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POLICE MISCONDUCT RECORDS SHOULD BE PUBLIC: Policies & Polling

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INTRODUCTION

When a police chokehold led to Eric Garner’s death back in 2014, a bystander caught it all on video. Protests across the nation called for fundamental reforms—and for the punishment of Daniel Pantaleo, the NYPD officer who executed the chokehold.¹ Anyone watching the video could see that something was wrong with the officer’s conduct. But no one could see that this officer had been in trouble before. It was not until years later, when an anonymous source leaked Pantaleo’s misconduct records to the press, that the public learned of his troubling history of misconduct—a history that had been addressed by only minimal disciplinary action.²

Pantaleo’s secret history of misconduct, and the minimal accountability that resulted, illustrate the need for public access to records of police misconduct.

Recent polling conducted by Data For Progress and The Justice Collaborative Institute shows that there is broad support for such public access. The national poll of likely voters shows that:

- ▶ 66% of likely voters, including 57% of Republicans, support “making all law enforcement disciplinary records of police officers available to the public.”
- ▶ 67% of likely voters, including 58% of Republicans, support “releasing ‘Brady Lists,’ that is, lists that record instances of police misconduct, to the public.”

- ▶ 73% of likely voters, including 67% of Republicans, believe that “the public has a right to know which police officers in the community have records of excessive force, sexual assault, racism, or dishonesty.”
- ▶ 69% of likely voters, including 63% of Republicans, support “allowing people to ... use public records requests to learn whether police officers in the community have records of excessive force, sexual assault, racism, or dishonesty.”

This polling data confirms what legislators, commentators, and courts have increasingly come to recognize: suppressing information about police misconduct is not in the public interest. Policies that allow law enforcement misconduct records to be withheld from the public enable troubled officers to stay on the job, thereby posing an ongoing threat to the very communities they are supposed to protect and serve. Privacy protections that shield information about police misconduct from the public also run headlong into the constitutional rule, set forth in *Brady v. Maryland* and its progeny, that prosecutors must disclose information that could impeach an officer’s credibility or call the officer’s testimony into question.

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

2. Carimah Townes & Jack Jenkins, *The disturbing secret history of the NYPD officer who killed Eric Garner*, ThinkProgress.com (Mar. 21, 2017), <https://archive.thinkprogress.org/daniel-pantaleo-records-75833e6168f3/>

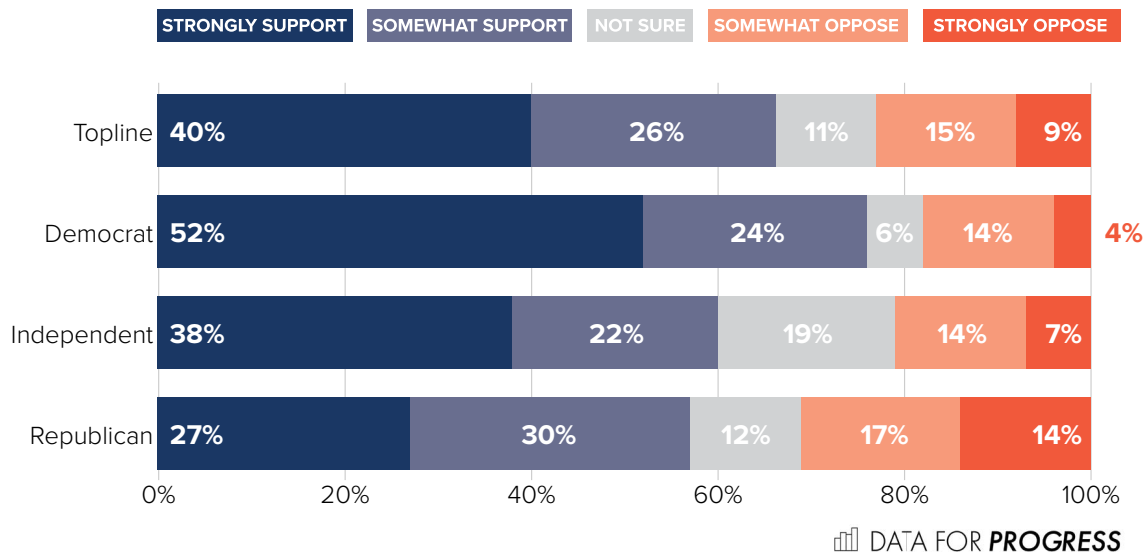
California, New York, and other jurisdictions have recently taken action to remove the shroud of secrecy that has long concealed this information. In New York, for example, the state legislature repealed Section 50-a, the law that kept Pantaleo and other officers' misconduct records confidential. But there is still much work to be done.

In this moment where significant reforms of the police disciplinary system are both needed and possible, it is worth taking stock of how we got here, and what work remains to ensure police misconduct is fully and fairly open to public scrutiny.

MISCONDUCT RECORDS & THEIR IMPORTANCE

Law enforcement agencies typically investigate themselves when allegations of police misconduct are raised. Larger departments often have internal affairs units that handle such investigations; smaller departments may rely on a single supervisor. In principle, this form of self-policing or quality control is meant to assure the public that the officers and agencies charged with enforcing the law are themselves following the law. The prospect of disciplinary action is supposed to incentivize officers to abide by their department's own rules.

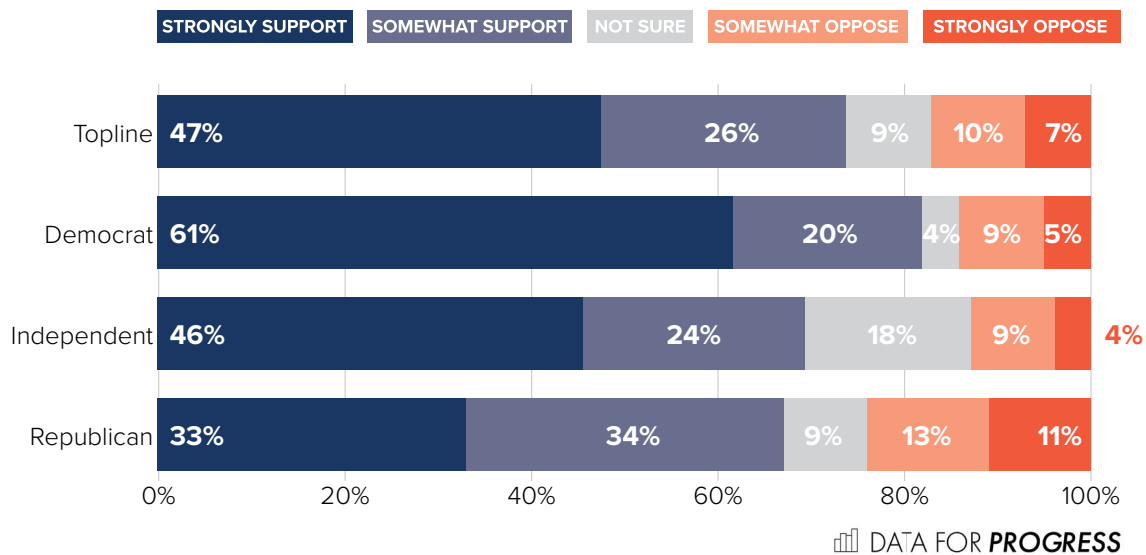
Do you support or oppose making all law enforcement disciplinary records of police officers available to the public?



A wide range of issues can be subject to internal affairs investigations. Internal affairs might investigate allegations that an officer is taking part in a drug trafficking operation, extorting money from business owners,³ or fabricating evidence by planting drugs and then claiming to have discovered them.⁴ Or, internal affairs could investigate allegations that a detective beat a confession out of a suspect, falsified overtime records,⁵ destroyed evidence,⁶ or slept on the job.⁷ These internal investigations usually start with a complaint from the public or another officer and can lead to a range of outcomes, from a finding that the allegation was unfounded to a recommendation that the officer be disciplined or even criminally prosecuted.

Public access to records of these investigations is critical for holding police departments and their officers accountable. There is the inherent risk that a department tasked with regulating its own misconduct will be less inclined to fully investigate, discipline, or remove an offending colleague. But allowing the public to see and understand the full extent of internal investigations provides a measure of oversight. Public access to this information also makes it harder for officers fired from one department for misconduct to simply move on to another department. Where there is not sufficient public scrutiny, officers with histories of misconduct have managed to hold on to their jobs and continue to misuse their power to jeopardize the lives and liberty of the public.⁸

Do you support or oppose the public’s right to know which police officers in the community have records of excessive force, sexual assault, racism, or dishonesty?

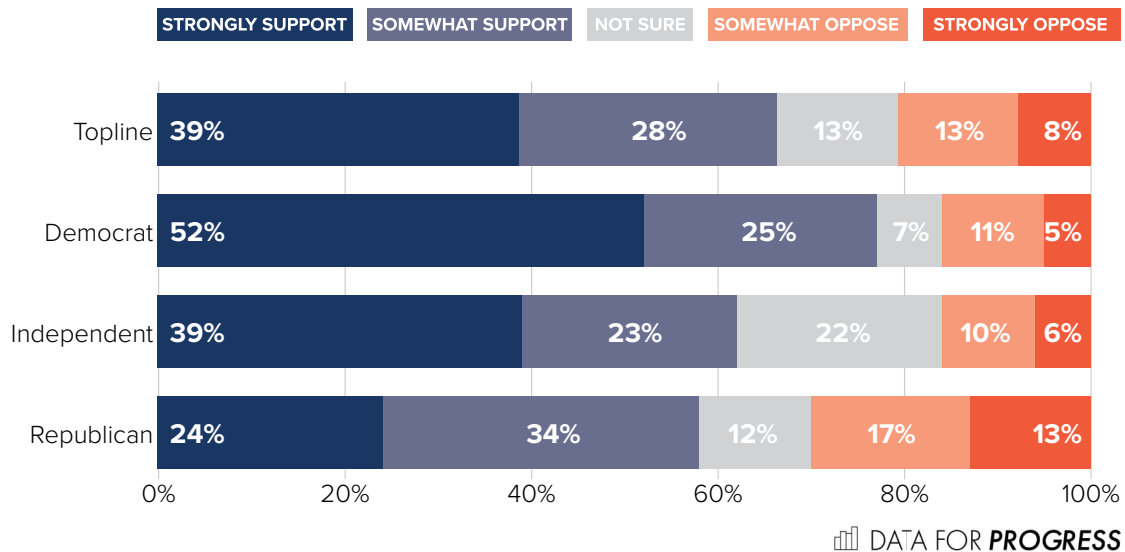


3. Chicago police officer charged with extorting \$800 a week from firm, Chicago Sun Times (Jul. 24, 2008).
 4. Kevin Rector, Judge: Officer falsified video, Baltimore Sun (Nov. 10, 2018).
 5. Gus G. Sentementes, 6 City Police Officers Suspended, Baltimore Sun (Feb. 7, 2007).
 6. Jane Musgrave, Probe: Phone in Adams case lost, Palm Beach Post (Nov. 12, 2015).
 7. Christopher Scott, Officer caught sleeping on job resigns in Lowell, Lowell Sun (Oct. 16, 2015).
 8. Maya Lau, Ben Poston, Corina Knoll, A Times Investigation: A secret list of deputy misconduct, L.A. Times (Dec. 10, 2017); Kala Kachmar and Andrew Ford, Bad cops are built; here’s how, The Daily Journal (Vineland, NJ) (Feb. 5, 2018).

Beyond the need for public access to this information, the Constitution requires that people charged with crimes have access to the disciplinary records of officers testifying against them. In *Brady v. Maryland* and subsequent cases, the U.S. Supreme Court has held that prosecutors must disclose to defendants any favorable, material evidence known to any member of the prosecution team, including the police.⁹ If an investigating officer’s disciplinary records show a history of dishonesty, bias, excessive force, or other conduct that would undermine the officer’s credibility or testimony, this information must be disclosed to the defense. Even if the prosecutor

herself does not know of this information, she has a constitutional duty to learn of and disclose it.¹⁰ In some instances, when an officer testified without disclosing some history of misconduct, courts have later vacated the resulting conviction when the undisclosed evidence came to light.¹¹ In this regard, the interests of the public and people accused of crimes align: both require transparency when it comes to police misconduct records.

Do you support or oppose releasing “Brady Lists” that record instances of police misconduct to the public?



9. *Brady v. Maryland*, 373 US 83 (1963).

10. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

11. E.g., *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013).

RECENT PROGRESS & ROADBLOCKS

Despite their significance, or maybe because of it, police misconduct records have been shielded from public view in many states. While Florida and other similar states have long allowed easy public access to police internal affairs investigations, California, New York, and other states have kept the information strictly confidential. In California, the confidentiality provisions were so strict that they barred not only the public from accessing the records, but also prosecutors seeking to fulfill their Brady obligations.¹² Prosecutors and defendants required a court order before the police department would produce any records.¹³ Even then, review of the records was permitted only after a judge had screened the records for any relevant material, typically with a representative from the police, but no one else, present.¹⁴ Whatever records ended up being disclosed were then subject to a protective order that prevented disclosure of the records even to other prosecutors working on different cases with the same officer.¹⁵

California's solicitude for police privacy was extreme—arguably the most extreme in the country. But, as the climate around police accountability has changed, so has the state's

approach to this issue. In 2018, California's legislature amended the secrecy laws to make certain types of police misconduct records available to the public. This amendment applied to records of police shootings, certain other police uses of force that resulted in death or serious injury, sustained allegations that an officer committed sexual assault, and certain sustained allegations relating to an officer's dishonesty. These changes were vigorously opposed by lobbying organizations representing California's roughly 80,000 law enforcement officers, who warned that the disciplinary process was unfair to officers and could violate officers' privacy in a way that would put them at risk.¹⁶

The California story is instructive not only because of the change in law, but also because of the subsequent resistance to it. The public records law was signed at the end of September 2018, with an effective date of January 1, 2019. In the closing months of 2018, some police agencies, like the Inglewood Police Department, reportedly started destroying misconduct records that were older than five years—the minimum record retention time required by statute.¹⁷ Other police agencies and police unions insisted that the new law did not apply to any records generated prior to the law's effective date, meaning that future records would be public but prior ones would

12. Jonathan Abel, *Brady's Blind Spot*, 67 Stan. L. Rev. 743, 762-66 (2015), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/04/67_Stan_L_Rev_743_Abel.pdf.

13. *Id.*

14. *Id.*

15. *Id.*

16. Liam Dillon & Maya Lau, *Laws Usher in New Era for Police*, L.A. Times (Oct. 1, 2018).

17. Liam Dillon & Jack Dolan, *Inglewood allows purge of police files*, L.A. Times (Dec. 23, 2018); see Darwin BondGraham, *California Cities Have Shredded Decades of Police Misconduct Records*, WitnessLA.com (April 25, 2019), <https://witnessla.com/california-cities-have-shredded-decades-of-police-misconduct-records/>; Cal. Penal Code Section 832.5 ("Complaints and any reports or findings relating to these complaints shall be retained for a period of at least five years.").

not—an argument that has been consistently rejected in court.¹⁸ Still other agencies sought to prevent disclosure by asserting that the volume of requests for misconduct information was so overwhelming that it would take them years and years to respond. For example, more than a year after the records law went into effect, San Francisco Public Defender Mano Raju publicly complained that disclosure of records was so slow that “it will be 20 years before San Francisco complies with the 2019 law.”¹⁹ Just last month, the *Los Angeles Times* sued the Los Angeles Sheriff’s Department for violating the public records law by, among other things, refusing to turn over any documents responsive to the new change in law.²⁰

The initial legislation now requires another bill to deal with this recalcitrance. The pending legislation, Senate Bill 776, would expand the types of misconduct allegations that are subject to disclosure and would impose \$1,000-a-day fines on agencies that take more than 30 days to provide records. These changes, if enacted, would increase transparency and accountability. But the fact that such explicit sanctions are required is a stark illustration of the culture of confidentiality and obstruction that must fundamentally change.

GOING FORWARD

Greater legal access to information about police misconduct is a necessary step on the path to police accountability. But, if these records are going to be useful, they need to be accompanied by other reforms that are sometimes overlooked. When an agency provides misconduct records, that production will be useful only if the information, often voluminous, is indexed in a user-friendly way. The Invisible Institute in Chicago has done an exemplary job collecting and visualizing misconduct records. Newspapers around the country have also published admirable compendiums of officers and their misconduct.²¹ And prosecutors and public defender organizations alike are building internal databases to track misdeeds that could be relevant to an officer’s testimony in court.²² But these examples cover only a handful of jurisdictions. Put simply, for police transparency initiatives to be successful, they must include the infrastructure to catalog and organize the raw data.

18. *Walnut Creek Police Officers’ Assn v. City of Walnut Creek*, 33 Cal. App. 5th 940 (2019); Thomas Peele et al., *California police accountability*: Appellate court upholds ruling in favor of disclosure of discipline records, *East Bay Times* (Mar. 13, 2019).
19. Mano Raju, Op-Ed, *How long must S.F. wait to root out police corruption?*, *S.F. Chron.* (Feb. 6, 2020); see S.F. Police Dep’t, *Status of Public Records Requests Made Pursuant to Senate Bill 1421* (Jun. 2, 2020), <https://sfgov.org/policecommission/sites/default/files/Documents/PoliceCommission/PoliceCommission061020-SB1421WeeklyReport2020-06-02.pdf>.
20. Alene Tchekmedyan, *Times files suit over sheriff withholding records*, *L.A. Times* (Jul. 1, 2020).
21. John Kelly & Mark Nichols, *Search the list of more than 30,000 police officers banned by 44 states*, *USA Today* (Oct. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002/>.
22. Jason Tashea, *Databases create access to police misconduct cases and offer a handy tool for defense lawyers*, *ABAJournal.com* (Feb. 1, 2016), https://www.abajournal.com/magazine/article/databases_create_access_to_police_misconduct_cases_and_offer_a_handy_tool_f.

Similarly, even the most sweeping collections of police misconduct records often fall short when it comes to linking police misconduct with prior cases in which the officers have testified. The fact that an officer has a history of misconduct is, of course, relevant to the future cases in which the officer will be called as a witness. But the officer's misconduct history is also relevant to all the people who have been convicted by, and may be serving prison sentences because of, the officer's testimony. These prisoners could be entitled to new trials if the officer's misconduct records come to light. Yet there is often no way to trace all the cases in which an officer has testified and, thus, no systematic way to use newly disclosed records of police misconduct to correct all the prior wrongful convictions that an officer may have taken part in. This issue is explored in more detail in [my ongoing academic research](#).

Further, increased access to police misconduct records should include explicit requirements that departments maintain the records indefinitely. All too often, agencies are permitted to destroy misconduct records that are only a few years old.²³ Because misconduct records have, for so long, been shielded from public access, and because the records have grave implications for prior criminal convictions, law enforcement agencies should be prohibited from destroying these records. Otherwise, improved public access will allow only a limited window into the disciplinary histories of police officers.

Only with comprehensive access to police misconduct records will the public finally see which officers have histories of misconduct and which officers do not. Public trust and confidence—the very foundation on which police legitimacy depends—cannot exist when these misconduct records are hidden from public view.

POLLING METHODOLOGY

From 6/26/2020 to 6/27/2020 Data for Progress conducted a survey of 1,388 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is +/- 2.6 percent.

23. Darwin BondGraham, *Fremont Destroyed Decades of Police Misconduct Record Shortly Before Transparency Law Took Effect*, KQED.org (Mar. 18, 2019).