

**CITIZEN-DIRECTED POLICE REFORM:  
HOW INDEPENDENT INVESTIGATIONS AND COMPELLED  
OFFICER TESTIMONY CAN INCREASE ACCOUNTABILITY**

by  
*Kristen Chambers\**

*Police misconduct in the United States has spurred decades of police reform efforts, but change has been slow and not attributable to any particular method. One method that seems promising both to remedy individual harms and to help transform police culture is citizen oversight of the police. This Note argues that citizen oversight agencies can aid in reformation of the police by conducting independent investigations of police misconduct. To be effective, such investigations must be conducted by citizen oversight agencies that are truly independent and vested with ample authority. In this Note, examples from Portland, Oregon's citizen oversight agency are used to illustrate common hurdles to conducting independent investigations, with specific focus on gaining the power to compel officer testimony. This Note challenges municipal deference to collective bargaining agreements with respect to police oversight and suggests methods for citizen oversight agencies to gain more independence and power.*

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## I. INTRODUCTION

At about 2:30 a.m. on August 12, 2006, Portland Police officers arrived at the scene of an altercation outside a bar.<sup>1</sup> One of the individuals involved, Jason Krohn, declined to cooperate when the police ordered the group to disperse. In response, multiple officers pushed Jason to the ground, where he was handcuffed. Then, although he was detained, an officer gave a knee-drop to the back of Jason’s neck, causing scrapes and swelling in Jason’s face. Jason was placed in the back of a patrol car, but his legs were still hanging out the door. An officer slammed the door twice on Jason’s legs, leaving bruises on his shins and

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<sup>1</sup> Maxine Bernstein, *Ex-Officer’s Son Struggles Through Complaint Process with Portland Police on Use of Force*, OREGONLIVE.COM (Dec. 5, 2009), [http://www.oregonlive.com/portland/index.ssf/2009/12/ex-officers\\_son\\_struggles\\_thro.html](http://www.oregonlive.com/portland/index.ssf/2009/12/ex-officers_son_struggles_thro.html) [hereinafter Bernstein, *Ex-Officer’s Son Struggles Through Complaint Process with Portland Police on Use of Force*].

blood on his slacks. On the way to the police station, the officers realized who their detainee was. Jason Krohn is the son of then-sergeant of the Portland Police Bureau, Kelly Krohn. Sergeant Krohn had served the bureau for 26 years. Sergeant Krohn was relieved when the officers decided not to press charges, but rather released Jason to his custody. However, Sergeant Krohn was upset when he heard about how the officers treated his son.

Jason Krohn filed a complaint with Portland's Independent Police Review division (IPR) for excessive use of force and failure of the police to file accurate reports. After a brief investigation by Internal Affairs, which did not include interviewing Jason, the case was dismissed based on a lack of information and the discrepancy between witness accounts compared to police reports. Jason appealed to the Citizen Review Committee (CRC), and three years later the Committee affirmed the investigation findings.<sup>2</sup> Before this incident, Sergeant Krohn had faith in the bureau and the system. After, he reflected "I have come away from this experience concluding that the [Portland Police Bureau] does not have the ability to investigate their own [officers]."<sup>3</sup>

Jason Krohn's story is just one example of the need for better oversight of the Portland Police Bureau. His story is unique because Jason is the son of a police officer. Once the officers became aware of Jason's identity, they were more lenient with Jason than they would have been with an ordinary citizen. Unfortunately, Jason's experience of being mistreated before they realized his identity is not unique. In 2010, the IPR received 385 formal complaints from citizens.<sup>4</sup> The accusations of these complaints ranged from excessive use of force to rude behavior to failure to take appropriate action.<sup>5</sup> Some of these incidents resulted in tragedy. From January 2010 to July 2011, Portland police officers shot eight citizens, killing five of them.<sup>6</sup> While there is no direct evidence that

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<sup>2</sup> Maxine Bernstein, *Citizen Panel Affirms Police Bureau Findings in 2006 Confrontation with Sergeant's Son*, OREGONLIVE.COM (Mar. 11, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/03/citizen\\_panel\\_affirms\\_police\\_b.html](http://www.oregonlive.com/portland/index.ssf/2010/03/citizen_panel_affirms_police_b.html).

<sup>3</sup> Bernstein, *Ex-Officer's Son Struggles Through Complaint Process with Portland Police on Use of Force*, *supra* note 1.

<sup>4</sup> OFFICE OF THE CITY AUDITOR, PORTLAND, OR., INDEPENDENT POLICE REVIEW ANNUAL REPORT 2010, at 6 fig.1 (2011).

<sup>5</sup> *Id.* tbl.4.

<sup>6</sup> Maxine Bernstein, *Grand Jury Transcripts Released in Jan. 2 Portland Police Fatal Shooting of Thomas Higginbotham*, OREGONLIVE.COM (Jan. 28, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/01/grand\\_jury\\_transcripts\\_release.html](http://www.oregonlive.com/portland/index.ssf/2011/01/grand_jury_transcripts_release.html) [hereinafter Bernstein, *Grand Jury Transcripts Released in Jan. 2 Portland Police Fatal Shooting of Thomas Higginbotham*]; Maxine Bernstein, *Marcus Lagazzino, Hit by at Least 3 Police AR-15 Rifle Rounds, Is Upgraded to Serious Condition*, OREGONLIVE.COM (Dec. 30, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/12/marcus\\_lagazzino\\_who\\_was\\_shot.html](http://www.oregonlive.com/portland/index.ssf/2010/12/marcus_lagazzino_who_was_shot.html); Maxine Bernstein, *Portland Police Explain What Led to the Fatal Stop of Keaton Otis*, OREGONLIVE.COM (June 2, 2010), [http://blog.oregonlive.com/portland\\_impact/print.html?entry=/2010/06/post\\_20.html](http://blog.oregonlive.com/portland_impact/print.html?entry=/2010/06/post_20.html); Maxine Bernstein, *When Man Reached for His Back Waistband, Officer Shot Him, Portland Police Say*, OREGONLIVE.COM (Feb. 8, 2010),

these particular individuals were targeted for police abuse, the victims were disproportionately African-American and people with mental illness<sup>7</sup>—groups that have been historically criminalized.<sup>8</sup> Of the shooting investigations that have been completed, IPR has found only one policy violation so far.<sup>9</sup> Overall, 66% of the complaints from 2010 were dismissed, and of those allegations that were investigated only 14% were sustained.<sup>10</sup> While some of these allegations were not sustained because the officer acted appropriately, past studies indicate that some of the allegations were not sustained because the investigatory procedure was “seriously inadequate.”<sup>11</sup> The sheer number of complaints, demographics of the complainants, low sustain rate,<sup>12</sup> and history of inadequate investigations suggest that there is room for improvement.

Police reform can be accomplished in a number of ways, but this Note focuses on the efforts of organized citizen oversight agencies. Most major cities in the United States have developed some form of an oversight agency, like Portland’s IPR or the CRC, that empowers citizens

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[http://www.oregonlive.com/news/index.ssf/2010/02/portland\\_police\\_thought\\_aaron.html](http://www.oregonlive.com/news/index.ssf/2010/02/portland_police_thought_aaron.html); Helen Jung, *Man Accidentally Shot by Portland Police Officer Upgraded from Critical Condition*, OREGONLIVE.COM (Oct. 22, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/07/man\\_accidentally\\_shot\\_by\\_portl\\_1.html](http://www.oregonlive.com/portland/index.ssf/2011/07/man_accidentally_shot_by_portl_1.html) [hereinafter Jung, *Man Accidentally Shot by Portland Police Officer Upgraded from Critical Condition*]; Helen Jung, *Investigators Interview Portland Police Officer Involved in Fatal Shooting*, OREGONLIVE.COM (Mar. 24, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/03/investigators\\_interview\\_portla.html](http://www.oregonlive.com/portland/index.ssf/2010/03/investigators_interview_portla.html); Stuart Tomlinson, *Portland Police Release Reports Related to Officer-Involved Shooting of Craig Boehler*, OREGONLIVE.COM (Jan. 13, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/01/portland\\_police\\_release\\_report\\_1.html](http://www.oregonlive.com/portland/index.ssf/2011/01/portland_police_release_report_1.html); Stuart Tomlinson, *Police Shoot and Kill Darryl Dwayne Ferguson, 45, in Confrontation Early Friday*, OREGONLIVE.COM (Dec. 17, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/12/police\\_shoot\\_and\\_kill\\_46-year-.html](http://www.oregonlive.com/portland/index.ssf/2010/12/police_shoot_and_kill_46-year-.html).

<sup>7</sup> Two of the victims were African-American and all of them were suffering from either a mental health crisis or untreated addiction. Jenny Westberg, *2010 Starts with Officer-Involved Shootings, Ends with More; 2011 Begins the Same Way*, MENTAL HEALTH ASS’N OF PORTLAND (Jan. 4, 2011), <http://www.mentalhealthportland.org/?p=7848>; Jung, *Man Accidentally Shot by Portland Police Officer Upgraded from Critical Condition*, *supra* note 6; see also Bernstein, *Grand Jury Transcripts Released in Jan. 2 Portland Police Fatal Shooting of Thomas Higginbotham*, *supra* note 6.

<sup>8</sup> See ANGELA Y. DAVIS *Race and Criminalization: Black Americans and the Punishment Industry*, in THE ANGELA Y. DAVIS READER 61, 64 (Joy James ed., 1998); RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM* (2008).

<sup>9</sup> OFFICE OF THE CITY AUDITOR, PORTLAND, OR., *supra* note 4, at 19 tbl.16 (collecting data of seven officer involved shootings from 2009 (one) and 2010 (six)).

<sup>10</sup> *Id.* at 7 tbl.5, 14 tbl.11.

<sup>11</sup> See EILEEN LUNA-FIREBAUGH, *PERFORMANCE REVIEW OF THE INDEPENDENT POLICE REVIEW DIVISION 65* (Jan. 23, 2008).

<sup>12</sup> Portland’s sustain rate for 2010 is low compared to the citizen oversight agency in Albuquerque, New Mexico, which had a sustain rate of 35%. CITY OF ALBUQUERQUE, INDEP. REVIEW OFFICE OF THE POLICE OVERSIGHT COMM’N, *2010 ANNUAL REPORT 8* (2010). IPR has historically reported lower sustain rates than other oversight agencies. See LUNA-FIREBAUGH, *supra* note 11, at 50–51.

to hold the police accountable.<sup>13</sup> Oversight agencies vary greatly in their structure, power, and size, but almost all can be criticized as less than ideal because they lack the power to overcome de facto police immunity.<sup>14</sup> This Note critiques a long standing system of police exemption from accountability in general, and the need to strengthen Portland's IPR in particular.

The majority of this Note is a policy analysis. The particulars of Portland, Oregon are discussed in detail, but the ideas could be applied to most United States municipalities. In general, this Note suggests that citizen oversight can be used as a vehicle to help transform police culture. In particular, to be effective, oversight agencies must have the power to conduct independent investigations including the authority to compel officer testimony.<sup>15</sup> Furthermore, compelling testimony is purely a public policy issue that should not be negotiable in a police union's collective bargaining agreement.

Because labor laws and administrative review can vary greatly by state, the latter portion of this Note primarily focuses on specific reforms to improve Portland's citizen oversight agency, IPR.<sup>16</sup> IPR's current system lacks true independence because IPR does not conduct investigations and does not have the power to compel officer testimony.<sup>17</sup> This Note provides practical steps to establish a procedure for compelling testimony that would likely withstand judicial scrutiny. IPR's major hurdle to conducting truly independent investigations is found in the collective bargaining agreement between the Portland Police Bureau's union ("the Union") and the City of Portland ("the City"). The agreement blocks IPR's potential power to compel testimony.<sup>18</sup> This Note suggests different options that the City and IPR could pursue to resolve this problem.

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<sup>13</sup> Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009).

<sup>14</sup> See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 37 (2005) [hereinafter WALKER, *THE NEW WORLD*].

<sup>15</sup> SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* 71 (2001) [hereinafter WALKER, *THE ROLE OF CITIZEN OVERSIGHT*].

<sup>16</sup> However, the policy arguments behind these suggestions for change would be helpful in other jurisdictions.

<sup>17</sup> Maxine Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, OREGONLIVE.COM (Mar. 11, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/03/portland\\_commissioner\\_randy\\_le\\_3.html](http://www.oregonlive.com/portland/index.ssf/2010/03/portland_commissioner_randy_le_3.html); PORTLAND, OR., CITY CODE § 3.21.120(D)(4) (2012).

<sup>18</sup> See discussion *infra* notes 191–93.

## II. CITIZEN OVERSIGHT OF THE POLICE IS NECESSARY

Because police misconduct has been an ongoing problem for over a century,<sup>19</sup> the notion that police accountability is desirable is not innovative.<sup>20</sup> However, police culture has resisted most reform efforts. Even successful efforts have addressed only part of the problem. The method that seems most promising for systemic change is citizen oversight of the police.

A. *Police Misconduct Has Spurred Ongoing Reform Efforts in the United States*

The history of the police in America demonstrates why reform is necessary. Early policing was very political, was unregulated by citizens, and provided tremendous opportunity for corruption.<sup>21</sup> From constables in the 1700s to the first police force established in the 1850s, police officers had been poorly trained, unprofessional, and had engaged in widespread corruption.<sup>22</sup> Waves of reform began in the 1930s,<sup>23</sup> but reform efforts did not prevent the police misconduct that was prevalent during the civil rights and antiwar movements of the 1960s.<sup>24</sup> Even today, after 80 years of attempted transformation, police misconduct still exists. The seriousness of the current problem is evidenced by the federal government's intervention. Just recently, the United States Department of Justice announced that it will be conducting an investigation of the Portland Police Bureau for civil rights violations.<sup>25</sup> In other jurisdictions the government has court mandated, rigorous reform.<sup>26</sup> The historical

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<sup>19</sup> ANTHONY V. BOUZA, *POLICE ADMINISTRATION: ORGANIZATION AND PERFORMANCE* 243–44 (1978). See *THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY* 25–28 (Bryan Vila & Cynthia Morris eds., 1999) for an overview of early American policing and the development of corruption in the police force.

<sup>20</sup> HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* 11 (1990).

<sup>21</sup> GEORGE L. KELLING & MARK H. MOORE, *THE EVOLVING STRATEGY OF POLICING* 3–4 (Nat'l Inst. of Justice, Perspectives on Policing No. 4, Nov. 1988); *THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY*, *supra* note 19, at 75–76.

<sup>22</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 68–71, 150, 154 (1993).

<sup>23</sup> KELLING & MOORE, *supra* note 21, at 4.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> Maxine Bernstein, *U.S. Justice Department Launches Civil Rights Review of Portland Police*, OREGONLIVE.COM (June 9, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/06/us\\_justice\\_department\\_launches.html](http://www.oregonlive.com/portland/index.ssf/2011/06/us_justice_department_launches.html).

<sup>26</sup> See, e.g., Doug Guthrie, *Detroit Police Fail to Meet Terms of Consent Decree*, DETROIT NEWS (July 7, 2009), <http://detnews.com/article/20090707/METRO01/907070363/Detroit-Police-fail-to-meet-terms-of-consent-decree>; Mark Rosenbaum & Peter Bibring, *Extend the LAPD Consent Decree*, L.A. TIMES (June 4, 2009), <http://articles.latimes.com/print/2009/jun/04/opinion/oe-roosenbaum4>; *Settlement Approved in Tulsa Police Discrimination Lawsuit*, NEWS ON 6 (May 20, 2010), <http://www.newson6.com/story/12508158/settlement-approved-in-tulsa-police-discriminationlawsuit?redirected=true>. The U.S. Department of Justice recently launched an investigation into alleged civil rights violations by the Seattle Police Department. Gene Johnson, *DOJ Launches Investigation of*

record of pervasive misconduct and failed reform efforts demonstrates that this problem is not going away on its own.

*B. The Police Need to Be Held Accountable*

Police officers need to be held accountable because they have shown a tendency to deviate from their own policies and the law. One reason why officers deviate from the rules is because of the way in which the police are impacted by power. The police have great discretion to enforce the law, including the power to decide when and how to intervene in a citizen's freedom.<sup>27</sup> To further complicate matters, the police carry guns and are authorized to kill people.<sup>28</sup> People in such powerful positions are more likely to have an exalted sense of self, rely on stereotypes, and view their targets of power as less human and deserving of brutal treatment.<sup>29</sup> It is easy to see how these psychological effects could lead police officers to mistreat individuals, especially minorities. Even seemingly well-intentioned deviations from the law for practical purposes, such as letting people with certain characteristics or connections to the police get away with illegal activities, can lead police officers to view themselves as above the law in a broader sense. For example, the police did not treat Jason Krohn like an ordinary citizen. The officers decided to not charge Jason with any crimes because his father was one of their colleagues. While Jason was probably grateful for the favor, an officer's discretion to not hold all people equally responsible could lead that officer to believe that the officer is more powerful than the law. To combat this tendency for an officer to stretch the rules too far, the police must consistently be held accountable for their actions.

*C. The Police Have Been Resistant to Accountability*

The nature and structure of police work has created a police culture that resists accountability. As a result of this resistance, police reform efforts have faced unique challenges. The well-known "code of silence" has been one of the greatest barriers to exposing police misconduct.<sup>30</sup> If an officer chooses to take the higher road and disclose information about another officer's misconduct, he risks being shunned by his

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*Seattle Police*, SEATTLE TIMES (Mar. 31, 2011), [http://seattletimes.nwsourc.com/html/nationworld/2014648417\\_apusseattlepolicedoj.html](http://seattletimes.nwsourc.com/html/nationworld/2014648417_apusseattlepolicedoj.html).

<sup>27</sup> BOUZA, *supra* note 19, at 233.

<sup>28</sup> ZENITH GROSS & ALAN REITMAN, POLICE POWER AND CITIZENS' RIGHTS: THE CASE FOR AN INDEPENDENT POLICE REVIEW BOARD 4 (1966); BETHAN LOFTUS, POLICE CULTURE IN A CHANGING WORLD 19 (2009).

<sup>29</sup> David G. Winter, *Power in the Person: Exploring the Motivational Underground of Power*, in THE SOCIAL PSYCHOLOGY OF POWER 113, 122 (Ana Guinote & Teresa K. Vescio eds., 2010).

<sup>30</sup> The code of silence is an agreement amongst police officers to not report each other's misconduct. See HOWARD S. COHEN & MICHAEL FELDBERG, POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK 7-8 (1991).



colleagues.<sup>31</sup> For example, a Portland Police Bureau recruit was shunned by her colleagues after reporting her supervisor for breaking laws and destroying evidence.<sup>32</sup> The recruit's concerns were not taken seriously, she was ridiculed by her colleagues, and she felt unsafe on the job.<sup>33</sup> Some officers have experienced worse treatment by their colleagues in retaliation for breaking the code of silence.<sup>34</sup> Officers express this loyalty toward each other because they share a unique experience, one which many officers report cannot be fully understood by those outside of law enforcement.<sup>35</sup> One possible explanation for this extreme comradery may be the effects of training police officers like a quasi-military organization.<sup>36</sup> Resembling soldiers, police officers wear uniforms, carry guns, earn badges, strictly follow a chain of command, and perform a very dangerous job. And, like the military,<sup>37</sup> peer loyalty is highly valued amongst the police. The distinctive power of the police coupled with the code of silence has resulted in a police culture where officers are pressured to lie to cover up their mistakes. Hence, reform has not been easy.

Even though police culture has had the negative effect of encouraging officers to dodge accountability, its development was a result of adaptation. The police have a tough job. Despite the power vested in officers, police work has historically been undesirable and low-ranking.<sup>38</sup> Even today, police work is rated as less attractive than other

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<sup>31</sup> The problem is so significant that a police sergeant, De Lacy Davis, started his own non-profit organization to combat police brutality against minorities based on his own experiences of breaking the code of silence. *Biography of DeLacy Davis*, BLACK COPS AGAINST POLICE BRUTALITY, [http://www.b-cap.org/bcap\\_home/bcap\\_bio.html](http://www.b-cap.org/bcap_home/bcap_bio.html).

<sup>32</sup> Maxine Bernstein, *Federal Jury Finds Portland Police Did Not Retaliate Against a Whistle-Blower*, OREGONLIVE.COM (June 4, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/06/federal\\_jury\\_in\\_portland\\_polic.html](http://www.oregonlive.com/portland/index.ssf/2011/06/federal_jury_in_portland_polic.html).

<sup>33</sup> *Id.*

<sup>34</sup> A horrific example of the effects of the code of silence is the story of an officer who reported her colleague for stealing money from a dead victim. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 69 (2000). The officer was subjected to severe harassment, including name calling, slashed tires, phone calls at home, and the refusal from other officers to back her up in dangerous work situations. *Id.* at 70–71. After complaining to her supervisors, she was transferred to another precinct and her complaints to the department about retaliation were dismissed. *Id.*

<sup>35</sup> BOUZA, *supra* note 19, at 215–16; GOLDSTEIN, *supra* note 20, at 29–30; *see also* HERVEY A. JURIS & PETER FEUILLE, POLICE UNIONISM: POWER AND IMPACT IN PUBLIC-SECTOR BARGAINING 19 (1973) (noting that surveys of police officers' dissatisfaction with public hostility revealed that officers felt harassed and looked down upon by citizens, and unsupported by city officials).

<sup>36</sup> Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1317 (E.D. Pa. 1973).

<sup>37</sup> *Living the Army Values*, U.S. ARMY, <http://www.goarmy.com/soldier-life/being-a-soldier/living-the-army-values.html#loyalty>.

<sup>38</sup> *See* THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY, *supra* note 19, at 72. The first police work in the United States was conducted by constables.

careers partly because of the high level of stress and danger involved.<sup>39</sup> Police officers regularly face the incredible challenge of protecting citizens from crime while simultaneously protecting individual rights.<sup>40</sup> In return, the police have been viewed as a symbol of society's oppression<sup>41</sup> and have been highly disliked by segments of the public.<sup>42</sup> Not surprisingly, officers have built solidarity to cope with the criticism from those outside of law enforcement.

The resistance to citizen oversight, however, has not served the police as well as they might think. A pattern of failing to correct mistakes has created a culture that increases the stressfulness of police work.<sup>43</sup> If police departments do not institute strict oversight, it can be difficult for individual officers to withstand peer pressure and police with integrity.<sup>44</sup> Therefore, the only way to truly accomplish systemic change is to transform police culture by mandating independent accountability. Instead of viewing the public's oversight as ignorant criticism, the police force as a whole would benefit from perceiving independent oversight as feedback that leads to better training and increased job morale.

#### *D. Other Remedies to Hold Police Accountable Are Not Enough*

Other avenues have proven unsuccessful in changing police culture and eliminating misconduct.<sup>45</sup> From the Supreme Court to temporary oversight commissions, each approach is flawed because of its limited ability to address the unique issues of each police department.

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*Id.* As people with successful employment preferred not to do this public service, the law enforcers were often those of dubious integrity. *Id.* at 79. They "seldom reflected the heroic romanticism portrayed so frequently in fiction." *Id.* at 72. Early police unionization efforts revealed that police work was a blue-collar occupation. *Id.* at 79–80.

<sup>39</sup> *The Top 200 Jobs of 2010: 161–180*, CAREERCAST.COM, <http://www.careercast.com/content/top-200-jobs-2010-161-180> (based on data from the U.S. Bureau of Labor Statistics and Census Bureau and trade association studies, ranking police officer at 180, below "Nuclear Decontamination Technician").

<sup>40</sup> PETER K. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* 112 (1977).

<sup>41</sup> See *Council of Orgs. on Phila. Police Accountability & Responsibility*, 357 F. Supp. at 1317; see also *THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY*, *supra* note 19, at 49 (noting that even in the late 1800s there were tensions between citizens and the police because officers enforced unpopular laws and were perceived to stretch the rules to accomplish their own objectives).

<sup>42</sup> *THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY*, *supra* note 19, at 77 (noting that technological advances in policing changed many citizens' view of the police from protector to adversary).

<sup>43</sup> See generally LEONARD TERRITO & HAROLD J. VETTER, *STRESS AND POLICE PERSONNEL* (1981).

<sup>44</sup> COHEN & FELDBERG, *supra* note 30, at 8.

<sup>45</sup> See, e.g., *Council of Orgs. on Phila. Police Accountability & Responsibility*, 357 F. Supp. at 1319 (acknowledging the inadequacy of existing methods to protect public interest in police accountability).

Constitutional restraints on police conduct are sparse. Since the wave of judicial activism of the 1960s,<sup>46</sup> the Supreme Court has often refused to enforce more restrictions on the police, and has even whittled away its own standards.<sup>47</sup> For example, in 2010 the Supreme Court further weakened *Miranda* protections in *Berghuis v. Thompkins*.<sup>48</sup> The Court heightened the standard for a suspect to invoke the right to remain silent and lowered the standard required for waiver, opening the door for “police interests[] to serve as determining factors” in how *Miranda* applies.<sup>49</sup>

The federal government has only intervened with court-ordered reforms in extreme cases. Often, by the time the Department of Justice has taken action,<sup>50</sup> the damage is great and not easily undone. For example, the Detroit Police Department was in such disrepair at the time a federal court issued a consent decree that six years and millions of tax dollars later, the department was still not in compliance with 64% of the agreement.<sup>51</sup>

Civil suits can be inaccessible to complainants because of lack of finances or evidence.<sup>52</sup> Moreover, civil suits have not been shown to change organizational systems of misconduct.<sup>53</sup> Even though complainants have won almost \$7 million in settlements against the Portland Police Bureau over the past couple decades, the cases usually took years to resolve, and came at a cost to the taxpayers.<sup>54</sup>

Criminal prosecutions are rare.<sup>55</sup> The friendly relationship between the police and the district attorney’s office creates a conflict of interest, and frequently there is a lack of evidence to show that the police acted illegally.<sup>56</sup> In fact, community groups have not been able to find one

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<sup>46</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966). See also WALKER, *THE NEW WORLD*, *supra* note 14, at 31.

<sup>47</sup> WALKER, *THE NEW WORLD*, *supra* note 14, at 30–31.

<sup>48</sup> 130 S. Ct. 2250 (2010); Michael L. Vander Giessen, Comment, *Berghuis v. Thompkins: The Continued Erosion of Miranda’s Protections*, 46 GONZ. L. REV. 189, 190 (2010/11).

<sup>49</sup> Giessen, *supra* note 48, at 192.

<sup>50</sup> See *supra* note 26.

<sup>51</sup> See Guthrie, *supra* note 26.

<sup>52</sup> See GROSS & REITMAN, *supra* note 28, at 26.

<sup>53</sup> See *Rizzo v. Goode*, 423 U.S. 362, 379–80 (1976) (refusing to address well-documented police misconduct on federalism grounds); WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY*, *supra* note 14, at 32–33 (stating that police consider civil suits the cost of doing business).

<sup>54</sup> See *Top 25 Settlements: Portland Police Incidents Settled 1993–2011 Total[ling] Roughly \$6.9 Million*, PORTLAND COPWATCH, <http://www.portlandcopwatch.org/top25settlements11.html>.

<sup>55</sup> Clarke, *supra* note 13, at 4.

<sup>56</sup> *Council of Orgs. on Phila. Police Accountability & Responsibility v. Rizzo*, 357 F. Supp. 1289, 1319–20 (E.D. Pa. 1973); GROSS & REITMAN, *supra* note 28, at 25.

incident where the grand jury has indicted a Portland police officer for excessive use of force.<sup>57</sup>

Internal investigation units have failed to provide fair investigations and are distrusted by the public.<sup>58</sup> An in-depth evaluation of Internal Affairs investigations of the Portland Police Bureau in 2007 revealed that 36% of investigations were “seriously inadequate.”<sup>59</sup> The investigators failed to fully investigate, failed to hold officers culpable for wrongdoing, ignored corroborated allegations of misconduct, failed to interview civilian witnesses, and failed to abide by the investigation regulations.<sup>60</sup> Even when internal investigations are conducted fairly, citizens may be wary because the code of silence has led to a history of concealed police misconduct.<sup>61</sup> In fact, a survey of complainants found that 80% were not satisfied with the complaint process.<sup>62</sup>

Temporary oversight commissions are unsuccessful at producing long term solutions. Temporary commissions are reactive and are not able to enforce their own recommendations for change.<sup>63</sup> In 2002, the City of Portland hired the Police Assessment Resource Center to conduct a review of officer-involved shootings.<sup>64</sup> While the organization conducted follow-up investigations in 2005, 2006, and 2009 with comprehensive reports and recommendations,<sup>65</sup> the Police Assessment Resource Center was not responsible for implementing the changes.

Each of these forms of accountability serve as a motivating factor for reform, and they may result in the discipline of an officer or the redress of a citizen’s complaint. Yet, none of them accomplish all of these goals in addition to monitoring the progress of long-term systemic change. Citizen oversight is the most promising approach to addressing all of these issues and creating lasting reform at a relatively low cost.

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<sup>57</sup> E-mail from Dan Handelman, Portland Copwatch, to Michael D. Schrunk, Dist. Attorney, Multnomah Cnty., (Oct. 2, 2006, 11:31 PDT), *available at* <http://www.portlandcopwatch.org/chasse.html>; *see also* Nick Budnick, *Anatomy of a Police Shooting*, WILLAMETTE WEEK (June 4, 2003), [http://www.wweek.com/portland/article-2106-anatomy\\_of\\_a\\_police\\_shooting.html](http://www.wweek.com/portland/article-2106-anatomy_of_a_police_shooting.html); Jacob Quinn Sanders & Ryan Geddes, *Grand Jury Exonerates Officers in Chase Death*, PORTLAND TRIB. (Oct. 30, 2009), [http://www.portlandtribune.com/news/print\\_story.php?story\\_id=116112501165538000](http://www.portlandtribune.com/news/print_story.php?story_id=116112501165538000).

<sup>58</sup> WALKER, *THE NEW WORLD*, *supra* note 14, at 72–73.

<sup>59</sup> LUNA-FIREBAUGH, *supra* note 11, at 65.

<sup>60</sup> *Id.*

<sup>61</sup> WALKER, *THE NEW WORLD*, *supra* note 14, at 64–65.

<sup>62</sup> LUNA-FIREBAUGH, *supra* note 11, at 94.

<sup>63</sup> *See, e.g.*, WALKER, *THE NEW WORLD*, *supra* note 14, at 36 (discussing Blue-Ribbon commissions).

<sup>64</sup> *Portland Police Bureau—Publications*, POLICE ASSESSMENT RES. CTR., [http://www.parc.info/portland\\_police\\_bureau-publications.chtml](http://www.parc.info/portland_police_bureau-publications.chtml).

<sup>65</sup> *Id.*

### III. PORTLAND'S CITIZEN OVERSIGHT SYSTEM NEEDS IMPROVEMENT

A variety of citizen oversight models have been implemented throughout the United States.<sup>66</sup> Effective oversight requires a combination of efforts including auditing, independent investigations, appellate review, and early intervention systems.<sup>67</sup>

#### A. *Portland's Oversight Structure Is Elaborate but Needs More Power*

An overview of Portland's oversight agency and a simplified version of its citizen complaint procedure illustrate one example of an elaborate oversight system that, with a little more power, could be very effective. Two entities mainly comprise Portland's oversight structure: the IPR and the CRC. An ordinance established the IPR under the Auditor's office, with the Auditor responsible for selecting the IPR director.<sup>68</sup> IPR's responsibilities include receiving citizen complaints against Portland police officers, monitoring internal police investigations, conducting independent investigations when necessary, issuing reports on complaint trends and investigations, recommending policy changes, hiring experts to review closed investigations of police shootings and in-custody deaths, and coordinating citizen complaint appeals.<sup>69</sup>

CRC is made up of nine citizens who are selected by the Auditor, citizens, former CRC members, and the IPR director.<sup>70</sup> Once selected, the City Council appoints the citizens to CRC.<sup>71</sup> CRC's primary duties include hearing appeals from citizen complaints, reviewing and advising IPR and Internal Affairs, working with IPR to recommend policy changes, and soliciting community concerns about the police.<sup>72</sup> Both IPR and CRC

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<sup>66</sup> See *Police Accountability and Citizen Review*, INT'L ASS'N OF CHIEFS OF POLICE § IV, fig.2 (Nov. 2000), <http://www.theiacp.org/PoliceServices/ExecutiveServices/ProfessionalAssistance/Ethics/ReportsResources/PoliceAccountabilityandCitizenReview/tabid/193/Default.aspx#sec4>.

<sup>67</sup> See WALKER, *THE ROLE OF CITIZEN OVERSIGHT*, *supra* note 15, at 86–113; see also WALKER, *THE NEW WORLD*, *supra* note 14, at 103; Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 658–59, 668 (2004).

<sup>68</sup> PORTLAND, OR., CITY CODE §§ 3.21.030–040 (2012). Most police oversight agencies in the country are governmental agencies that derive their power through a municipal charter, which is supported by state law. See WALKER, *THE ROLE OF CITIZEN OVERSIGHT*, *supra* note 15, at 41–42; see, e.g., OR. CONST. art. VI, § 10 (granting voters of any local government the authority to “adopt, amend, revise or repeal” a local charter). The Constitution permits the county charter authority to deal with matters of local concern, and requires the charter to provide for the local government's organization, officers' election or appointment, and officers' powers and duties. *Id.*

<sup>69</sup> *Independent Police Review*, AUDITOR'S OFFICE, <http://www.portlandonline.com/auditor/index.cfm?c=26646>.

<sup>70</sup> PORTLAND, OR., CITY CODE § 3.21.080.

<sup>71</sup> *Id.*

<sup>72</sup> *Independent Police Review*, *supra* note 69.

could benefit from a number of increased powers,<sup>73</sup> including the power to compel officer testimony.

*B. The Independent Police Review Division's Complaint Process Is Confusing and It Involves Too Many Entities*

IPR's citizen complaint process is unnecessarily lengthy and complicated. After a citizen complaint is filed, IPR obtains preliminary information and determines whether the complaint contains sufficient allegations for investigation.<sup>74</sup> If the complaint warrants further inquiry, IPR can choose to conduct its own investigation or refer the complaint to the police department's Internal Affairs division.<sup>75</sup>

If IPR refers the complaint, Internal Affairs then decides whether to investigate or dismiss the complaint.<sup>76</sup> If an investigation is conducted, Internal Affairs sends a report to the accused officer's commander who makes a finding for each allegation of either "sustained," "exonerated," "insufficient evidence," or "unfounded," and then communicates those findings to IPR.<sup>77</sup>

If at least one finding is "sustained" or the ordinance specifies that the complaint's category warrants further review—including the police shooting category and findings with possible severe discipline—the Police Review Board<sup>78</sup> looks over the investigation and makes recommendations to the Police Chief.<sup>79</sup> IPR and Internal Affairs also have discretion to challenge the Commander's findings and trigger a Police Review Board hearing.<sup>80</sup> The Commissioner in Charge of the police, or the Police Chief, has the "final" say in disciplinary action,<sup>81</sup> subject to the police union's subsequent actions taken on behalf of the officer.<sup>82</sup>

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<sup>73</sup> A Portland ordinance established a Stakeholder Committee Group in 2010, which came up with many recommendations for improving IPR and CRC. CITY OF PORTLAND, OR., POLICE OVERSIGHT STAKEHOLDER COMM., FINAL REPORT 5–11 (Sep. 21, 2010).

<sup>74</sup> PORTLAND, OR., PUB. SAFETY POL'Y PSF-5.01 (2012).

<sup>75</sup> *Id.* IPR has never acted on the authority to conduct its own investigations. Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, *supra* note 17.

<sup>76</sup> *Independent Police Review Division - Internal Affairs Division Protocols & Procedures - Citizen Initiated Complaints* (Portland, Or., Portland Policy Documents No. PSF-5.01, 2012), available at <http://www.portlandonline.com/auditor/index.cfm?c=27455&a=9023>.

<sup>77</sup> *Id.*

<sup>78</sup> The Police Review Board's voting members are the IPR director, the Assistant Branch Chief, a Commander or Captain, a peer officer, and a citizen. PORTLAND, OR., CITY CODE § 3.20.140(C)(1)(a) (2012).

<sup>79</sup> *Id.* § 3.20.140(B).

<sup>80</sup> *Id.* §§ 3.21.120(G)(3), 3.20.140(B)(1)(a).

<sup>81</sup> *Id.* § 3.20.140(H).

<sup>82</sup> The police union's success in overturning the Bureau's discipline efforts is another important accountability issue—one which is outside this Note's scope. Even though discipline for police misconduct is not common, when it does occur, it is often turned over or modified during arbitration because there is no precedent for

If a finding is “exonerated” or “unfounded,” Internal Affairs refers the case back to IPR, who is then responsible for contacting the complainant and informing her that she has the option to appeal the decision to CRC.<sup>83</sup> If a complainant or an officer appeals a finding to CRC, Internal Affairs or IPR can further investigate the complaint at its discretion.<sup>84</sup> Later, the involved parties have an opportunity to be heard at a public hearing in front of CRC.<sup>85</sup> CRC determines whether a “reasonable person could make the finding in light of the evidence.”<sup>86</sup> If the police bureau refuses to accept one or more CRC findings, IPR schedules a hearing before City Council to review the controversial findings and make a final decision.<sup>87</sup> This process could be streamlined by granting IPR enough power to replace Internal Affairs’ work.

#### IV. TRUE INDEPENDENCE IS ESSENTIAL TO EFFECTIVE OVERSIGHT

Many experts agree that true independence is essential to an effective oversight agency.<sup>88</sup> True independence means that the oversight agency conducts its activities separately from the police department. While Portland’s oversight system has authority to conduct all of the best-practice activities identified by researchers, and arguably has one of the strongest structures in the country,<sup>89</sup> IPR is not truly independent because it has chosen not to conduct independent investigations.<sup>90</sup> Even if it did, the city ordinance that grants the authority for independent investigations does not permit IPR to compel officer testimony.<sup>91</sup>

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discipline. *See, e.g.,* Maxine Bernstein, *Portland Police Chief Fires Officer Ron Frashour in Aaron Campbell Shooting*, OREGONLIVE.COM (Sept. 23, 2011), [http://www.oregonlive.com/portland/index.ssf/2010/11/portland\\_police\\_chief\\_mike\\_ree\\_1.html](http://www.oregonlive.com/portland/index.ssf/2010/11/portland_police_chief_mike_ree_1.html).

<sup>83</sup> *Independent Police Review Division - Internal Affairs Division Protocols & Procedures - Citizen Initiated Complaints*, *supra* note 76.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; PORTLAND, OR., CITY CODE § 3.21.020 (2012). Portland Copwatch, a grassroots, volunteer organization that promotes police accountability, has recently critiqued the reasonable person standard as inadequate. *Standard of Review for Citizen Review Committee: Examining Replacing the Current “Reasonable Person” Standard with “Preponderance of the Evidence,”* PORTLAND COPWATCH (Apr. 2011), [http://www.portlandcopwatch.org/preponderance\\_analysis\\_0411.pdf](http://www.portlandcopwatch.org/preponderance_analysis_0411.pdf).

<sup>87</sup> *Independent Police Review Division - Internal Affairs Division Protocols & Procedures - Citizen Initiated Complaints*, *supra* note 76.

<sup>88</sup> LUNA-FIREBAUGH, *supra* note 11, at 33.

<sup>89</sup> *Id.* at 111. Portland’s civilian oversight began in the 1980s in response to allegations of racially motivated wrongdoing, excessive force, and corruption. *Id.* at 17.

<sup>90</sup> Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, *supra* note 17.

<sup>91</sup> PORTLAND, OR., CITY CODE § 3.21.120(D)(4).

A. *Objective Oversight Requires Independent Investigations*

Independent investigations are essential to objective oversight<sup>92</sup> because internal investigations are perceived as—if not actually—biased.<sup>93</sup> Individuals who are part of a group are more likely to favor their own interests.<sup>94</sup> When an investigator is evaluating his peers, the investigator may be more selective about the investigation's depth, and he may be more inclined to avoid a transparent process. This tendency is even more prominent in groups such as the police, whose culture highly values loyalty.<sup>95</sup> “The more independent the investigator, the more credible the investigation” is to those involved, as well as to outsiders.<sup>96</sup> Thus, for an oversight agency to be completely independent, the agency must conduct its own investigations of alleged misconduct. Unfortunately, many oversight agencies do not have the ability to administer investigations because they lack authority, staff, and resources. Portland's IPR has the necessary authority, staff, and resources to conduct at least some investigations, but it has not yet chosen to conduct its own citizen complaint investigations.<sup>97</sup>

1. *Portland's Independent Police Review Division Should Conduct All Investigations of Police Conduct*

Portland's IPR should conduct all investigations of alleged police misconduct. IPR reports that it has declined to conduct independent investigations because it is pleased with the integrity of the Bureau's internal investigations.<sup>98</sup> IPR's satisfaction with internal investigations is problematic because it does not create a clear separation between the overseers and the overseen. Although Internal Affairs is capable of conducting many investigations with integrity, the system is problematic because it does not provide a safeguard to ensure that *all* investigations are conducted fairly. Even the best trained officers with the highest integrity need independent oversight because they cannot escape their environment's influence. Moreover, an expert has speculated that increased independent investigations may improve the lower-than-average sustain rate of citizen complaints against the police in Portland.<sup>99</sup>

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<sup>92</sup> The ACLU's first essential component to an effective citizen oversight agency is independent investigations. LUNA-FIREBAUGH, *supra* note 11, at 33.

<sup>93</sup> GARETH JONES, CONDUCTING ADMINISTRATIVE OVERSIGHT & OMBUDSMAN INVESTIGATIONS 20 (2009).

<sup>94</sup> See Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. OF SOC. ISSUES 429, 435–38 (1999).

<sup>95</sup> See discussion *supra* Part II.C.

<sup>96</sup> JONES, *supra* note 93, at 19.

<sup>97</sup> Bernstein, *Portland Officials Call for Overhaul of Police Oversight*, *supra* note 17.

<sup>98</sup> LUNA-FIREBAUGH, *supra* note 11, at 113.

<sup>99</sup> See *id.* at 50.



To increase credibility and accountability, IPR should conduct all investigations of alleged police misconduct.<sup>100</sup>

IPR's practical concerns about conducting its own investigations are legitimate, but they can be overcome. In fact, no evidence shows the perceived disadvantages of effective independent oversight outweigh the benefits.<sup>101</sup> First, IPR has expressed concern that only the Bureau has the properly trained staff to do complex investigations.<sup>102</sup> However, IPR could acquire properly trained staff by recruiting former police officers to be IPR investigators. Other oversight agencies, such as the San Francisco Office of Citizen Complaints, employ mostly former law enforcement officers as investigators.<sup>103</sup> To reduce bias, the Office of Citizen Complaints has a policy that investigators cannot be former members of the San Francisco Police Department.<sup>104</sup> Second, IPR has expressed concern that only the Bureau has sufficient resources to conduct complex investigations. Surely, resources are scarce because the City of Portland is funding both IPR and Internal Affairs, two separate entities that have many of the same goals and responsibilities. To correct this problem, the City could provide IPR with sufficient resources by redirecting the funding the City has allocated to police misconduct investigations from Internal Affairs to IPR.

## *2. Citizens and Police Officers Would Benefit from Independent Investigations*

Citizens would likely perceive IPR as more effective and fair if all investigations were conducted independently. Currently, because a citizen complaint's path is not easy to follow and complaints are rarely sustained, citizens are skeptical of Portland's oversight structure's effectiveness.<sup>105</sup> A survey of Portland citizens conducted a few years ago reflected this reality; many complainants reported being confused about and disappointed by the IPR and CRC processes.<sup>106</sup> Presumably, this elaborate system was designed to create true accountability. In practice, the system has had the effect of limiting transparency.

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<sup>100</sup> While conducting all investigations is an ideal long-term goal, a good short-term goal would be for IPR to conduct some investigations. An extensive review of IPR's effectiveness suggested that exercising its authority to conduct investigations in some cases would assist in increasing independence. *See id.* at 114.

<sup>101</sup> JONES, *supra* note 93, at 354.

<sup>102</sup> *See* LUNA-FIREBAUGH, *supra* note 11, at 114.

<sup>103</sup> The San Francisco Office of Citizen Complaints employs approximately 35 people, the majority of whom are former law enforcement officers. *Frequently Asked Questions*, CITY AND CNTY. OF S.F. OFFICE OF CITIZEN COMPLAINTS, <http://www.sfgov3.org/index.aspx?page=534>; Telephone interview with Charles Gallman, Chief Investigator, San Francisco Office of Citizen Complaints (Oct. 22, 2010).

<sup>104</sup> S.F., CAL., CHARTER § 4.127 (2004).

<sup>105</sup> *See* LUNA-FIREBAUGH, *supra* note 11, at 82.

<sup>106</sup> *Id.*

Police officers could also benefit from independent investigations. The lack of effective and independent oversight is more likely to increase alienation between the public and the police. If the public believes that police oversight is legitimate and truly independent, officers might be treated with more respect. If IPR could compel testimony, then even if an officer did invoke the privilege against self-incrimination to refuse to speak, IPR could require him to testify. As a result, officers may not feel as pressured to succumb to the temptation of covering up for their coworkers. Rather, an officer could escape the burden of personal choice by “blaming” the system for the requirement to cooperate. Therefore, if officers want to increase the likelihood that they will be perceived as just and fair without their peers shunning them, officers should welcome independent scrutiny.

*B. Independent Investigations Require the Power to Compel Officer Testimony*

Oversight agencies must have the power to compel officer testimony to conduct fair and thorough investigations. Even if IPR were to conduct investigations, it lacks authority to administer those investigations properly. Under IPR’s current policy, if an officer were under investigation for a report of misconduct, the officers involved would not be required to answer IPR’s questions.<sup>107</sup> Granted, many officers would likely cooperate with IPR’s questions, but the authority to compel testimony, similar to the authority for independent investigators, is needed to ensure that *all* officers cooperate. If IPR waits until an officer refuses to cooperate to obtain authority to compel officer testimony, it will be too late. IPR must establish an official procedure to demand answers from officer witnesses and the accused so that officers who adhere to the code of silence cannot easily thwart investigations.

*1. Investigations in the Public Employee Context Require More Than Just Subpoena Power*

A preliminary matter for understanding the intricacies of public employee investigations is the difference between subpoena power and the power to compel officer testimony. Subpoena power only requires a witness to show up and testify.<sup>108</sup> A witness who fails to comply with a subpoena may be punished through judicial contempt proceedings.<sup>109</sup> However, a witness who claims a privilege, such as the privilege against self-incrimination, does not have to testify. Courts have generally upheld

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<sup>107</sup> See discussion *infra* Part VII.A.

<sup>108</sup> In Oregon, a civil subpoena is defined as “a writ or an order direct[ing]” a person to (1) appear at a certain time and place to testify as a witness or (2) produce specified “books . . . documents, or [other] tangible things” for inspection and copying. OR. R. CIV. P. 55A.

<sup>109</sup> OR. R. CIV. P. 55G; OR. REV. STAT. § 33.015(2)(c) (2011). During contempt proceedings, “[a] court may impose either remedial or punitive sanctions” of confinement or a fine. *Id.* § 33.045.

oversight agencies' subpoena powers.<sup>110</sup> In Portland, the City Code grants subpoena powers to its elected officials and other designated entities.<sup>111</sup> Just recently, the City granted IPR authority to subpoena witnesses for its investigations.<sup>112</sup> This grant of authority shows that the City recognizes the importance of witness testimony in investigations of police misconduct.

Compelling testimony is similar to subpoena power in some ways,<sup>113</sup> but the process of obtaining testimony from public employees is different than that of an ordinary citizen. A public employee is required to cooperate with administrative investigations as a condition of employment.<sup>114</sup> Unlike a subpoenaed citizen witness who can only be punished for refusing to testify via contempt proceedings, a public employee can be terminated from employment for refusing to testify. A public employee who refuses to testify may be ordered, or compelled, to do so by the employer. The City of Portland has explicitly denied IPR the power to question police officers,<sup>115</sup> even though police officers are public employees. Currently, the City Code provides that officers must submit to interviews regarding an incident, but IPR cannot ask the officers questions directly, and the officers are not required to answer.<sup>116</sup>

## 2. *Live Testimony Is Crucial to a Fair Investigation*

Live testimony is fundamental to a thorough investigation. According to modern techniques, a thorough administrative investigation is conducted by independent investigators with proper training, experience, and access to resources. The investigators identify issues, procure witnesses and evidence, and make an objective evaluation

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<sup>110</sup> See, e.g., *Dibb v. Cnty. of San Diego*, 884 P.2d 1003, 1013–14 (Cal. 1994) (holding that subpoena power was the type of power conferred to the county charter by the state constitution and the power to issue subpoenas is conferred on oversight agencies throughout the country).

<sup>111</sup> PORTLAND, OR., CITY CODE § 3.04.010 (2012).

<sup>112</sup> *Id.* § 3.21.210.

<sup>113</sup> See *Kastigar v. United States*, 406 U.S. 441, 443–44 (1972). See E.R. Harding, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 471–73 (1974), for an abbreviated history of compelled testimony.

<sup>114</sup> Portland police officers are required to answer questions presented to them by Internal Affairs. PORTLAND POLICE BUREAU MANUAL OF POLICY AND PROCEDURE § 330.00 (2010), available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=32482> (“Members will cooperate fully and be truthful in giving statements about events under investigation. No member shall conceal information, impede, or interfere with the reporting or investigation of any complaint. Members who become aware of the investigation of an incident about which they have knowledge shall contact the investigator(s) with this information.”); PORTLAND, OR., CITY CODE § 3.21.120(C)(2)(b) (“[T]he IAD investigator may repeat the question and/or direct the member to answer the question.”).

<sup>115</sup> PORTLAND, OR., CITY CODE § 3.21.120(C)(2)(b). The City's refusal to grant IPR the authority to compel officer testimony is based in the City's collective bargaining agreement with the Bureau. *Id.*; see *infra* notes 191–93 and accompanying text.

<sup>116</sup> PORTLAND, OR., CITY CODE § 3.21.120(C)(2)(b).

of the materials based on the facts.<sup>117</sup> In obtaining information to complete the investigation, the most important step is live interviews of witnesses and the accused after the incident.<sup>118</sup> Written interviews are not as effective as in-person interviews because the witness can take time to craft a response, consult others for input, or draft insufficient responses.<sup>119</sup> In addition, live testimony provides an opportunity for an investigator to assess a witness's credibility and demeanor.<sup>120</sup>

### *3. Obtaining Testimony Soon After an Incident Decreases the Likelihood of Collusion*

A delay in interviewing officers can “give[] the appearance of,” and opportunity for, collusion.<sup>121</sup> Some researchers recommend that colleagues who are involved in the same incident should be separated immediately after the incident to avoid collusion.<sup>122</sup> Officer separation is in the best interests of the accused, the complainant, and witnesses because it increases the likelihood of unhampered testimony. Especially in the context of police misconduct, separating officers after an incident may be helpful in combating the challenges posed by the code of silence. For example, in one Portland case where police officers used excessive force against a man, evidence suggests that the citizen's death resulted from the subsequent cover-up, not the force itself.<sup>123</sup>

### *4. Officers Should Be Held to a High Standard in Administrative Investigations*

Because officer testimony is crucial for resolution in most investigations of alleged police misconduct, officers should be expected to fully cooperate in administrative investigations. In general, employees are accountable to their employers to perform the job as assigned. The police are no different. But, officers should be held to an even higher standard than civilian witnesses because police officers are also accountable to the public. Sometimes the only parties involved in an incident that gives rise to a citizen complaint are a citizen and police officers. While a citizen's complaint may be against only one officer, other officers who witnessed the event probably have information invaluable to a full and fair investigation. Unfortunately, Portland's IPR director cannot require officers to answer the same questions that the

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<sup>117</sup> JONES, *supra* note 93, at 10.

<sup>118</sup> *Id.* at 125, 133.

<sup>119</sup> *Id.* at 135–36.

<sup>120</sup> *Id.* at 133, 136.

<sup>121</sup> Maxine Bernstein, *California Consultants Find Flaws in Portland Police Review of James P. Chasse Jr.'s Death in Custody*, OREGONLIVE.COM (July 23, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/07/outside\\_consultants\\_find\\_gaps.html](http://www.oregonlive.com/portland/index.ssf/2010/07/outside_consultants_find_gaps.html).

<sup>122</sup> WALKER, *THE NEW WORLD*, *supra* note 14, at 82–83.

<sup>123</sup> Maxine Bernstein, *Attorneys for James Chasse Family Argue That Portland Police Coverup Led to Chasse's Death*, OREGONLIVE.COM (Oct. 21, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/10/chasse\\_documents\\_released\\_by\\_a.html](http://www.oregonlive.com/portland/index.ssf/2010/10/chasse_documents_released_by_a.html).

director could demand from a non-bureau member witness. The testimony of all people involved in an incident is critical to a fair investigation, and officers should at least be expected to participate as much as other witnesses are required to participate. At minimum, officers should be held accountable because they are required, as a condition of their employment, to be truthful.<sup>124</sup>

#### V. THE POLICE SHOULD NOT BE ABLE TO PRIVATELY CONTRACT OUT OF PUBLIC ACCOUNTABILITY

Collective bargaining agreements that impede fair investigations of police conduct should be held void for public policy. Police unions have been successful in using their collective bargaining agreements to block oversight agencies from gaining the power to compel officer testimony.<sup>125</sup> The Portland Police Bureau has prevented IPR's authority to compel officer testimony by limiting interview procedures in its collective bargaining agreement.<sup>126</sup> While all unions should have the right to bargain over wages, hours, and other conditions of employment, police officers should not be able to obstruct their own accountability through private contract. Because the public has a say in the functioning of its government, the public should have a stake in the accountability of police officers.

##### A. *The Unique Power of Police Unions Calls for Public Accountability*

Police reform efforts can be stifled by a police union's political tactics aimed at insulating accountability.<sup>127</sup> Police unions have grown to be very powerful as a result of their lobbying function,<sup>128</sup> organization,

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<sup>124</sup> PORTLAND POLICE BUREAU MANUAL OF POLICY AND PROCEDURE § 310.50, available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=32482>. In fact, officers have been fired for lying. See, e.g., Jennifer Anderson, *TV Cop Gets Time in Katz's Court*, PORTLAND TRIB. (Oct. 30, 2009), [http://www.portlandtribune.com/news/print\\_story.php?story\\_id=22473](http://www.portlandtribune.com/news/print_story.php?story_id=22473); *Portland Officer Fired For Lying About Weight-loss Surgery*, KOMO NEWS (July 30, 2008), <http://www.komonews.com/news/local/26099659.html>; *Three Portland Police Officers Fired for Unsatisfactory Performance*, PORTLAND COPWATCH (2001), <http://www.portlandcopwatch.org/PPR21/threecopsfired.html>.

<sup>125</sup> See, e.g., *Citizen Police Review Bd. v. Murphy*, 819 A.2d 1216, 1221–22 (Pa. Commw. Ct. 2003).

<sup>126</sup> Labor Agreement Between the Portland Police Association and the City of Portland, July 1, 2010–June 30, 2013, art. 61.2.2 (2011) [hereinafter Labor Agreement].

<sup>127</sup> In the 1960s, New York's police union was successful in preventing an oversight agency—which had already been approved by the Mayor—from being established by raising over \$500,000 to place the issue on the ballot and campaign for its overwhelming passage. JURIS & FEUILLE, *supra* note 35, at 49.

<sup>128</sup> See, e.g., James V. Grimaldi & Sari Horwitz, *Police Union Lobbyist Has Influence in Gun Debate, Beyond*, WASH. POST, Dec. 15, 2010, at A11; Aaron C. Davis, *Police Union Endorses Ehrlich in Md. Gov's Race*, WASH. POST (Sep. 23, 2010),

and resistance to accountability.<sup>129</sup> Unlike other public-sector union members, such as teachers and fire fighters, police officers carry weapons and have the power to use deadly force against others. This special power calls for heightened transparency to the public.

*B. The Public Has a Legitimate Interest in Issues That Affect Public Policy*

Independent police investigation procedures should be left out of union contracts because the public has an undeniably strong interest in issues that affect public policy. When investigation procedures are incorporated into a private union contract, the public has no official role. For example, Portland's Albina Ministerial Alliance Coalition for Justice and Police Reform, a group made up of various community organizations and individuals, has made demands of the City that would require changes to the Portland Police Bureau's collective bargaining agreement, including granting IPR the authority to compel testimony.<sup>130</sup> Although these demands are likely to have some bearing on the City's decisions, the City has had to weigh the importance of accountability against other bargaining issues.<sup>131</sup>

Unless citizens are given an equal voice at the bargaining table with respect to important public policy issues, those issues should not be incorporated into union contracts at all.<sup>132</sup> Community groups probably do not have a right to join a collective bargaining agreement between a

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[http://voices.washingtonpost.com/annapolis/2010/09/first\\_click\\_marylandpolice\\_uni.html](http://voices.washingtonpost.com/annapolis/2010/09/first_click_marylandpolice_uni.html); Jeff Gottlieb, *Bell Officials Order Police Union to Halt Campaign*, L.A. TIMES (Mar. 2, 2011), <http://articles.latimes.com/2011/mar/02/local/la-me-0302-bell-police-20110302>. For historical examples of police union influence, see JURIS & FEUILLE, *supra* note 35, at 157–59. Unions do not become powerful by investing the majority of their efforts in collective bargaining. They become powerful by building organizational power through political action. RON DELORD ET AL., *POLICE UNION POWER, POLITICS, AND CONFRONTATION IN THE 21ST CENTURY: NEW CHALLENGES, NEW ISSUES* 7–8 (2d. ed. 2008).

<sup>129</sup> Entire books have been written coaching police union leaders on how to obtain more power. One encourages unions to create an illusion of power in order to get what the union wants. *See generally* DELORD ET AL., *supra* note 128. Unlike unions in other countries, in the United States, police unions are often involved in the campaigns of the officials who control them, which gives the unions a distinct advantage over their own Chiefs and other elected officials. *Id.* at 239.

<sup>130</sup> *AMA Community Demands 2010*, AMA COAL. FOR JUSTICE AND POLICE REFORM (Oct. 2010), <http://www.albinaministerialcoalition.org/amademands2010.html>.

<sup>131</sup> In Portland, City Council is the entity that both approves amendments to the IPR ordinance and represents the City in collective bargaining with the police union. The City has added permissive language to the IPR ordinance, suggesting that it is in support of giving IPR the authority to compel officer testimony. PORTLAND, OR., CITY CODE § 3.21.120(D)(4) (2012). However, City Council has refused to raise this issue during collective bargaining with the police. Therefore, it seems that City Council either does not know that it can take action or has no real intention to take action.

<sup>132</sup> It is worth noting that the author generally supports all types of unionism and workers' rights and only makes the distinction in this case based on an issue of critical concern to the public.

city and a police union.<sup>133</sup> In *Citizen Police Review Board of the City of Pittsburgh v. Murphy*, the oversight agency argued that as a “lawfully authorized agent of official City business,” it should be party to collective bargaining negotiations with the police.<sup>134</sup> However, the court held that the oversight agency cited no authority that it was an agent of the city or employer with the right to participate in the bargaining agreement.<sup>135</sup>

*C. Accountability Can Be Obtained Without Jeopardizing Officers’ Procedural Safeguards*

Without question, the police should be allowed to bargain for basic due process protections during investigations of alleged employee misconduct. But the police should not be allowed to entirely block an issue of great public concern, such as independent investigations. Fortunately, independent investigations can be administered without requiring the police to sacrifice procedural protections.

The police have historical reasons for wanting to maintain basic protections during investigations of their conduct. Many early internal police investigation policies were unfair to officers.<sup>136</sup> Officers reported unease about the method of interrogation, the presumption of officer guilt, arbitrary and inconsistent punishment, the lack of representation, misinformation about self-incrimination rights, and the absence of guidelines for investigations.<sup>137</sup> Critics of this practice concluded that “when [a] program becomes preoccupied with muting external criticism at the expense of justice, it becomes a procedure which attempts to attain a just end through unjust means.”<sup>138</sup> Collective bargaining was viewed as a means to protect officers from these unfair procedures.<sup>139</sup>

Ironically, the same criticism of procedures used for investigating police misconduct can be applied to Portland today, but the pendulum seems to have swung toward favoring the officer. The early concerns that officers had about irregular and unfair investigation procedures have been alleviated through collective bargaining. Currently, the Portland Police Bureau has a Bill of Rights that offers numerous protections to officers, such as the right to be treated fairly, to have union representation, and to appeal disciplinary decisions.<sup>140</sup> In addition, Oregon law requires that police officers cannot be disciplined without

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<sup>133</sup> *Citizen Police Review Bd. v. Murphy*, 819 A.2d 1216 (Pa. Commw. Ct. 2003).

<sup>134</sup> *Id.* at 1222.

<sup>135</sup> *Id.* at 1221–22.

<sup>136</sup> CHARLES W. MADDOX, *COLLECTIVE BARGAINING IN LAW ENFORCEMENT* 120 (1975).

<sup>137</sup> JURIS & FEUILLE, *supra* note 35, at 142–43; MADDOX, *supra* note 136, at 120–21.

<sup>138</sup> MADDOX, *supra* note 136, at 120.

<sup>139</sup> *See id.* at 120–21.

<sup>140</sup> Labor Agreement, *supra* note 126, at art. 61. Many police departments fought for their own Bill of Rights in the 1970s. JURIS & FEUILLE, *supra* note 35, at 143.

“just cause,”<sup>141</sup> and provides a laundry list of protections.<sup>142</sup> Even with these protections, Portland’s police union has specifically resisted the authority of IPR<sup>143</sup> and even general public exposure to its bargaining process.<sup>144</sup> But the police need not worry about losing the due process rights that they have worked so hard and long to achieve. If IPR was granted authority to compel testimony, any protection currently provided to officers by Internal Affairs could continue to be offered to officers by IPR or the City.

#### VI. GAINING THE POWER TO COMPEL OFFICER TESTIMONY IS AN UPHILL, BUT SURMOUNTABLE BATTLE

Because other methods to remedy police misconduct have not solved the problem, oversight agencies that conduct independent investigations should pursue gaining the power to compel officer testimony. While community groups in Portland have been fighting for IPR to have the authority to compel officer testimony for over a decade,<sup>145</sup> neither IPR or CRC has pressed the issue through litigation.<sup>146</sup> Before an oversight agency pursues the endeavor of gaining the power to compel officer testimony, however, the agency should establish a procedure that will withstand judicial scrutiny. Model procedures integrate immunity warnings to circumvent the privilege against self-incrimination and place the technical authority to compel testimony with an appropriate disciplinary figure, such as the Mayor or Police Commissioner.

Only a handful of oversight agencies in the United States have the power to compel officer testimony.<sup>147</sup> Of these agencies, nearly all have

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<sup>141</sup> OR. REV. STAT. § 236.360(4) (2011).

<sup>142</sup> *Id.* § 236.360(2)(a)–(k). Although this law was originally enacted in 1979, it was greatly expanded in 2009 to provide this lengthy list of protections. Act of July 16, 2009, ch. 716 § 2, 2009 Or. Laws 2344, 2344–46. However, Portland police officers are exempt from this law because they have equal protections under the police union’s collective bargaining agreement. OR. REV. STAT. § 236.370(2), (7).

<sup>143</sup> Maxine Bernstein, *Public Packs Portland City Council Meeting to Testify on Police Oversight Proposal*, OREGONLIVE.COM (Mar. 19, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/03/public\\_packs\\_portland\\_city\\_cou.html](http://www.oregonlive.com/portland/index.ssf/2010/03/public_packs_portland_city_cou.html).

<sup>144</sup> Maxine Bernstein, *Portland Police Union Files Grievance over Public Contract Negotiations*, OREGONLIVE.COM (Mar. 23, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/03/portland\\_police\\_union\\_files\\_gr.html](http://www.oregonlive.com/portland/index.ssf/2010/03/portland_police_union_files_gr.html).

<sup>145</sup> *See generally* MAJORITY REPORT OF THE MAYOR’S PIIAC WORK GROUP (Oct. 30, 2000), available at <http://www.portlandcopwatch.org/MajorityReport.html>.

<sup>146</sup> Even though there are many public groups who would have likely pursued litigation earlier, only IPR and CRC would have standing.

<sup>147</sup> *See, e.g.*, MINNEAPOLIS, MINN., CITY ORDINANCE 172.180 (2005); S.F. POLICE DEP’T GEN. ORDER 2.08 (2005); SAN DIEGO CNTY. CITIZEN’S LAW ENFORCEMENT REVIEW BD. RULES AND REGS. § 9.3 (2003). One of the reasons that more agencies do not have the power to compel officer testimony is that many oversight agencies do not have authority to conduct independent investigations. In those jurisdictions, the power to compel testimony would not be of any use. *See, e.g.*, *City of Tucson Independent Police Auditor*, TUSCONAZ.GOV, <http://cms3.tucsonaz.gov/oeop/ipa>; *Office of the Independent*



had the power to compel testimony since their inception or gained it soon thereafter.<sup>148</sup> Other oversight agencies have tried to gain the power to compel testimony, but have not been successful.

The battles fought by the Pittsburgh Citizens Police Review Board (“CPRB”) illustrate some of the challenges encountered when an oversight agency seeks to obtain the power to compel testimony. In *Citizen Police Review Board v. Murphy*, the court held that CPRB did not have the power to compel officer testimony even though the city ordinance required the police to “cooperate” with the oversight agency.<sup>149</sup> CPRB argued that if the Chief of Police is allowed to compel officer testimony for internal investigations he should not be able to refuse to do so when requested by the oversight agency.<sup>150</sup> The court ruled that it would not order the Chief of Police to compel testimony at CPRB’s request because CPRB failed to cite any legislative authority giving it that right.<sup>151</sup>

However, CPRB gained some support from the court in subsequent litigation. In *City of Pittsburgh v. Citizen Police Review Board*, the court held the city in contempt for failing to give internal interview records to CPRB.<sup>152</sup> The parties settled the case, agreeing that when CPRB subpoenas officer statements from internal investigations, the city will produce those statements.<sup>153</sup> CPRB’s win fell short of acquiring full authority to compel officer testimony, partly because CPRB challenged the court to find an *existing* right to compel testimony instead of fighting for the right to compel testimony to be *established*.

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*Monitor*, CITY & CNTY. OF DENVER, <http://www.denvergov.org/Default.aspx?alias=www.denvergov.org/oim>; *Community Ombudsman Oversight Panel*, CITY OF BOS., <http://www.cityofboston.gov/police/co-op/>; *Office of the Police Monitor*, CITY OF AUSTIN, <http://www.ci.austin.tx.us/opm/>. Another reason that more oversight agencies do not have the power to compel officer testimony is because law enforcement does not like outsiders challenging its actions. JONES, *supra* note 93, at 342 n.9. A Portland jury recently awarded a citizen \$82,000 in damages because an officer refused to identify himself. Aimee Green, *Jury Awards \$82,000 After Woman is Arrested When Asking Police for a Business Card*, OREGONLIVE.COM (Apr. 15, 2011), [http://www.oregonlive.com/portland/index.ssf/2011/04/jury\\_awards\\_woman\\_82000\\_after.html](http://www.oregonlive.com/portland/index.ssf/2011/04/jury_awards_woman_82000_after.html). The citizen requested a business card after witnessing what she thought was an officer using excessive force. *Id.* Not only did the officer refuse to give her the card, but when she came closer to look at his nametag, he arrested her. *Id.*

<sup>148</sup> See, e.g., SAN DIEGO CNTY. CITIZEN’S LAW ENFORCEMENT REVIEW BD. RULES AND REGS. § 9.3; S.F. POLICE DEP’T GEN. ORDER 2.08; MINNEAPOLIS CITY ORDINANCE 172.180.

<sup>149</sup> *Citizen Police Review Bd. v. Murphy*, 819 A.2d 1216, 1220–22 (Pa. Commw. Ct. 2003).

<sup>150</sup> *Id.* at 1219–20.

<sup>151</sup> *Id.* at 1221.

<sup>152</sup> *City of Pittsburgh v. Citizen Police Review Bd.*, No. G.D. 02-24710, slip op. at 4 (Ct. of Common Pleas of Allegheny Cnty. Apr. 1, 2004).

<sup>153</sup> Order of the Court at 1, *City of Pittsburgh v. Citizen Police Review Bd.*, No. G.D. 02-24710 (Ct. of Common Pleas of Allegheny Cnty. Aug. 12, 2004).

A. *The First Hurdle Is Avoiding Self-incrimination Problems By Mandating Immunity*

The first challenge in establishing a process to compel testimony that could withstand judicial scrutiny involves crafting immunity warnings that protect against future self-incrimination. Immunity effectively strikes a balance between an individual's constitutional rights and the government's interest in prosecution. Both the United States and Oregon Constitutions provide protection against self-incrimination. But these protections are limited, and case law has carved out a constitutionally permissible way to compel officer testimony by granting immunity.

1. *The United States' and Oregon's Constitutional Protections Against Self-incrimination Do Not Prohibit Compelled Testimony*

Under both the United States and Oregon Constitutions, courts have articulated that the privilege against self-incrimination does not prohibit compelled testimony in non-criminal proceedings.<sup>154</sup> Rather, the privilege only limits the future use of that testimony.<sup>155</sup> The Fifth Amendment of the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself."<sup>156</sup> The Oregon Constitution's self-incrimination clause is similar to that of the federal constitution, both in language<sup>157</sup> and in application. The privilege not only applies to a defendant in a criminal case, but also to a person "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."<sup>158</sup> The privilege also extends to answers that would "furnish a link in the chain of evidence" needed to prosecute the speaker.<sup>159</sup> However, the privilege is not absolute—it only protects testimony that is compelled. For testimony to be compelled, "[t]he test is whether . . . the free will of the witness was overborne."<sup>160</sup> In other words, if a person volunteers to testify in a way that may incriminate him, he has not been compelled.<sup>161</sup> One way in which administrative investigators can compel testimony without violating

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<sup>154</sup> Lefkowitz v. Turley, 414 U.S. 70 (1973). For similar protections provided by the Oregon Constitution, see State v. Langan, 718 P.2d 719 (Or. 1986).

<sup>155</sup> Turley, 414 U.S. at 77.

<sup>156</sup> U.S. CONST. amend. V.

<sup>157</sup> Article 1, section 12 provides in part that "no person shall . . . be compelled in any criminal prosecution to testify against himself." OR. CONST. art. I, § 12.

<sup>158</sup> Turley, 414 U.S. at 77; accord Langan, 718 P.2d at 722.

<sup>159</sup> Hoffman v. United States, 341 U.S. 479, 486 (1951).

<sup>160</sup> United States v. Washington, 431 U.S. 181, 188 (1977). For Oregon examples, see Shepard v. Bowe, 442 P.2d 238, 239–40 (Or. 1968) (considering court-ordered psychiatric examination compulsion); State v. Smith, 791 P.2d 836, 840 (Or. 1990) (finding that custodial interrogation is compulsion).

<sup>161</sup> United States v. Monia, 317 U.S. 424, 427 (1943).

the privilege against self-incrimination is by granting immunity against future use of the compelled testimony.<sup>162</sup>

2. *Garrity v. New Jersey and Its Progeny Provide a Framework for Immunity That Adequately Protects Officers' Rights*

A line of Supreme Court cases has established the boundaries of the privilege against self-incrimination in the context of public employees. A public employee who is forced to testify by threat of termination has not voluntarily waived his right against self-incrimination.<sup>163</sup> The individual is no longer left with a reasonable choice between two options, and the testimony is automatically considered compelled.<sup>164</sup> In *Garrity v. New Jersey*, the Supreme Court held that compelled statements of public employees under threat of job forfeiture are unconstitutional when the statements could be used in subsequent criminal prosecution.<sup>165</sup> Shortly after *Garrity* was decided, the Court concluded that police officers cannot be forced to waive immunity, and that investigatory questions must be “specifically, directly, and narrowly” tailored to an employee’s job.<sup>166</sup> Next, the Court determined the extent of protection required by the Fifth Amendment. “Use immunity” prohibits the government from using compelled testimony or any information derived from that testimony in future prosecutions or investigations.<sup>167</sup> Use immunity is narrower in scope than “transactional immunity,” which provides absolute immunity from future prosecution.<sup>168</sup> In *Kastigar v. United States*, the Court concluded that use immunity is sufficient to supplant the protections of the Fifth Amendment.<sup>169</sup>

The Oregon Constitution prohibits anything less than transactional immunity to be granted by statute.<sup>170</sup> However where no statute authorizes a grant of immunity, the rules of *Garrity* apply.<sup>171</sup> The officer can still test the constitutionality of any adverse consequences through the Union.<sup>172</sup>

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<sup>162</sup> *Kastigar v. United States*, 406 U.S. 441, 462 (1972); OR. REV. STAT. § 136.619(1) (2011).

<sup>163</sup> *City & Cnty. of Denver v. Powell*, 969 P.2d 776, 779 (Colo. App. 1998) (citing *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967)).

<sup>164</sup> *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

<sup>165</sup> *Garrity*, 385 U.S. at 500. “Statements are compelled by threat of discharge of employment when: (1) an individual subjectively believes that he or she will be terminated from employment for asserting the Fifth Amendment privilege; and (2) that belief is objectively reasonable under the circumstances.” *Powell*, 969 P.2d at 779.

<sup>166</sup> *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).

<sup>167</sup> *Kastigar*, 406 U.S. at 459–60.

<sup>168</sup> *Id.* at 453.

<sup>169</sup> *Id.* at 462.

<sup>170</sup> *State v. Graf*, 835 P.2d 934, 938 (Or. Ct. App. 1992).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Because *Garrity* does not prevent future prosecution entirely, police officers may be skeptical of the extent of its protection. However, if an officer was later charged with a crime for which he had been administratively investigated, the burden that *Garrity* places on the prosecutor is in fact substantial. Courts place severe restrictions on use of this type of immunized testimony—more so than confessions that police officers coerce from suspects by excessive use of force.<sup>173</sup> The government must prove that its evidence “is derived from a legitimate source wholly independent of the compelled testimony.”<sup>174</sup> This burden shift results in great protections to officers who were previously compelled to speak.<sup>175</sup>

3. *An Oversight Agency’s Garrity Warning Should Be Structured to Withstand Judicial Scrutiny*

Oversight agencies should implement routine procedures to provide *Garrity* warnings. Because there is a circuit split on whether notice of these rights *must* be provided to employees, it is wise for oversight agencies to err on the safe side and administer warnings.<sup>176</sup> The types of warnings issued by employers vary, but contain common themes articulated by *Garrity* and its progeny.<sup>177</sup> The Minneapolis Civilian Police Review Authority provides a good model warning:

[A]ny statements given under this warning, or the fruits thereof, compelled as a condition of employment, cannot then be used in any subsequent criminal proceeding against the employee except in cases of alleged perjury by the employee giving the statements where the criminal charge is based upon the falsity of the statement given.<sup>178</sup>

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<sup>173</sup> Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1321 (2001) (stating that the prosecution cannot introduce immunized testimony in its case-in-chief or use it for impeachment purposes).

<sup>174</sup> *Kastigar*, 406 U.S. at 460.

<sup>175</sup> Clymer, *supra* note 173, at 1339–41 (noting that the Department of Justice’s approach to investigating criminal cases of police misconduct is to have entirely separate teams to ensure that prosecutors are not exposed to tainted evidence). The extent of these protections has been criticized as too lenient and unnecessary. At least one critic has suggested that the threat of loss of employment was not the kind of compulsion which the Fifth Amendment privilege was intended to protect against and *Garrity* should be reassessed. *Id.* at 1362–63. While this suggestion may seem drastic, this scholar has based his concerns on an issue discussed throughout this Note: the need for the government to be a responsible employer and hold its employees accountable.

<sup>176</sup> Lindsay Niehaus, *The Fifth Amendment Disclosure Obligations of Government Employers When Interrogating Public Employees*, 21 REGENT U. L. REV. 59, 59–60 (2008); *see, e.g.*, *Sher v. U.S. Dep’t of Veterans Affairs*, 488 F.3d 489, 502–05 (1st Cir. 2007). The Ninth Circuit has not yet decided the issue, so for now it is safer for IPR to administer warnings.

<sup>177</sup> Some states have implemented their own basis for the warning. For example, California established the *Lybarger* Warning in *Lybarger v. City of L.A.*, 710 P.2d 329, 333 (Cal. 1985).

<sup>178</sup> MINNEAPOLIS CIVILIAN POLICE REVIEW AUTHORITY ADMINISTRATIVE RULES 3–4 (2003).

Creating a sufficient warning is just the first step in providing notice to the officer. The next step involves determining *how* to appropriately administer the warning.

*B. The Second Hurdle Is to Ensure That a Disciplinary Figure Delivers the Grant of Immunity to Officers*

The second challenge in establishing a process to compel testimony that could withstand judicial scrutiny involves structuring the procedure so that the person who delivers the *Garrity* warning has discipline authority over the employee. Because officers are much more likely to cooperate with investigations if there is an adverse effect for their noncooperation,<sup>179</sup> the power to compel testimony is meaningless without the power to enforce a consequence. Unlike a court that can hold a subpoenaed witness in contempt,<sup>180</sup> or a public employer who can threaten employment related sanctions for its employees' refusal to comply with an order to testify,<sup>181</sup> most oversight agencies do not have the authority to impose a consequence for an officer's failure to testify. Some courts have ruled that because oversight agencies do not have the authority to discipline officers, they cannot demand testimony under a threat of discipline.<sup>182</sup> Therefore, the power to compel testimony must technically reside with a disciplinary figure. In March 2010, IPR gained authority to sit on the discipline panel and help determine the recommended discipline for officers found responsible for misconduct.<sup>183</sup> Participation in the disciplinary process may be sufficient to permit Portland's IPR technical authority to administer *Garrity* warnings.<sup>184</sup>

If the level of an oversight agency's disciplinary involvement is insufficient to warrant authority to administer *Garrity* warnings, an oversight agency can establish a procedure with the Mayor or the Police Commissioner. Again, the Minneapolis Civilian Police Review Authority's procedure is illustrative. When the Minneapolis oversight agency needs to compel testimony from an officer, the Manager sends a "Notice to

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<sup>179</sup> Of 200 officers requested to interview by the Pittsburgh CPRB, only eight voluntarily provided statements. Brief for Appellant at 8–9, *Citizen Police Review Bd. v. Murphy*, 819 A.2d 1216 (Pa. Commw. Ct. 2003) (No. 1848 CD 2002), 2002 WL 32622585 at \*8–9. In internal investigations conducted by the Pittsburgh Police Department, approximately 70% of officers are provided *Garrity* warnings and compelled to testify. *Id.* at 10.

<sup>180</sup> OR. REV. STAT. § 136.619(1) (2011).

<sup>181</sup> *Gardner v. Broderick*, 392 U.S. 273, 276 (1968) (public employees can be compelled to testify under threat of termination as long as proper immunity is granted).

<sup>182</sup> *City & Cnty. of Denver v. Powell*, 969 P.2d 776, 779–80 (Colo. App. 1998).

<sup>183</sup> PORTLAND, OR., ORDINANCE No. 183657 (2010).

<sup>184</sup> *See, e.g., Powell*, 969 P.2d at 779–80. The court in *Powell* distinguished its facts from *Pirozzi v. City of New York*, 950 F. Supp. 90 (S.D.N.Y. 1996), because "the New York police citizen review board is an integral part of the discipline process and officers are compelled by specific police department regulations to give a statement to that review board under threat of termination." *Powell*, 969 P.2d at 780.

Give *Garrity* Warning” to the Chief of Police. The notice asks the Chief to order the officer to cooperate with the investigation and issue a *Garrity* warning.<sup>185</sup> If the Chief fails to cooperate with the request, the Chief must give reasons for not doing so in writing to the Mayor, who then decides whether to sustain the Chief’s decision or order the Chief to comply.<sup>186</sup> This process circumvents the lack of authority at issue in *Citizen Police Review Board v. Murphy* because the power to order the compelled testimony rests with the Chief and the Mayor.

To comply with the standards established in other jurisdictions, the City of Portland would have to amend local law to grant IPR the power to compel officer testimony. As the next Section of this Note will illustrate, the IPR ordinance already provides for potential future authority to compel officer testimony. The activation of that authority is contingent upon a change in the Union’s collective bargaining agreement.

#### VII. THE CITY OF PORTLAND’S GREATEST BARRIER TO GRANTING THE INDEPENDENT POLICE REVIEW DIVISION AUTHORITY TO COMPEL OFFICER TESTIMONY MAY BE AVOIDABLE

Different oversight agencies will have to address different barriers depending on their local and state laws. Some will have to work to gain the support of their city council while others will have to lobby for more resources. One of the greatest challenges that many will face is push-back from a police union.

Portland may not have to succumb to the demands of its police union. IPR is already well-situated to establish a procedure for compelling officer testimony that could withstand judicial scrutiny. IPR even has the support of City Council. IPR’s only real roadblock to gaining the authority to compel officer testimony has been the Union’s resistance in its collective bargaining agreement. However, the City may not legally be required to bargain over its decision to give IPR authority to compel officer testimony.<sup>187</sup>

##### A. *The City of Portland Has Probably Not Granted the Independent Police Review Division Authority to Compel Testimony Because the City Believes That It Is Obligated to Bargain with the Police Union*

The City of Portland’s actions indicate that it is not opposed to granting IPR the authority to compel officer testimony. In fact, the City

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<sup>185</sup> MINNEAPOLIS CIVILIAN POLICE REVIEW AUTHORITY ADMINISTRATIVE RULES, *supra* note 178, at 12.

<sup>186</sup> *Id.*

<sup>187</sup> Even though the City may not be *required* to bargain over its decision to give IPR authority to compel officer testimony, the City may be resistant to pursuing such a change for political reasons. However, for the policy reasons articulated throughout this Note, it is the responsibility of both the City and IPR to stand up to political challenges in order to fulfill their duty to hold the police accountable.

Code emphasizes the importance of officer cooperation with IPR. The Code mandates that “[a]ll bureau employees shall be truthful, professional and courteous in all interactions with IPR. No member shall conceal, impede or interfere with the filing, investigation or adjudication of a complaint.”<sup>188</sup> However, the Code also explicitly states that if an applicable collective bargaining agreement specifies that an officer can only be interviewed by another bureau member, IPR cannot conduct direct interviews of the officer during its investigation.<sup>189</sup> The Code goes on to say “[w]hen a collective bargaining agreement . . . does not specify that a member may only be interviewed by a police officer, then the [IPR] Director shall ask the member the question directly and/or direct the member to answer the question.”<sup>190</sup> Because the City only denies IPR the power to compel officer testimony based on its binding agreement with the police union, the City could increase IPR’s authority in a future agreement.

The Portland Police Bureau’s collective bargaining agreement, effective July 1, 2010–June 30, 2013, does not expressly prohibit the interviewing of officers by IPR, but it has such effect. It states merely that “[i]nterviews shall take place at a Portland Police Station facility,<sup>191</sup> . . . [and] [t]he officer being interviewed shall be informed of the name, rank, and command of the *officer* in charge of the investigation, the interviewing *officer*, and all other persons present during the interview.”<sup>192</sup> The City has interpreted this language to imply that IPR cannot conduct direct interviews or compel testimony from officers.<sup>193</sup>

The City assumes that the issue of compelling officer testimony is an issue over which the City must bargain.<sup>194</sup> Since Portland’s police union has shown no intention of allowing IPR to conduct interviews in the

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<sup>188</sup> PORTLAND, OR., CITY CODE § 3.21.070(N) (2012). The Charter provision can be compared with the Internal Affairs Police Directive that requires officers to “cooperate fully and be truthful in giving statements about events under investigation,” to not interfere with the investigation, and to come forward with any information about it. PORTLAND POLICE BUREAU MANUAL OF POLICY AND PROCEDURE § 330.00 (2010), *available at* <http://www.portlandonline.com/shared/cfm/image.cfm?id=32482>.

<sup>189</sup> PORTLAND, OR., CITY CODE § 3.21.120(D) (4).

<sup>190</sup> *Id.*

<sup>191</sup> Labor Agreement, *supra* note 126, at art. 61.2.2.2.

<sup>192</sup> *Id.* at 61.2.2.4 (emphasis added).

<sup>193</sup> If the City had interpreted it otherwise, the City would not have included the language “[w]hen a collective bargaining agreement . . . does not specify that a member may only be interviewed by a police officer, then the [IPR] Director shall ask the member the question directly and/or direct the member to answer the question.” PORTLAND, OR., CITY CODE § 3.21.120(D) (4).

<sup>194</sup> In an initial draft of reform recommendations, the Mayor opposed granting IPR authority to compel testimony partly because “[c]hanging the process to allow IPR to directly compel officer testimony . . . would be a mandatory subject for bargaining with the Bureau’s labor unions.” CITIZEN REVIEW COMM. PARC REPORT WORKGROUP ET AL., REPORT ON RECOMMENDATIONS REGARDING THE PORTLAND POLICE BUREAU 12–13 (Discussion Draft Nov. 4, 2011), *available at* <http://www.portlandonline.com/shared/cfm/image.cfm?id=372686>.

future, the City has not pressed the issue in collective bargaining. However, if the City learned that the issue of compelling officer testimony is likely an issue that the City does not have to bargain over, the City could take action. And, the City should take action, for the policy reasons emphasized throughout this Note. Whether granting authority to IPR to compel officer testimony is required for bargaining is ultimately for a court to determine, but labor law trends and precedent indicate how a court might decide the issue.

*B. Oregon's Public-Sector Bargaining Laws Protect the Police and Limit Oversight*

Public-sector labor laws are designed to protect unions, and as a result, these laws mandate subjects which municipalities must bargain over with police unions. Because each state is so different, this Note focuses on Oregon's laws. Oregon's Public Employee Collective Bargaining Act (PECBA) was enacted in 1973.<sup>195</sup> Oregon's statute was modeled after the private sector collective bargaining statute, the National Labor Relations Act.<sup>196</sup> PECBA requires good faith bargaining "with respect to employment relations."<sup>197</sup> Public employers and employees can bargain with respect to "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment."<sup>198</sup> "Other conditions of employment" is a catchall phrase that the courts have had to define to determine the scope of bargaining.

Oregon adopted the private-sector National Labor Relations Board's distinction between mandatory and permissive subjects.<sup>199</sup> PECBA classifies topics as mandatory (subjects which the parties *must* bargain about), permissive (subjects which the parties *may* bargain about), and prohibited (subjects which the parties *cannot* bargain about).<sup>200</sup> For mandatory subjects, the parties must "bargain in good faith until they reach agreement or impasse,"<sup>201</sup> and cannot make unilateral changes.<sup>202</sup> Because police officers are strike-prohibited employees, the law requires

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<sup>195</sup> Act of July 21, 1973, ch. 536, 1973 Or. Laws 1166.

<sup>196</sup> Donald W. Brodie, *Public Sector Collective Bargaining in Oregon*, 54 OR. L. REV. 337, 337 (1975).

<sup>197</sup> OR. REV. STAT. § 243.650(4) (2011).

<sup>198</sup> *Id.* § 243.650(7) (a).

<sup>199</sup> *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 1 PECBR 347, 349–50 (Or. Emp't Rel. Bd. 1975).

<sup>200</sup> *See, eg.*, *Nat'l Labor Relations Bd. v. Wooster Div. of the Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *id.* at 354 (Harlan, J., concurring in part and dissenting in part); *see also* DONALD H. WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 143 (4th ed. 1993).

<sup>201</sup> Brodie, *supra* note 196, at 350.

<sup>202</sup> *Portland Fire Fighters' Association, Local 43, IAFF v. City of Portland*, 263 P.3d 1040, 1045 (Or. App. 2011).



arbitration on issues for which the parties cannot agree.<sup>203</sup> The interest arbitrator makes a decision based on factors identified by the legislature,<sup>204</sup> which becomes final and binding.<sup>205</sup> For permissive subjects, bargaining is optional—one party could announce that it does not intend to bargain about the subject and the other party cannot push the subject to impasse.<sup>206</sup> If a party refuses to bargain in good faith or sidesteps the bargaining process by making unilateral changes, the other party can file an Unfair Labor Practice complaint to Oregon’s Employment Relations Board (ERB).<sup>207</sup>

The scope of bargaining test changed slightly when PECBA was amended in 1995.<sup>208</sup> Prior to the amendments, ERB made scope of bargaining decisions by applying the balancing test to each individual proposal.<sup>209</sup> While the PECBA amendments did not change the balancing test, they changed its application. Now, ERB has to first determine which *subject* the proposal falls under and then make a decision based on that subject’s articulation in the statute or ERB’s precedent.<sup>210</sup> Only if neither of those are deemed conclusive will ERB apply the balancing test.<sup>211</sup>

### *C. The Structure of Independent Investigations Should Be a Permissive Bargaining Subject*

While compelling testimony under the threat of losing one’s job is arguably related to a condition of working, allowing citizen oversight agencies to conduct thorough investigations is not a mandatory bargaining subject such as wages or work hours. An officer’s rights during an investigation, including whether *Garrity* warnings are administered, would likely be considered mandatory subjects because they are closely

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<sup>203</sup> OR. REV. STAT. § 243.742(1).

<sup>204</sup> *Id.* § 243.746(4).

<sup>205</sup> *Id.* § 243.752(1).

<sup>206</sup> Brodie, *supra* note 196, at 350.

<sup>207</sup> OR. REV. STAT. § 243.672.

<sup>208</sup> Act of June 6, 1995, ch. 286, 1995 Or. Laws 683; *see also* Henry H. Drummonds, *A Case Study of the ex ante Veto Negotiations Process: The Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 32 WILLAMETTE L. REV. 69, 72 (1996). The initial bill identified a list of enumerated subjects for mandatory bargaining and considered all others to be permissive or prohibited. *Id.* at 90. The bill was amended a number of times, broadening the scope of mandatory subjects until the final bill restored the liberal language of the existing law. *Id.* at 94–97. Under Oregon precedent, this meant that there would be a nonexclusive list of specifically enumerated subjects and the ERB would continue to determine other subjects that fell under the catchall phrase, “conditions of employment.” *Id.* at 97.

<sup>209</sup> *See* AKIN BLITZ & LIZ JOFFE, PUBLIC EMPLOYEES AND OREGON’S SCOPE OF BARGAINING 28 (Labor Educ. & Res. Ctr., U. of Or., LERC Monograph Series No. 18, 2007).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

tied to “fundamental fairness” and “discipline.” But those subjects should be considered independently from the authority of IPR to compel testimony. According to PECBA’s protocol for determining the bargainability of a subject, the issue of *who* conducts an interview during an investigation should be considered permissive, if not prohibited. If ERB concluded that deciding who the interviewer is for an investigation is a permissive—or prohibited—subject, the City could permit IPR to compel officer testimony in future contracts without the Union’s permission.

*1. Public Interest Is Highly Valued Under Oregon’s Public Employment Labor Law*

One of a city government’s roles in the bargaining process is to represent the people’s interests.<sup>212</sup> Although Oregon law does not consider all public policy issues to be prohibited bargaining subjects, it does highly value consideration of the public interest in determining scope of bargaining. PECBA mandates that “[t]he state has a basic obligation to protect the public by attempting to assure the orderly and uninterrupted operations and functions of government.”<sup>213</sup> In addition, an arbitrator’s findings must give *first priority* to “[t]he interest and welfare of the public.”<sup>214</sup> Therefore, even though Oregon’s scope of bargaining test does not explicitly give the public a role, it does require that the City represent the public’s interests. In addition, where a subject has otherwise been considered mandatory, an arbitrator is more likely to find a particular instance of that subject that hinders the public interest to be permissive.

*2. The Employment Relations Board Finds Most Bargaining Subjects That Relate to Employee Investigations to Be Permissive*

ERB has already identified the scope of bargaining for a number of subjects that fall within the larger category of investigations of employee misconduct. Precedent dictates that “a public employer is generally not required to bargain over the manner in which it investigates alleged employee misconduct.”<sup>215</sup> Subjects that ERB has classified as mandatory include “discipline”<sup>216</sup> and “fundamental fairness.”<sup>217</sup> Permissive subjects include complaint procedures,<sup>218</sup> “qualifications necessary for any

<sup>212</sup> BOUZA, *supra* note 19, at 261.

<sup>213</sup> OR. REV. STAT. § 243.656(4) (2011).

<sup>214</sup> *Id.* § 243.746(4) (a).

<sup>215</sup> Eugene Police Emps. Ass’n v. City of Eugene, 23 PECBR 972, 1002 (Or. Emp’t Rel. Bd. 2010) (Gamson, Chair, concurring).

<sup>216</sup> See, e.g., Portland Fire Fighters Ass’n, Local 43 v. City of Portland, 16 PECBR 245, 250–52 (Or. Emp’t Rel. Bd. 1995).

<sup>217</sup> See, e.g., Eugene Police Emps. Ass’n, 23 PECBR at 1002, n.17.

<sup>218</sup> The PECBA Digest has categorized the permissive proposals in *Ass’n of Or. Corr. Emps. v. Dep’t of Corr.*, 14 PECBR 832, 870–71 (Or. Emp’t Rel. Bd. 1993), as falling under the subject of complaint procedures. OR. LAB. REL. RES. ASSOCS., PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT DIGEST: 1991–95, at 188–89 (1996).

position,”<sup>219</sup> “assignment of duties,”<sup>220</sup> and, more specifically, assignment of duties to employees outside the bargaining unit.<sup>221</sup> As the cases below will illustrate, if presented with the question of categorizing the subject of granting IPR authority to compel officer testimony, ERB would likely conclude that such act falls within one of the latter categories, and is therefore a permissive bargaining subject.

*3. Related Cases Suggest That Granting an Oversight Agency the Power to Compel Officer Testimony Would Be a Permissive Subject*

ERB has not squarely decided whether granting authority to an oversight agency to compel officer testimony is a mandatory or permissive bargaining subject. However, ERB has addressed similar issues in three cases that shed light on ERB’s analysis of employee investigation procedures.<sup>222</sup>

In the first case, *Oregon Public Employees Union v. Oregon Executive Department (OPEU)*,<sup>223</sup> ERB emphasized the importance of the State’s interest in employee investigations and held that decisions about how to conduct investigations are permissive subjects. In that case, state hospital and mental health service employees filed an Unfair Labor Practice against their employer for refusing to bargain over employee investigation procedures.<sup>224</sup> ERB weighed the employees’ interest in not being subject to stigma and anxiety against the State’s interest in controlling the investigation.<sup>225</sup> ERB found that the “restrictions and conditions imposed on the investigation process which could potentially jeopardize its validity and integrity are . . . matters in which the State’s interest in identifying . . . abuse will generally override effects on employees subject to investigations.”<sup>226</sup> ERB held that three of the proposals at issue were permissive and one was mandatory. The subjects ERB deemed permissive included providing notice to the employee of the specific allegations against him, providing notice to the employee of the complaining party’s identity, and allowing the employee the opportunity to provide information first.<sup>227</sup> ERB concluded that “[d]ecisions about when to interview parties and in general how to conduct . . . investigations are not ones over which the State can be

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<sup>219</sup> OR. REV. STAT. § 243.650(7)(g).

<sup>220</sup> *Id.*

<sup>221</sup> *See, e.g., Eugene Educ. Ass’n v. Eugene Sch. Dist. No. 4J*, 1 PECBR 446, 451–52 (Or. Emp’t Rel. Bd. 1975).

<sup>222</sup> The first two cases were decided prior to the 1995 PECBA amendments. However, the result of these cases would likely be the same today because even though ERB would categorize the subject before applying the balancing test, the result would likely be the same as if the pre-PECBA amendments procedure applied. *See supra* Part VII.C.1.

<sup>223</sup> 14 PECBR 746 (Or. Emp’t Rel. Bd. 1993).

<sup>224</sup> *Id.* at 767.

<sup>225</sup> *Id.* at 768.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 767–68.

required to bargain” because “[a]n employee has no legitimate interest in interfering with the investigation process.”<sup>228</sup> ERB distinguished the proposal for imposing time frames to initiate and complete investigations as mandatory. ERB reasoned that the “State has no interest in unreasonably protracting or delaying the investigation process, while the accused employee has a significant interest in being cleared of or charged with wrongdoing in as swift a manner as possible.”<sup>229</sup>

In the second case, *Association of Oregon Corrections Employees v. Oregon Department of Corrections*,<sup>230</sup> ERB concluded that to uphold the integrity of employee investigations, early notice, information and representation during interviews are permissive subjects. In that case, state correctional employees filed an Unfair Labor Practice complaint against their employer for refusing to bargain over particular employee investigation procedures.<sup>231</sup> ERB weighed the employees’ interest in “protections [to] ensure fairness” against the employer’s interest in the “integrity and effectiveness of the investigation.”<sup>232</sup> ERB concluded that three of the five proposals were permissive subjects. ERB held that requiring the State to notify employees of a complaint within 48 hours was permissive based on its reasoning in *OPEU*.<sup>233</sup> ERB also held that divulging information concerning the complaint to the accused officer at least 72 hours before questioning and allowing the officer to consult with a representative during the interview are both permissive subjects for bargaining because they “substantially defeat[] the purpose of such an interview.”<sup>234</sup> ERB explained that the “purpose [of the interview] is to obtain the employee’s own, candid, spontaneous, and unvarnished rendition of the events under investigation. The employee has no legitimate interest in providing anything else.”<sup>235</sup> Furthermore, ERB distinguished between a criminal and administrative proceeding by stating that the latter does not accord the same constitutional protections as the former, including due process rights.<sup>236</sup> However, ERB held that requiring investigators to not use “threats or intimidations” during the interview, and allowing an employee to tape record the interview are mandatory subjects for bargaining.<sup>237</sup> ERB reasoned that these subjects were mandatory because they “would not interfere with” or “adversely affect[]” the employer’s ability to conduct investigations.<sup>238</sup>

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<sup>228</sup> *Id.* at 768.

<sup>229</sup> *Id.* at 769.

<sup>230</sup> 14 PECBR 832 (Or. Emp’t Rel. Bd. 1993).

<sup>231</sup> *Id.* at 832.

<sup>232</sup> *Id.* at 871.

<sup>233</sup> *Id.* at 870–71.

<sup>234</sup> *Id.* at 871–72.

<sup>235</sup> *Id.* at 872.

<sup>236</sup> *Id.* at 871.

<sup>237</sup> *Id.* at 872.

<sup>238</sup> *Id.*

In the third case, *Eugene Police Employees Association v. City of Eugene*,<sup>239</sup> ERB permitted an auditor to conduct employee interviews, and the concurring opinion stated that designating investigation authority to a third party is a permissive subject. In that case, a police union contested the city's unilateral action of allowing the auditor to participate in investigatory interviews.<sup>240</sup> The city and the union had previously "agreed that neither . . . would pursue proposals concerning the police auditor's investigatory role."<sup>241</sup> But, the city withdrew its proposal during bargaining, and referred the issue to the voters.<sup>242</sup> Unfortunately, ERB did not have the opportunity to reach the decision of whether the subject was mandatory or permissive because ERB held that the city did not change the status quo when the city gave authority to the auditor to conduct investigatory interviews.<sup>243</sup> Thus, the bargaining status of *who* can conduct investigatory interviews is still an open question. However, the city asserted that "all matters related to the police auditor's role in interviews, except notice of the interview, were permissive topics of bargaining," and the union did not challenge that assertion.<sup>244</sup>

In addition, the concurring opinion, written by the ERB Chair, speculated that this issue would be permissive.<sup>245</sup> The concurrence reasoned that "[d]eciding who will conduct investigatory interviews clearly concerns assignment and qualifications."<sup>246</sup> By statute, assignment of duties and qualifications for a position are permissive for bargaining.<sup>247</sup> The concurrence concluded that the city is not required to bargain over how the oversight agency is included in investigations.<sup>248</sup> The Chair noted in a footnote an exception to the general rule that conducting investigations is a permissive bargaining subject. This exception

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<sup>239</sup> 23 PECBR 972 (Or. Emp't Rel. Bd. 2010).

<sup>240</sup> *Id.* at 973.

<sup>241</sup> *Id.* at 995.

<sup>242</sup> *Id.* at 972, 995.

<sup>243</sup> *Id.* at 998. "The duty to bargain in good faith under [OR. REV. STAT. §] 243.672(1)(e) includes an obligation to bargain prior to changing existing employment conditions that concern mandatory subjects of bargaining." *Eugene Police Emps. Ass'n*, 23 PECBR at 997–98. In a unilateral change case, ERB first identifies the status quo based on an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln Cnty. Educ. Ass'n v. Lincoln Cnty. Sch. Dist.*, 19 PECBR 656, 664–65 (Or. Emp't Rel. Bd. 2002). Then ERB determines whether the employer changed it. *See id.* If so, ERB decides whether the change affects a mandatory subject for bargaining. *See id.* "If it does, [ERB reviews] the record to determine whether the employer completed its bargaining obligation before it decided to make the change." *Lebanon Educ. Ass'n v. Lebanon Cmty. Sch. Dist.*, 22 PECBR 323, 360 (Or. Emp't Rel. Bd. 2008). Because ERB found that the city did not change the status quo in *Eugene Police Emps. Ass'n*, it never reached the scope of bargaining issue.

<sup>244</sup> *Eugene Police Emps. Ass'n*, 23 PECBR at 995.

<sup>245</sup> *Id.* at 1002–03 (Gamson, Chair, concurring).

<sup>246</sup> *Id.* at 1002.

<sup>247</sup> OR. REV. STAT. § 243.650(7)(g) (2011).

<sup>248</sup> *Eugene Police Emps. Ass'n*, 23 PECBR at 1003.

“concerns aspects of an investigation that involve fundamental fairness to the employee and do not unduly interfere with the investigation,” which are mandatory.<sup>249</sup> These include protections such as “completing an investigation as promptly as possible,” “prohibit[ing] investigators from using ‘threats or intimidations,’ and . . . allow[ing] tape recording of interviews.”<sup>250</sup> While the union argued that “fundamental fairness” was involved “because allowing the [oversight agency] to participate in . . . interviews would cause employees to lose” their *Garrity* rights, the Chair found no law or evidence indicating that this was the case.<sup>251</sup>

*4. Based on Precedent, the Employment Relations Board Would Likely Conclude That Granting the Independent Police Review Division Authority to Compel Testimony Is a Permissive Subject*

Based on precedent and the concurrence in *Eugene Police Employees Association*, ERB would likely find that granting IPR the authority to compel testimony is a permissive subject that does not require arbitration. To begin with, compelling officer testimony does not infringe on related mandatory bargaining subjects. Unlike OPEU’s complaint about time limits for investigations<sup>252</sup> or AOCE’s concern about the use of threats and intimidation,<sup>253</sup> compelling officer testimony does not implicate “fundamental fairness.” In fact, procedural safeguards such as the officers’ Bill of Rights would remain untouched. Likewise, compelling officer testimony does not infringe on the mandatory subject of “discipline” because disciplinary decisions resulting from interviews and other evidence are made separately from the investigation process, and ultimately by the Mayor or Police Commissioner.<sup>254</sup> Even the decision of whether to administer *Garrity* warnings would be a separate subject of bargaining, one which could be mandatory.

The authority to compel officer testimony more appropriately falls under the permissive subjects of complaint procedures, “assignment of duties,” and “qualifications for a position.”<sup>255</sup> Internal Affairs already is permitted to compel officer testimony,<sup>256</sup> therefore, granting the same authority to IPR involves the narrow subject of “assignment of duties to

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<sup>249</sup> *Id.* at 1002 n.17.

<sup>250</sup> *Id.* (citations omitted).

<sup>251</sup> *Id.*

<sup>252</sup> *Oregon Pub. Emps. Union v. Or. Exec. Dep’t*, 14 PECBR 746, 769 (Or. Emp’t Rel. Bd. 1993).

<sup>253</sup> *Ass’n of Or. Corr. Emps. v. Or. Dep’t of Corr.*, 14 PECBR 832, 872 (Or. Emp’t Rel. Bd. 1993).

<sup>254</sup> *See* PORTLAND, OR., CITY CODE § 3.20.140(B)(1) (2012).

<sup>255</sup> *Eugene Police Emps. Ass’n*, 23 PECBR at 1002; *Ass’n of Or. Corr. Emps.*, 14 PECBR at 870–71.

<sup>256</sup> Labor Agreement, *supra* note 126, at art. 61.2.2.2–4.

employees who are outside of the bargaining unit.”<sup>257</sup> In other words, the City would merely be transferring authority from Internal Affairs to IPR.

Even if ERB could not agree on a bargaining subject into which compelling officer testimony falls, it would still be likely to find the subject permissive. Applying the balancing test, an employee has no legitimate interest in hiding misconduct whereas an employer has a strong interest in holding its staff accountable. If an employee is suspected of breaking a work rule, the employee should expect that the employer will require an explanation of the violation to retain employment. Therefore, conducting interviews and compelling testimony are management prerogatives and thus permissive bargaining subjects.

### VIII. PROPOSALS FOR CHANGE IN PORTLAND

IPR and the City of Portland can facilitate changes to improve police accountability in a number of ways. Some solutions are judicial, some legislative, and some political. Pursuing any one of the following changes would be an improvement to the current system.

*A. The City of Portland Should Assert That Compelling Officer Testimony Is a Permissive Subject and Pursue Change During the Next Bargaining Process*

The City of Portland should take action to promote the public policy of holding the police accountable. At the next collective bargaining opportunity between the City and the police union, the City should assert that compelling officer testimony is a permissive subject. The City should change the language from the old collective bargaining agreement and the City Code to authorize IPR to compel testimony from officers.<sup>258</sup> In response, the Union would probably file an Unfair Labor Practice complaint against the City. ERB would then have the opportunity to determine whether compelling testimony is a permissive or mandatory bargaining subject. Based on precedent, ERB would likely conclude that granting IPR the authority to compel officer testimony is a permissive subject. If, however, ERB ruled in favor of the Union, the City should appeal the decision to the Oregon Court of Appeals and, if necessary, to the Oregon Supreme Court.

*B. If a Higher Court Rules That Compelling Testimony Is a Mandatory Subject, the City Should Bargain in Good Faith, but Take a Hard Line*

If after appealing to the highest court, the final ruling is that compelling officer testimony is a mandatory bargaining subject, other

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<sup>257</sup> *Eugene Police Emps. Ass’n*, 23 PECBR at 1003 (citing *Eugene Educ. Ass’n v. Eugene Sch. Dist. No. 4J*, 1 PECBR 446, 451–52 (Or. Emp’t Rel. Bd. 1975)).

<sup>258</sup> See *infra*, Part IX for a proposal of the new language.

courses of action are available. The City should make the issue a priority and take a hard line in bargaining, which may force the parties into interest arbitration. At that point, the City should argue to the arbitrator the public policy concerns articulated in this Note. Since the effects on the public, by law, must be the foremost concern of the arbitrator, the arbitrator should conclude that allowing IPR to compel testimony is a good policy. The arbitrator's decision would render the topic prohibited for the length of the next contract term.

*C. The Public Could Propose Legislation to Prohibit Bargaining Over Police Oversight Agency Procedures*

If judicial remedies prove unhelpful, another possible solution is to attempt to change state law to prohibit collective bargaining over important public accountability issues. Changing state law would be time-consuming and difficult, and involves other risks. If successful, however, the change would ensure favorable results in the next collective bargaining agreement.<sup>259</sup> By no means should a legislator encourage the type of drastic cuts to public-sector bargaining rights that have recently occurred in other states such as Wisconsin and Ohio<sup>260</sup> or an across-the-board narrowing like the Oregon legislature proposed in the 1995 PECBA amendments.<sup>261</sup> Because of the inherent risk that other legislators might use an opportunity like this to reconsider limiting all public employee collective bargaining rights, this avenue should be approached with caution.

A specific proposal to prohibit bargaining over police citizen oversight agency procedures would be ideal. The scope-of-bargaining balancing test that Oregon adopted has been criticized because subjects that involve public policy are decided in the isolated process of collective bargaining.<sup>262</sup> Citizen oversight of the police, as an issue of strong public concern, should be left off the bargaining table altogether. The legislature may be open to this proposal because it has reached a similar conclusion in the past with respect to the right to strike.<sup>263</sup> For obvious public safety reasons, it is in the community's best interest that firefighters and police officers are not able to withhold their services to

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<sup>259</sup> While a city charter or code cannot take precedence over a collective bargaining agreement under PECBA, state law can. *Portland Fire Fighters' Ass'n, Local 43 v. City of Portland*, 23 PECBR 43, 75–76 (Or. Emp't Rel. Bd. 2009).

<sup>260</sup> Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher Than Wisconsin's*, N.Y. TIMES, Apr. 1, 2011, at A16.

<sup>261</sup> Drummonds, *supra* note 208, at 89.

<sup>262</sup> WOLLETT ET AL., *supra* note 200, at 143. It has also been argued that these categories have little actual meaning and whether a demand is determined permissive or mandatory is a result of how strong the union is. *Id.* at 145.

<sup>263</sup> OR. REV. STAT. § 243.736 (2011).



obtain better working conditions.<sup>264</sup> Similarly, citizen oversight procedures, such as compelling officer testimony, where the public's right to hold the police accountable outweighs the private interest of the police to escape scrutiny, should be prohibited bargaining topics. However, the legislation should be sure to maintain police unions' rights to collectively bargain over important fairness issues such as those contained in the Bureau's Bill of Rights.<sup>265</sup>

*D. The Independent Police Review Division Might Be Able to Circumvent the Need for Additional Power Granted from the City by Making Adverse Inferences*

Yet another possible option involves an entirely different approach to this problem. At least one scholar has proposed an alternative method of eliciting officer testimony during investigations. He suggests that an oversight agency could interpret an officer's silence as an adverse inference of guilt.<sup>266</sup> Because of the fundamental importance of the Fifth Amendment's protections, this proposal should be considered in the narrowest of conditions. In criminal trials, the Supreme Court has prohibited an inference of guilt when a defendant refuses to testify.<sup>267</sup>

In *Baxter v. Palmigiano*, however, the Supreme Court permitted adverse inferences of silence in prison disciplinary proceedings.<sup>268</sup> The court reasoned that a prisoner's silence can be persuasive evidence and is appropriately used against him in a civil proceeding where the prisoner chose to remain silent.<sup>269</sup> Since then, the *Baxter* holding has been applied in other contexts outside the prison setting.<sup>270</sup> However, lower courts have emphasized that adverse inferences cannot be the only evidence relied on by the decision-maker.<sup>271</sup> Rather, adverse inferences can only be used to support independent evidence.<sup>272</sup> Furthermore, in some circumstances, courts have determined that an adverse inference is "too high a price to pay."<sup>273</sup>

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<sup>264</sup> The Boston police strike of 1919 tainted public opinion of police labor unions because it was commonly accepted that "[t]here is no right to strike against the public safety by anyone, anywhere, any time." MADDOX, *supra* note 136, at 9–11.

<sup>265</sup> Other public policy concerns contained within the Portland Police Bureau's Bill of Rights would have to be addressed separately.

<sup>266</sup> Clymer, *supra* note 173, at 1380.

<sup>267</sup> Griffin v. California, 380 U.S. 609 (1965).

<sup>268</sup> Baxter v. Palmigiano, 425 U.S. 308 (1976).

<sup>269</sup> *Id.* at 317.

<sup>270</sup> See, e.g., Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000); LaSalle Bank Lake View v. Seguban, 54 F.3d 387 (7th Cir. 1995); Peiffer v. Lebanon Sch. Dist., 848 F.2d 44 (3d Cir. 1988).

<sup>271</sup> See, e.g., Rudy-Glanzer, 232 F.3d at 1264.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 1265. See also Lefkowitz v. Cunningham, 431 U.S. 801, 807–09 (1977) (finding that a statute cannot force a political party officer to waive his privilege against self-incrimination); Lefkowitz v. Turley, 414 U.S. 70, 83–85 (1973) (finding the States cannot threaten to cancel contracts unless the contractors waive their

Although incorporating adverse inferences into the investigation procedure could be much easier for IPR to implement than modifying a future collective bargaining agreement, it may be challenging in other ways. First, Oregon courts have not decided this issue. The Oregon Supreme Court heard one case involving adverse inferences in the 1980s.<sup>274</sup> The court held that adverse inferences were prohibited, but its decision was based on the Oregon Rules of Evidence.<sup>275</sup> Since the Oregon Rules of Evidence do not apply in an administrative investigation of police misconduct, the question of whether this procedure would be permissible is still at issue. Second, many reports of police misconduct are not supported by any evidence beyond statements of officers. Since the Constitution requires additional evidence, adverse inferences may only be applicable in a few cases.

If IPR chose to take this route, an officer could choose to answer questions during an investigation or choose to take the risk of being silent. Under the Oregon Supreme Court's standard, this would not be a violation of the Fifth Amendment and would eliminate the need for IPR to be connected to a disciplinary authority figure.

#### IX. A TRULY INDEPENDENT OVERSIGHT AGENCY IN PORTLAND WOULD CONDUCT INVESTIGATIONS AND HAVE THE POWER TO COMPEL OFFICER TESTIMONY

An ideal new structure in Portland would incorporate greater changes than just the power to compel officer testimony. Independence would be increased by granting IPR sole authority to conduct all investigations of citizen generated complaints of police misconduct, replacing the Internal Affairs division's efforts. IPR would hire a team of trained investigators, including some former police officers from different law enforcement agencies, and the City would ensure that IPR was adequately equipped with sufficient resources.

Regardless of whether IPR was granted sole authority to conduct investigations, IPR must be granted authority to compel testimony to facilitate any truly independent investigations. A revision in the City Code would allow IPR investigators to ask questions directly to officers involved in an incident. If officers asserted the privilege against self-incrimination, IPR could issue *Garrity* warnings and compel testimony under threat of termination.<sup>276</sup> Granting IPR power to compel officer testimony would

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privilege against self-incrimination); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999) (holding that no adverse inference may be drawn from a party's assertion of attorney-client privilege).

<sup>274</sup> *John Deere Co. v. Epstein*, 769 P.2d 766 (Or. 1989).

<sup>275</sup> *Id.* at 770.

<sup>276</sup> If a court determined that IPR does not have sufficient disciplinary authority to issue *Garrity* warnings, then IPR could arrange for the Commissioner or the Mayor to issue the warnings upon IPR's request.

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likely lead to more officers providing testimony that would help IPR impartially resolve allegations of misconduct.

For this system to be effective and challenge-proof, the authority for each component would need to be incorporated into the Portland City Code. For example, the new language might read as follows:

When conducting investigations of alleged officer actions, the IPR director is authorized to directly ask questions to Bureau members. If an officer refuses to cooperate or answer a question, the IPR director shall send a "Notice to give Garrity warning" to the Police Commissioner. Upon receipt of the warning from the Commissioner, the officer will either answer the questions presented to him by IPR or risk forfeiting his employment. If the Commissioner refuses to cooperate with providing the warning or punishment to the officer, the Mayor will order compliance.

By adding the power to compel officer testimony to IPR's authority, the City could position IPR to be one of the strongest, truly independent oversight agencies in the country.

#### X. CONCLUSION

Jason Krohn should never have been subjected to unnecessary force by a police officer in the first place. But since Jason was subjected to such mistreatment, IPR should have held the officers involved accountable. If IPR had conducted an independent investigation of that case and had authority to compel the involved officers to testify, the outcome could have been different: Jason could have received the apology he deserved and Sergeant Krohn might still have faith in the bureau. Most importantly, proper discipline and training could discourage officers from subjecting citizens to such abuse in the future. The City of Portland has an opportunity to positively affect the outcomes of many future cases like Jason Krohn's by granting IPR sufficient authority to conduct truly independent investigations.

With adequate powers and resources, citizen oversight agencies have great potential to reform police departments across the United States. To eventually change police culture, however, strong and persistent systems of oversight will be required. After implementing the changes suggested in this Note, Portland's IPR and CRC could provide other cities with an oversight model that incorporates the majority of promising methods of police accountability. Achieving the authority to compel officer testimony is just one step toward administering truly independent investigations, and truly independent investigations are just one step toward reforming the police. However, taking these steps would create an essential barrier between the overseers and the overseen, which, in turn, would help raise the public's perception of the effectiveness of oversight agencies and would deter officers from future misconduct.