been provided almost exclusively through remote access. However, in recent months, improving COVID-19 conditions in Alameda County have enabled the Court to gradually restore in-person services.

On June 8, 2021, for the first time since the establishment of the tier system, Alameda County moved to the "Yellow Tier," easing some COVID restrictions. On Friday, June 11, the California Department of Public Health (CDPH) issued an order that, among other things, mandated new face covering requirements effective June 15. In addition, the tier system will be eliminated. As an employer, however, the Court is required to comply with regulations issued by Cal/OSHA. Thus, all who enter court facilities will be required to wear a face covering at all times and maintain social distancing until such time as the current regulations are modified by Cal/OSHA or through executive action.

Just as court operations have consistently followed public health guidance, on June 15, with the greatly improved health conditions in Alameda County and throughout the State, the Court will continue and significantly expand its in-person reopening efforts.

Specifically, starting on June 15, 2021, the following clerk's offices will physically re-open to the public for in-person services from 8:30 a.m. to 3:00 p.m., Monday through Friday (with the exception of Friday, June 25):

- Rene C. Davidson Courthouse (RCD), 1225 Fallon Street, Oakland (Criminal).
- Wiley W. Manuel Courthouse, 661 Washington Street, Oakland (Criminal and Traffic).
- East County Hall of Justice, 5151 Gleason Drive, Dublin (Criminal and Traffic).

- Fremont Hall of Justice, 39439 Paseo Padre Parkway, Fremont (Criminal, Traffic).
- Juvenile Justice Center, 2500 Fairmont Drive, San Leandro (Juvenile).

Telephone services will continue to be offered during those business hours, and drop boxes will be available at each of the above locations from 3:00 to 4:00 p.m. every day.

Then, starting June 21, the following services will be offered at the Berkeley Courthouse (Probate), RCD (Civil and Appeals), George E. McDonald Hall of Justice (Records) and Hayward Hall of Justice (Civil, Family), with the exception of Friday, June 25:

- In-person clerk's office hours: 8:30 a.m. – 2:30 p.m.
- Drop box hours: 2:30 p.m. – 4:00 p.m.
- Telephone hours: 10:00 a.m. – 2:00 p.m.

The Court asks all who visit court facilities not to enter if they have been diagnosed with COVID within the last 10 days, if they live or have had "close contact" with a COVID-positive person within the last 14 days, or if they have any symptoms of COVID. Litigants and members of the public can continue to access the Court's services remotely, as explained on the Court's dedicated COVID-19 web page.

The Court looks forward to continuing to expand its in-person court offerings while also maintaining remote access to our Court to the extent permitted by public health and safety guidelines and other applicable authorities. Please continue to check our website and follow @AlamedaSuperior on Twitter for the most current information.

EXHIBIT 5

Superior Court of California
COUNTY OF ALAMEDA

Charles A. Smiley III, Presiding Judge
Thomas Nixon, Assistant Presiding Judge
Chad Finke, Executive Officer

René C. Davidson Courthouse
1225 Fallon Street
Oakland, California 94612
@AlamedaSuperior
www.alameda.courts.ca.gov

For more information about this news release, please contact:

Executive Office
pcomments@alameda.courts.ca.gov
510-891-6012

FOR IMMEDIATE RELEASE

Thursday, April 14, 2022

OAKLAND, CALIFORNIA: Superior Court of Alameda County announces reopening of courtrooms to the public and expansion of clerk's office hours.

The Superior Court of Alameda County (Court) announced today that, effective April 25, 2022, it will begin reopening courtrooms to the public. For the duration of the COVID pandemic, the public has been unable to observe court proceedings in person, although access has been available through live audio streaming. While the live streaming option will remain, the public also will now be able to be physically present in the courtroom for proceedings that are open to the public generally.

The process of reopening courtrooms will occur on a rolling basis, driven by resource availability. The Court will maintain an up-to-date list of which courtrooms are open to the public on its dedicated COVID-19 web page. Please note that courtrooms will only be open during times when court is in session. In some courthouses, lists of the daily proceedings are printed and posted, and litigants, attorneys, and members of the public may also check the appropriate case management system online to determine the date, time, and location of hearings:

- Odyssey (Criminal)
- TCMS (Traffic)
- eCourt (Civil/Small Claims)
- DomainWeb (Family/Probate)

The Court continues to require face coverings in all courthouses at all times under General Directive 2022-03A. And while the Court does not currently have any social distancing mandate, it requests that courtroom spectators attempt to maintain a safe distance from each other, including leaving empty seats if possible. Judicial officers will have the authority to limit the number of persons in a courtroom if necessary for the health and safety of the public or Court personnel.

In addition, beginning April 25, Civil, Family, Probate, Records, and Appeals clerk's offices will once again open at 8:30 a.m. for in-person and telephone services, and will close at 2:00 p.m. Criminal clerk's offices will continue to open at 8:30 a.m. and close at 3:00 p.m., while Traffic clerk's offices will open at 8:00 a.m. and close at 3:00 p.m. Drop boxes will be available from when each office closes until 4:00 p.m. every day.

Civil e-filing will still be available 24 hours per day, 7 days a week, along with Criminal and Juvenile e-filing. Fax filing also remains available for Family and Probate filings.

The Court's Self-Help Center will remain closed for in-person service at this time, although assistance is still available by telephone and LiveChat. The Court is planning to resume in-person Self-Help services by appointment only within the coming weeks.

For additional information related to the Court's COVID response, please see our dedicated COVID-19 page, and please follow @AlamedaSuperior on Twitter for immediate updates.

EXHIBIT 6

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

A PROCLAMATION
BY THE GOVERNOR OF THE STATE OF CALIFORNIA
TERMINATING STATE OF EMERGENCY

I, **GAVIN NEWSOM**, Governor of the State of California, having found pursuant to Government Code section 8629 that the conditions of extreme peril to the safety of persons and property declared in the State of Emergency proclamation listed below no longer exist, therefore proclaim that the State of Emergency proclaimed on the following date and in the following jurisdiction no longer exists, effective at 11:59 p.m. on February 28, 2023. Accordingly, any Executive Orders related to the terminated State of Emergency will also no longer be in effect as of 11:59 p.m. on February 28, 2023.

PROCLAMATION		
Emergency	**Date Proclaimed**	**Jurisdiction**
COVID-19	March 4, 2020	Statewide

I FURTHER DIRECT that as soon as hereafter possible, this Proclamation be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Proclamation.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 28th day of February 2023.

GAVIN NEWSOM
Governor of California

ATTEST:

SHIRLEY WEBER, PH.D.
Secretary of State