

# COLLECTIVE BARGAINING AND THE TRANSFORMATION OF POLICE

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## I. INTRODUCTION

There has been no shortage of diagnoses of the problems underlying police misconduct, or police more generally, and proposals to address it.<sup>1</sup> Some proposals focus on qualified immunity and the legal standard allowing police to use lethal force.<sup>2</sup> Others focus on job protections that require more evidence and more procedure to discipline police officers as compared to other government or nongovernment employees.<sup>3</sup> Others focus on the lack of transparency in police contract negotiations and

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1. See, e.g., Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PENN. L. REV. 407 (2022); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016); Rachel Harmon, *When Is Police Violence Justified?* 102 NW. U. L. REV. 1119 (2008); Eliana Machevsky, *The California Act to Save [Black] Lives? Race, Policing, and the Interest Convergence Dilemma in the State of California*, 109 CAL. L. REV. 1959 (2021).

2. *Id.*

3. See generally Ayesha Bell Hardaway, *Time Is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not be Allowed to Delay Police Reform Efforts*, 15 STAN. J. CIV. RTS. & CIV. LIB. 137 (2019).

discipline,<sup>4</sup> the political power,<sup>5</sup> or governance<sup>6</sup> of police unions, or police union contracts, including their arbitration procedures.<sup>7</sup> Still others identify consultants that thwart the adoption and implementation of reforms.<sup>8</sup> Some blame police abuse on collective bargaining rights<sup>9</sup> or police unions per se.<sup>10</sup> Most broadly, scholars identify the root causes of police misconduct in the profound estrangement of police from poor communities of color, which is deeply intertwined with the carceral state, segregation and subordination of impoverished communities of color, and anti-blackness.<sup>11</sup> On that analysis, the problem is not police misconduct; the problem is the very structure or existence of policing, and the solution is radical transformation of policing (sometimes called abolition or defunding) rather than reform.<sup>12</sup>

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4. See generally Catherine Fisk et al., *Reforming Law Enforcement Labor Relations*, Blog, CALIFORNIA LAW REVIEW (Aug. 2020), <https://californialawreview.org/reforming-law-enforcement-labor-relations/> [<https://perma.cc/N3YE-5P35>]; Katherine J. Bies, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109 (2017).

5. See generally Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L.R. <https://ssrn.com/abstract=4059643> (Mar. 2022).

6. See generally Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017).

7. See generally Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023 (2021); Stephen A. Plass, *Police Arbitration and the Public Interest*, 37 HARV. BLACKLETTER L.J. 31 (2021).

8. See generally Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 IND. L.J. 1 (2022); Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018).

9. See generally Dhammika Dharmapala et al., *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 38 J. L. ECON. & ORG. 1 (2020).

10. See generally Falco Anthony Muscante II, *Defund the Police (Unions): Collective Bargaining is the Problem, Not Law Enforcement*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4197316](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4197316) (Jan. 2023); Benjamin Levin, *What's Wrong with Police Unions?* 120 COLUM. L. REV. 1333 (2020) (exploring the possibility that the problem is police unions, but concluding perhaps the problem is the police per se).

11. See, e.g., Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2016); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021); Carly Margolis, *Targeting Police Unions, Rethinking Reform*, 46 N.Y.U. REV. L. & SOC. CHANGE 224 (2022); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020); Ayesha Bell Hardaway, *The Rise of Police Unions on the Back of the Black Freedom Movement*, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4052024](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052024) (Jan. 2023).

12. See generally Carly Margolis, *Targeting Police Unions, Rethinking Reform*, 46 N.Y.U. REV. L. & SOC. CHANGE 224 (2022); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020).

I agree with almost all those diagnoses of the problems and see merit in scholars exploring the wide range of proposals for reform. With respect to the scholarship that has called for radical police transformation, such as abolition, and has criticized less sweeping reform proposals for enabling a continuation of the status quo,<sup>13</sup> I leave to those with greater political savvy and community-activist connections the difficult calculus about whether it is better to prioritize more ambitious or radical change, to end the cycle of failed reforms, or undertake more modest changes that could be politically feasible in the near term.<sup>14</sup> In this article, I focus on the prospects for police transformation through, or notwithstanding, police unions, and explore a few possibilities of varying degrees of ambition.

Police officers are unionized in large police departments in every state.<sup>15</sup> In all but a handful of states, legislation gives police unions the right to negotiate collectively over wages and working conditions, including the standards and procedures that apply when officers may face discipline for misconduct.<sup>16</sup> Police have a federal constitutional right to join unions,<sup>17</sup> and some state constitutions likewise protect the right of public employees to unionize.<sup>18</sup> Moreover, union contracts typically

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13. *See supra* notes 11–12.

14. Some criticism of reforms as being too modest has been leveled at works I have published. *See* Margolis, *supra* note 12. I take seriously the criticism that proposing reforms that fail to address the root problems may be worse than doing nothing at all if the proposals distract legislatures from enacting laws that will finally end the persistent and widespread state violence against poor people and people of color. For what it's worth, I personally am in sympathy with far more radical changes, and I am insufficiently networked with political and community activists to know whether ideas for modest reform that are intended to be politically feasible are worse than nothing at all.

15. Fisk & Richardson, *supra* note 6, at 722.

16. Abdul Nasser Rad et al., *Police Unionism, Accountability, and Misconduct*, 6 ANN. REV. CRIMINOLOGY 181, 185 (2022). Four states—Georgia, North Carolina, South Carolina, and Tennessee—specifically forbid collective bargaining between police and government agencies (or did in 2014). *See* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, REGULATION OF PUBLIC SECTOR BARGAINING IN THE STATES (2014). Virginia did so until a 2020 statute authorized municipalities to enact ordinances allowing recognition and bargaining with public employee unions. *See* Antonio Olivo, *Va. Public Employees Begin Union Contract Talks for First Time in Decades*, WASH. POST (NOV. 23, 2022), <https://www.washingtonpost.com/dc-md-va/2022/11/23/virginia-contract-union-talks/> [<https://perma.cc/U33T-AAFA>]. Four states—Alabama, Colorado, Mississippi, and Wyoming—had, as of 2014, no statutes or case law authorizing or prohibiting bargaining. *See* SANES & SCHMITT, *supra*.

17. *McLaughlin v. Tilendis*, 398 F.2d 287, 288–89 (7th Cir. 1968) (holding that public school teachers have a right to join unions); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D. N.C. 1969) (holding unconstitutional a North Carolina law barring public employees from joining unions); *cf.* *Smith v. Arkansas State Highway Emps.*, Loc. 1315, 441 U.S. 463, 464–65 (1979).

18. *See* Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 53–54 (2015).

require the employer to prove just cause for discipline and discharge.<sup>19</sup> And unions, which gain institutional legitimacy and rank-and-file loyalty through the job benefits and protections secured through contract negotiations, parlay that solidarity into political cohesion that makes them effective in political advocacy for at least some of the interests of some of their members.<sup>20</sup> Together, the contractual and political institutional leverage give police significant power to thwart efforts to transform, reduce, or eliminate policing as we know it, or even to discipline individual cops for misconduct or to change policies that would increase accountability.<sup>21</sup> Accountability is usually used in this context to mean workplace discipline, civil liability, or criminal prosecution for misconduct.<sup>22</sup>

The proposal I consider in this article is the elimination of police unions, or at least elimination of their rights to recognition by government and to bargain collectively. A few social science studies have found that when police gain the legal right to bargain collectively, police violence rises.<sup>23</sup> In other words, the government's duty to bargain with police unions and the contracts that flow from that legal duty have been identified as likely causes of increased police violence (including killings of Black and Brown—but not white—people).<sup>24</sup> Moreover, one study finds it is the duty to bargain, not other statutory protections for police job security, that is associated with increased police killings.<sup>25</sup> To be sure, some research finds no correlation between police collective bargaining and excessive force.<sup>26</sup> Not being an empirical social scientist, I will not assess the persuasiveness of the competing analyses. Rather, for the sake of argument, I will assume collective bargaining rights increase police misconduct generally, or police killings in particular. What I wish to explore is whether there are mechanisms short of eliminating collective bargaining rights that could significantly reduce the correlation between police collective bargaining and misconduct.

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19. See Rushin, *supra* note 7, at 1042–1043; see also Plass, *supra* note 7, at 33.

20. See Rushin, *supra* note 7, at 1037; see also Plass, *supra* note 7, at 34.

21. See Levin, *supra* note 10; Rad et al., *supra* note 16; Rushin, *supra* note 7, at 1073–74; Bell, *Police Reform*, *supra* note 11.

22. See Levin, *supra* note 10; Rad et al., *supra* note 16; Rushin, *supra* note 7; Bell, *Police Reform*, *supra* note 11.

23. Dharmapala et al., *supra* note 9; Jamein Cunningham et al., *Collective Bargaining Rights, Policing, and Civilian Deaths*, IZA INSTITUTE OF LABOR ECONOMICS DISCUSSION PAPER SERIES No. 14208 (March 2021), available at <https://www.iza.org/publications/dp/14208/collective-bargaining-rights-policing-and-civilian-deaths>.

24. Cunningham et al., *supra* note 23.

25. Dharmapala et al., *supra* note 9.

26. See *infra* notes 96–99 and accompanying text.

In raising questions about whether eliminating collective bargaining for police would increase accountability and, therefore, reduce police violence, I seek to surface some possible reforms that might be more likely to gain political traction and that might achieve much of what reformers seek by eliminating police union bargaining rights. There are considerable obstacles to abolishing or sharply limiting collective bargaining for police. Among them is police union leaders' credible threat to ensure that any legislation seeking to eliminate collective bargaining will apply to all government employees, including teachers, nurses, and office clerks.<sup>27</sup> That is a threat that must be taken seriously. Left-wing hostility to police unions and right-wing hostility to all other unions might make a powerful political coalition.<sup>28</sup>

None of the research has answered a crucial question: What is it about collective bargaining, as opposed to other job rights, that changes police conduct or police culture? If there is a causal relationship, is the cause particular contract terms or something more general about the political or legal leverage that police gain by bargaining collectively? What would police jobs and discipline look like without collective bargaining? Should the goal be to create some version of at-will employment for police, with the significant managerial discretion that would accompany it? Apart from political threats to all employee unions that accompany proposals to abolish police unions, it is worth considering whether we should be considering all workers when we assert that job security causes workers to abuse their role, or whether there is something different about those who are authorized by government to use weapons.

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27. When the District of Columbia enacted legislation in the summers of 2020 and 2021 limiting police union bargaining over discipline, the union representing District of Columbia police filed a suit in federal court alleging that the legislation violated equal protection (among other constitutional guarantees) by singling out police and denying them—and not the 44 other unions representing district employees, the right to bargain over discipline. *Fraternal Order of Police v. District of Columbia*, 502 F. Supp. 3d 45 (D.D.C. 2020). The court dismissed the suit, finding the law was rationally related to a legitimate governmental purpose. *Id.* The campaign to change D.C. police, including the legislation limiting bargaining, is described in great and valuable detail in Carly Margolis, *Targeting Police Unions, Rethinking Reform*, 46 N.Y.U. REV. L. & SOC. CHANGE 224, 243–55 (2022). Martin Malin conducted a survey of laws dramatically curtailing public employee bargaining rights in a dozen states in the conservative state legislative upheaval of 2010–2012. Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 ABA J. LAB. EMP. L. 149 (2012) (analyzing curtailment of bargaining rights in Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, and Wisconsin).

28. This is a point that Benjamin Levin raised in his essay, *supra* note 10, at 1363.

## II. POLICE ABUSE AND THE QUESTION OF MANAGERIAL FAILURE

Two heavily-reported incidents of police abuse in early 2023 illuminate the challenge of achieving police reform by focusing mainly on police collective bargaining.<sup>29</sup> One occurred in a state with no statutory police collective bargaining rights and another in a state with strong rights and other statutory protections for police officer job security.<sup>30</sup> Both incidents involved police chiefs and senior management who promoted “tough on crime” policies that license violence against communities, and both incidents involved failures of internal affairs departments created by senior management to investigate misconduct.<sup>31</sup> Neither of these cases presents significant evidence of the role of the police union in protecting bad cops or creating a culture of impunity.<sup>32</sup> But the information released thus far suggests failures of police management.<sup>33</sup>

Driving home from work, Tyre Nichols was ordered by Memphis police officers to pull over.<sup>34</sup> Reports indicate the officers had no basis for the traffic stop.<sup>35</sup> When Nichols attempted to leave on foot, five cops chased him down, beat him savagely, and impeded the efforts of the EMTs dispatched to the scene to care for him.<sup>36</sup> Nichols died of his injuries a few days later.<sup>37</sup> The officers filed a dishonest report of the incident.<sup>38</sup> When the killing provoked widespread public outrage, the Memphis Chief of Police, a Black woman who has styled herself as a reformer—although

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29. Rick Rojas et al., *What We Know About Tyre Nichols's Lethal Encounter with Memphis Police*, N.Y. TIMES (Feb. 12, 2023), <https://www.nytimes.com/article/tyre-nichols-memphis-police-dead.html> [<https://perma.cc/2XUJ-8UNW>]; Yelena Dzhanova, *Memphis Police Chief CJ Davis Protected Bad Cops and Empowered Elite Units that Became Abusive, Critics Say*, INSIDER (Feb. 6, 2023, 12:18 PM), <https://www.insider.com/critics-memphis-police-chief-cerelyn-cj-davis-abusive-cop-units-2023-2> [<https://perma.cc/3DCG-ZGUQ>].

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Rojas et al., *supra* note 29.

35. Juliana Kim, *Police Experts Say Tyre Nichols' Arrest Was Filled with Procedural Violations*, NPR (Jan. 28, 2023, 5:15 PM), <https://www.npr.org/2023/01/28/1152319138/tyre-nichols-arrest-what-went-wrong-policing-experts> [<https://perma.cc/3E42-9SFJ>].

36. Minyvonne Burke, *Fired Memphis EMT Said Police Impeded Tyre Nichols' Care by Refusing to Remove Handcuffs* (Mar. 4, 2023, 12:09 PM), NBC NEWS, <https://www.nbcnews.com/news/us-news/fired-memphis-emt-said-police-impeded-tyre-nichols-care-refusing-remov-rcna73408> [<https://perma.cc/ZX2S-3YUZ>].

37. *Id.*

38. Rachel Treisman, *Prosecutors Will Review All Cases of the Ex-Officers Charged in Tyre Nichols' Death*, NPR (Feb. 10, 2023, 11:38 AM), <https://www.npr.org/2023/02/10/1155962683/tyre-nichols-death-charged-officers-case-review-memphis-district-attorney> [<https://perma.cc/TZ3W-RF72>].

evidence of her record as a reformer is mixed—fired six officers, five of whom are Black.<sup>39</sup> She ordered the disbanding of the special unit they worked for, a unit the department had created during her tenure as chief.<sup>40</sup> Five officers were charged with second-degree murder.<sup>41</sup> The fire department fired the EMTs who failed to care for Nichols on the scene.<sup>42</sup> Perhaps that looks like the kind of accountability (firing and criminal prosecution) and structural change (disbanding the special unit) that reformers demand.<sup>43</sup> But it also raises questions about the responsibility of senior leadership for creating the unit that enabled that kind of violent behavior in the first place.

Tennessee does not confer statutory rights on public employees, other than teachers and transit workers, to bargain collectively.<sup>44</sup> However, thousands of Tennessee public employees belong to unions, and some municipalities have negotiated collective agreements with public employee unions, although the contracts may be unenforceable depending on the status of home rule in the municipality.<sup>45</sup> One could look at the Memphis police violence against Nichols and draw one of two conclusions. Either the prompt firing of the cops and EMTs is evidence of why police union contracts are bad, or the absence of clearly enforceable job rights apparently did not—in this one instance at least—dissuade the cops from engaging in egregious misconduct.

In contrast, across the country in Oakland, California, there is sobering news about the extent to which the law can effect structural reform and accountability in a police department with a long history of racist violence. Oakland police unionized decades ago.<sup>46</sup> In addition, like all California public sector employees, police enjoy a variety of procedural and substantive job protections through state civil service and other laws.<sup>47</sup> And they also are protected by the California Public Safety Officers

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Rojas et al., *supra* note 29; Dzhanova, *supra* note 29.

44. *Fulenwider v. Firefighters Ass’n Loc. 1784*, 649 S.W.2d 268, 270 (Tenn. 1982) (observing that “contracts between municipal corporations and unions representing their employees are unenforceable”); *Kraemer v. Luttrell*, 189 F. App’x. 361 (6th Cir. 2006) (holding MOU between a county and Deputy Sheriff’s Association unenforceable).

45. *Id.*

46. *See Oakland Police Officers Ass’n v. City of Oakland*, 30 Cal. App. 3d 96 (Ct. App. 1973) (showing the existence of the Oakland Police Officers Association in 1973).

47. Fisk et al., *supra* note 4; *see generally* Ann C. Hodges, *The Interplay of Civil Service Laws and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95 (1990) (explaining that California and other states have an overlay of civil service protections and collective bargaining rights for public employees).

Procedural Bill of Rights Act (originally known as the Peace Officers Bill of Rights Act and still known as POBRA), which extensively regulates the process by which police departments may investigate misconduct.<sup>48</sup> As a recent book exhaustively detailing a twenty-year legal effort to reform the Oakland Police Department observes, “[m]ore has been done to try to reform the Oakland Police Department than any other police force in the United States.”<sup>49</sup> Yet still, there appear to be serious problems in investigating violent misconduct.

In 2000, a rookie cop blew the whistle on a gang of corrupt and sadistic cops in the OPD known as the Riders.<sup>50</sup> The Riders planted evidence on innocent people, tortured arrestees, shot pet dogs for sport, and beat up innocent bystanders who objected to unlawful and violent arrests.<sup>51</sup> Although four Riders were indicted, none were convicted.<sup>52</sup> But a class action civil rights suit on behalf of 119 victims of the Riders’ abuse resulted in a settlement by a consent decree set to be lifted in 2023, after 20 years.<sup>53</sup> The class hoped that the decree would allow the OPD to prevent misconduct and investigate it when it occurred.<sup>54</sup>

Twenty years later, the federal judge overseeing the consent decree indicated that Oakland had made sufficient progress such that the consent decree would be lifted within a year.<sup>55</sup> And then the judge received a report from the consent decree’s Compliance Director finding “systemic deficiencies” in handling complaints of police misconduct.<sup>56</sup> The report was prepared by a law firm that had been hired to investigate how the OPD Internal Affairs Department handled two incidents involving the same cop, Michael Chung.<sup>57</sup> In one, according to the report, Chung had collided with a vehicle in a parking garage while driving his police vehicle, and had left

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48. CAL. GOV’T CODE § 3300 et seq.; see *Oakland Police Officers’ Ass’n v. City of Oakland*, 277 Cal. Rptr. 3d 750 (2021) (describing the procedural requirements of POBRA and holding that mandatory disclosure of complaints and reports prior to interrogation of officer suspected of misconduct is inconsistent with POBRA).

49. ALI WINSTON & DARWIN BONDGRAHAM, *THE RIDERS COME OUT AT NIGHT: BRUTALITY, CORRUPTION, AND COVER-UP IN OAKLAND 3* (2023).

50. *Id.*

51. *Id.* at 23.

52. See generally *id.*

53. *Id.* at 94.

54. *Id.*

55. David DeBolt & Darwin BondGraham, *Oakland Police Closer than Ever to Exiting Federal Oversight*, OAKLANDSIDE (Apr. 28, 2022), <https://oaklandside.org/2022/04/28/oakland-police-closer-than-ever-to-exiting-federal-oversight/> [<https://perma.cc/4Z8H-5TJ3>].

56. Order re Conclusions and Recommendations re Vehicle Collision and Elevator Discharge Incidents, *Delphine Allen v. City of Oakland*, Case No. 00-cv-04599-WHO (Jan. 18, 2023).

57. *Id.*



the scene without reporting it.<sup>58</sup> In another, several months later, Chung fired his service gun in an elevator at the police headquarters and hid the evidence of this misconduct by throwing the shell casings off a bridge into the San Francisco Bay.<sup>59</sup> He never reported either incident.<sup>60</sup> The report found that IAD and the department's Criminal Investigation Division did not properly handle the investigation into either incident and that the failure to take any action against the officer was a product of favoritism.<sup>61</sup> The report also concluded that the OPD Chief, LeRonne Armstrong, had closed the investigations without reviewing the evidence under circumstances that suggested he was showing favoritism or was eager to cover up misconduct.<sup>62</sup>

When the federal judge released the report to the public, the public furor led Oakland's newly-elected mayor to fire Chief Armstrong.<sup>63</sup> He is the twelfth chief to leave the job in twenty years.<sup>64</sup> He is also a Black twenty-four-year veteran of the OPD and rallied members of the Oakland NAACP and Black church community to protest his firing.<sup>65</sup> Former independent police auditors were not surprised that the OPD still has systemic deficiencies.<sup>66</sup> Two decades of federal court oversight had clearly accomplished some things: the failures to fairly and adequately investigate incidents of misconduct came to light, and Chief Armstrong was held accountable for it.<sup>67</sup> But it has yet to produce fair and adequate investigations into misconduct.<sup>68</sup>

Going back further in time, we now know that two of the officers who stood by and watched while Minneapolis police officer Derek Chauvin choked George Floyd to death in 2020 were rookies in their first weeks on

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58. *Id.* at 2.

59. *Id.* at 2, 8.

60. *Id.* at 3.

61. *Id.* at 10

62. *Id.*

63. Sarah Ravani, *Oakland Mayor Fires Police Chief After Report Finds Misconduct Over Officer Investigations*, S.F. CHRON. (Feb. 16, 2023, 2:14 PM), <https://www.sfchronicle.com/eastbay/article/oakland-mayor-thao-fires-police-chief-armstrong-17780304.php> [<https://perma.cc/5KFK-KV6Z>].

64. *Id.*

65. *Id.*

66. LaDoris Hazzard Cordell, *I Used to Audit Law Enforcement. Trust Me, Oakland Police Are Incapable of Investigating Their Own*, S.F. CHRON. (Jan. 27, 2023), <https://www.sfchronicle.com/opinion/openforum/article/oakland-police-department-internal-affairs-unit-17739843.php> [<https://perma.cc/J3TK-P7S7>].

67. *Id.*

68. *Id.*

the job.<sup>69</sup> We also know that Derek Chauvin had been the subject of many complaints for excessive force, and a number of Minneapolis police officers refused to work with him because they disliked his methods.<sup>70</sup> So why on earth was somebody like Chauvin training rookies? The same phenomenon happened in Oakland in 2000; the rookie who blew the whistle on the Riders was in his first weeks on the job.<sup>71</sup> Given the evidence available to supervisors that Chauvin and the Riders were violent, placing rookies with them for training is a failure of management, not (or at least not only or not primarily) a failure of the union.

Thinking about this from the standpoint of police managers, including the two Black chiefs of police in Memphis and Oakland, we can consider possible reasons why they might have created the situation that led to the scandals. Anecdotal evidence suggests both police chiefs tolerated misconduct or the risk of misconduct because the rank-and-file officers worked in sections that were popular with some elements in the local community for their “tough-on-crime” actions.<sup>72</sup> In Oakland, did Chief Armstrong look the other way during the IAD investigation of Officer Chung because he thought that if he had imposed discipline it would have been overturned in a grievance arbitration? If the five officers who beat Tyre Nichols to death had been involved in past incidents of violence or misconduct, was that information available to supervisors?

The DOJ found an array of problems in the Louisville Metro Police Department that may not be clearly tied to the union. Internal affairs investigators delayed starting investigations and abandoned them before completion; they coached officers on how to answer interview questions to exonerate themselves; they deemed federal court findings of unconstitutional stops and searches “presumptuous.”<sup>73</sup> Even where the investigators found misconduct and recommended discipline, the chief of police or other management disregarded them, or reduced the severity of the discipline without explanation.<sup>74</sup>

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69. Steve Karnowski, *Attorneys: 2 Ex-Cops Charged in Floyd's Death Were Rookies*, AP NEWS (June 4, 2020), <https://apnews.com/article/tou-thao-george-floyd-derek-chauvin-minneapolis-us-news-8c3d108016fd639137ce2b05da172f3f> [https://perma.cc/67MW-FN62].

70. Jeffrey C. Kummer & Nicholas Bogel-Burroughs, *Last 2 Officers Involved in George Floyd's Death Are Sentenced to Prison*, N.Y. TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/us/george-floyd-j-alexander-kueng.html> [https://perma.cc/2BPV-P5UU].

71. See generally WINSTON & BONDGRAHAM, *supra* note 49.

72. See *supra* notes 29, 35, 38, 56, and 63.

73. U.S. DEP'T OF JUST., C.R. DIV. & U.S. ATT'YS OFF. W.D. KY., CIV. DIV., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 77–78 (2023).

74. *Id.*

Focusing on the pernicious influence of unions may obscure the role of mid-level and senior management in creating the structures that led to the murders of Tyre Nichols, Breonna Taylor, George Floyd, or any of thousands of people before and since. There has been reliable evidence for years that officers are more likely to face discipline for excessive force or other misconduct when there is a public furor. For example, the DOJ investigation into the murder of Freddie Gray in 2014 found that rank-and-file officers complained that management ignored misconduct unless there was media or other public attention.<sup>75</sup> The March 2023 DOJ report on its investigation of the Louisville police in the wake of the murder of Breonna Taylor found the same thing: the police chief investigated misconduct “only after incidents received media attention, long after the civilians involved had objected to their treatment.”<sup>76</sup> A 2001 investigation into the Los Angeles Police Department in the wake of the Rampart scandal likewise found that rank-and-file officers believed that the leadership of the LAPD used the discipline system to protect command staff and to persecute whistleblowers and minority officers.<sup>77</sup> This kind of arbitrariness—or invidious discrimination—in the imposition of discipline tends to empower police unions generally, and it makes it particularly likely that when a chief imposes discipline, appeal or arbitration will likely overturn it. A general principle in labor arbitration or any system of fair process such as a civil service appeal is that like cases be treated alike.<sup>78</sup>

The foregoing are anecdotes, not data. But the available evidence, and the fact that cops who did not have a statutory right to bargain collectively murdered Tyre Nichols, suggests the possibility that substituting managerial discretion for collective bargaining may not by itself achieve police reform.

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75. U.S. DEP’T OF JUSTICE, C.R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 147 (2016) (“Throughout our interviews and ride-alongs with officers, we heard officers express that discipline is only imposed if an incident makes it into the press or if you were on the wrong side of a supervisor, not because of the magnitude of the misconduct.”); *see also* Fisk & Richardson, *supra* note 6, at 725.

76. U.S. DEP’T OF JUST., C.R. DIV. & U.S. ATT’YS OFF. W.D. KY., CIV. DIV., *supra* note 73, at 75.

77. Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 598 (2001).

78. Rushin, *supra* note 7.

III. THE CONTROVERSY OVER POLICE UNIONS AND VIOLENCE:  
COLLECTIVE ACTION, CONTRACT, CULTURE, OR SOMETHING ELSE?

Police have several mechanisms to claim rights on the job and to assert those rights in the context of discipline. Government employees have constitutional rights and civil service protections in most states.<sup>79</sup> These are both procedural (requiring certain processes in misconduct investigations) and substantive (protecting them against adverse job action because of off-duty affiliations or speech).<sup>80</sup> Police also have police-specific statutory protections (generically known as Law Enforcement Officers' Bills of Rights or LEOBORs) in many states; LEOBORs provide primarily procedural protections in disciplinary investigations and proceedings.<sup>81</sup> Through unionization, police have enhanced their statutory rights (such as by enactment of LEOBORs) and have gained the right to collective bargaining.<sup>82</sup> Many of these separate legal regimes offer overlapping protections, such that the elimination of one would not change another (e.g., repeal of a LEOBOR would not change a union contract, and elimination of collective bargaining and collective contracts would not eliminate rights stemming from a LEOBOR or civil service protection).<sup>83</sup>

Recent social science research has identified collective bargaining and union contracts as being correlated with more misconduct, notably violence against or killing civilians. Professor Schanzenbach found that:

policing is a surprisingly secure, well-paid job with little turnover prior to retirement age; inexperienced police officers are, all else equal, more likely to commit misconduct and, at the same time, more likely to receive high risk assignments; and bad cops are a serious problem, are identifiable, and are rarely removed or disciplined.<sup>84</sup>

Professors Dharmapala, McAdams, and Rappaport studied reported "moral character" violations between 1996 and 2015, comparing Florida

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79. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 816–17 (2012). Another argument that greater attention should be paid to police personnel policies is Max Schanzenbach, *Policing the Police: Personnel Management and Police Misconduct*, 75 VAND. L. REV. 1523 (2022).

80. See Kate Levin, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016).

81. See Nick Place, *Double Due Process: How Police Unions and Law Enforcement "Bills of Rights" Enable Police Violence and Prevent Accountability*, 52 U.S.F. L. REV. 275 (2018).

82. See Fisk et al., *supra* note 4; Fisk & Richardson, *supra* note 6.

83. Fisk et al., *supra* note 4; Fisk & Richardson, *supra* note 6; Rushin, *supra* note 7.

84. Schanzenbach, *supra* note 79, at 1527.

police departments and sheriff departments.<sup>85</sup> The police departments had collective bargaining rights during the study period while the municipalities acquired collective bargaining rights in 2003 as a result of a Florida Supreme Court decision and subsequent negotiations.<sup>86</sup> They found that the extension of collective bargaining rights to sheriffs led to a forty percent increase in violent misconduct incidents among sheriffs as compared to the police.<sup>87</sup> Cunningham, Feir, and Gillezeau studied the expansion of law enforcement collective bargaining rights across the United States from 1959 to 1979 and civilian deaths by law enforcement over the same period.<sup>88</sup> Their unpublished paper reports, controlling for other variables, that a legal right to bargain collectively increased police killings of non-whites, accounting for ten percent of all non-white civilian deaths by police between 1959 to 1988.<sup>89</sup> They found no increase in police killings of whites, no reduction in deaths of police, and the enactment of LEOBORs had no effect.<sup>90</sup> Finally, Rad has coded both union contracts and other legal protections and found that procedural protections are positively associated with subsequent police killings of civilians.<sup>91</sup>

Moreover, scholars have made alarming observations about the toxicity of police unions to public welfare generally and to Black and Brown communities in particular.<sup>92</sup> One recent survey of the literature posits a conceptual framework in which police unions, through three mechanisms (identified as “collective bargaining,” “legislative lobbying and electoral politics,” and “courts and legal action” in a diagram of the framework) create “outcomes”: “insulated police practices and culture; lack of accountability; increased misconduct and use of force.”<sup>93</sup> Yet, even while describing the causal relationship between police unions and the outcomes, that article recognizes much uncertainty about the connection.<sup>94</sup> The article, like most of the articles (social scientific or otherwise),

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85. Dharmapala et al., *supra* note 9; Cunningham et al., *supra* note 23.

86. Dharmapala et al., *supra* note 9.

87. *Id.* at 4.

88. Cunningham et al., *supra* note 23.

89. *Id.*

90. *Id.*

91. Abdul Nasser Rad et al., *Developing an Index of Police Protectionism: A Research Note*, SOCARXIV (2022), available at <https://scholar.archive.org/work/f4g3uuiukzbpajlo e5lk22bti4/access/wayback/https://files.osf.io/v1/resources/nuhcd/providers/osfstorage/623d288c938b480d2d97b854?action=download&direct&version=>; Abdul Nasser Rad, *Police Institutions and Police Abuse: Evidence from the US*, CAMPAIGN ZERO (Jan. 1, 2018), <https://campaignzero.org/research/police-institutions-and-police-abuse-evidence-from-the-us/>.

92. Rad et al., *supra* note 16, at 185.

93. *Id.*

94. *Id.*

hesitates to condemn public employee unions *per se* (“we do not wish to indict unionism in general”) even as it says a “key contributor to cohesion among police and the rise of police unionism was racial animus and resistance to the Civil Rights Movement” and police unions “cannot be understood or separated from the backlash to racial progress.”<sup>95</sup>

Two unpublished studies, however, have found little to no significant connection between police union contracts and police misconduct.<sup>96</sup> Professor Felipe Goncalves used a different way of studying the effect of expanding collective bargaining rights in Florida and nationwide. He found a slight (at most ten percent increase) and mostly statistically insignificant effect of police collective bargaining on civilian deaths.<sup>97</sup> Jacob Bell conducted a linear regression analysis of 178 police union contract discipline-related terms and the corresponding police departments’ accountability-related indicators.<sup>98</sup> He found no statistically significant relationship between contract terms and accountability metrics.<sup>99</sup>

None of these studies explains the mechanism by which collective bargaining leads to increased police violence. The research also does not disaggregate which contract provisions correlate highly with higher levels of police misconduct.<sup>100</sup> Cunningham *et al.*, concede the possibility that the “channel driving the results is not grounded in collective agreements themselves, but rather the particular culture associated with police unions.”<sup>101</sup> The literature on police culture concludes it is an enormously powerful force in shaping police conduct.<sup>102</sup> The scholarship cannot rule out the possibility that eliminating collective bargaining rights, or narrowing the subjects on which police can bargain, would have little impact.<sup>103</sup> Consequently, one approach municipalities and states could consider (and some have implemented) is limiting the duty to bargain over specific topics and prohibiting contract terms correlated with violence or

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95. *Id.* at 184, 198.

96. Felipe Goncalves, *Do Police Unions Increase Misconduct?* Working Paper, UCLA (2021), available at [https://static1.squarespace.com/static/58d9a8d71e5b6c72dc2a90f1/t/60622724b6a902732b636324/1617045285669/Goncalves\\_Unions.pdf](https://static1.squarespace.com/static/58d9a8d71e5b6c72dc2a90f1/t/60622724b6a902732b636324/1617045285669/Goncalves_Unions.pdf); Jacob Bell, *Do Police Union Contracts Hinder Accountability: A Quantitative Approach*, Working Paper, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL (April 2022), available at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1022&context=prize\\_papers](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1022&context=prize_papers).

97. Goncalves, *supra* note 96.

98. Bell, *supra* note 96.

99. *Id.*

100. *Id.*; see also Goncalves, *supra* note 96.

101. Cunningham *et al.*, *supra* note 23.

102. See, e.g., Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 CRIM. JUST. 199 (2003).

103. Cunningham *et al.*, *supra* note 23.

misconduct.<sup>104</sup> The growing literature on the content of police union contracts suggests many avenues that legislatures or courts could take to reduce the power of police unions to secure contracts impeding accountability.<sup>105</sup>

Scholarship on police unions identifies as a question for future research whether or why they have a culture that is distinct from other public employee unions, including unions of teachers, nurses, and other so-called public safety workers such as firefighters.<sup>106</sup> Professor Monica Bell has made a compelling argument that dismantling legal estrangement between the police and people who are policed is essential,<sup>107</sup> and of course that legal estrangement is a far more complex phenomenon than the labor rights of police officers. If police unions (as opposed to police officers or police departments) create a culture of racist violence and the union contract enables it, the argument for eliminating or curtailing the power of unions by eliminating their legal right to bargain becomes compelling. But can we know this, and are there risks to targeting police unions for reform efforts as opposed to other institutions in policing? And what are the alternatives?

#### IV. WHITHER POLICE LABOR RELATIONS REFORM

In the summer of 2020, public outrage over the police killings of George Floyd and Breonna Taylor manifested in massive street protests<sup>108</sup> that made it possible to believe that legislatures might adopt significant

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104. In California, for example, police departments have had no duty to bargain over a new use of force policy for decades. *San Jose Peace Officers' Ass'n v. City of San Jose*, 78 Cal. App. 3d 935 (Ct. App. 1978). However, implementation of discipline for violations of a new use of force policy is a subject over which the agency must bargain under the doctrine that management must often bargain over the effects of a new policy even if the policy itself is not subject to the mandatory duty to bargain. Of course, any state that has such rules could narrow the duty to bargain over either the policy itself or its effects, thus enabling faster changes of policy. See *Claremont Police Officers Ass'n v. City of Claremont*, 39 139 P.3d 532 (Cal. 2006) (providing that there is no duty to bargain over adoption of a study of racial profiling in traffic stops that requires all officers to provide data about the race of people stopped for traffic violations); *Dibb v. County of San Diego*, 884 P.2d 1003 (Cal. 1994) (holding that a county could amend its charter to create citizens review of police and sheriff departments, but not addressing whether it is a mandatory subject of bargaining).

105. See Rad et al., *supra* note 91.

106. *Id.*; see also Levin, *supra* note 10.

107. Bell, *Police Reform*, *supra* note 11.

108. See *Protests Break Out Around The US Following Deaths Of George Floyd, Breonna Taylor*, USA TODAY (July 23, 2020), <https://www.usatoday.com/picture-gallery/news/nation/2020/05/28/protests-break-out-around-us-following-death-george-floyd/5278673002/> [<https://perma.cc/P7BK-GZ73>].

reforms to police labor relations and oversight. Along with many other scholars and commentators, I proposed many reforms.<sup>109</sup> Many states have enacted reforms,<sup>110</sup> but it is too soon to know which have had significant effects. To the extent, however, that the empirical studies lead to the conclusion that banning collective bargaining is necessary (or even sufficient) to reduce police violence, time will tell whether the last three years' worth of reforms will make a difference.

Some reforms that were intended to increase accountability seem to have had the opposite effect. In Los Angeles, for example, a reform enacted in 2017 known as Charter Amendment C increased the role of civilian review panels in examining how the Los Angeles Police Department (LAPD) metes out discipline to individual cops.<sup>111</sup> In 2022, a study conducted by the LAPD found that all-civilian review panels were significantly more lenient than police department disciplinary appeals processes.<sup>112</sup> Under the LAPD system, the Chief of Police does not have the power to fire an officer; any officer who is recommended for firing can appeal the decision to a three-person panel known as a Board of Rights.<sup>113</sup> Prior to the enactment of Measure C, the Board of Rights consisted of two police officers and one civilian, but Measure C gave officers the choice of

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109. In the spring of 2020, I joined a group with a collective few hundred years of legal experience to study what we could contribute to the effort to reform police by reforming police labor relations. The group consisted of a retired federal judge who was a civil rights lawyer before going on the bench and as a judge oversaw the Riders consent decree against Oakland Police Department; a retired California Supreme Court and Court of Appeals Justice and emeritus law professor of labor law; a retired California Superior Court Judge and mediator who was a labor and civil rights lawyer before becoming a judge; a nationally respected arbitrator; and a retired Director of the California Department of Personnel Administration and lawyer specializing in representing law enforcement and firefighter unions. Fisk et al., , *Reforming Law Enforcement Labor Relations*, CAL. L. REV. ONLINE (Aug. 2020). We had difficulty finding a California legislator who would carry a bill embodying any of them. One legislator introduced a bill embodying one of our proposals. It died in committee.

110. See Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> [<https://perma.cc/4S7M-WGXR>].

111. See *Los Angeles, California, Civilian Review of Police Disciplinary Matters, Measure C (May 2017)*, BALLOTPEDIA, [https://ballotpedia.org/Los\\_Angeles,\\_California,\\_Civilian\\_Review\\_of\\_Police\\_Disciplinary\\_Matters,\\_Measure\\_C\\_\(May\\_2017\)](https://ballotpedia.org/Los_Angeles,_California,_Civilian_Review_of_Police_Disciplinary_Matters,_Measure_C_(May_2017)) [<https://perma.cc/AFL2-J9LD>] (last visited Mar. 23, 2023).

112. See Josh Cain, *Study of LAPD's Civilian Disciplinary Boards Offers Critical Look into How They Operate*, L.A. DAILY NEWS (Nov. 23, 2022), <https://www.dailynews.com/2022/11/23/study-of-lapds-civilian-disciplinary-boards-offers-critical-look-into-how-they-operate/> [<https://perma.cc/Z68A-QD8H>].

113. See *id.*



an all-civilian Board of Rights.<sup>114</sup> The percentage of cases in which the Board chose a punishment less severe than the chief recommended rose from 55 percent in 2019 to 76 percent in 2021.<sup>115</sup> Mixed panels agreed with the chief's recommendation half the time; all civilian panels overruled the chief in more than two-thirds of cases.<sup>116</sup> This has led the newly-elected mayor and city council to propose the repeal of Charter Amendment C in order to ensure that LAPD management and officers alike are accountable for police misconduct.<sup>117</sup> The considerable literature on civilian review boards and their effect on reported incidents of violent police misconduct suggests that civilian oversight, although by now very widespread, can be toothless unless it is designed carefully to include adequate review and an independent investigative agency. Design of the oversight and racial composition of the police force matter.<sup>118</sup>

As the search for effective reform continues, it is thus important not only to consider which reforms have a chance of passing but also those that will avoid unintended consequences. Hence, I return here to the challenge with which I began. Even if collective bargaining is correlated with increased police misconduct nationwide, there remain many ways to regulate collective bargaining to increase accountability (and therefore, presumably, reduce misconduct) without resorting to a system of managerial discretion that seems, from the evidence noted above in Part II, uncertain in its ability to increase accountability. Several proposals are described below. Some have been enacted in part, although most have not. But they remain reforms that cities could negotiate for, or that legislatures could mandate, to reform collective bargaining. It is also worth noting that

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114. See Frank Stoltze, *LA's Measure C Upends Politics Around Police Discipline*, LAIST (May 4, 2017), <https://www.kpcc.org/news/2017/05/04/71462/la-s-measure-c-upends-politics-around-police-disci/> [<https://perma.cc/6Z42-PFY4>].

115. See Libor Jany, *All Civilian Review Panels Are More Lenient with LAPD Officers, Report Finds*, L.A. TIMES (Nov. 24, 2022), <https://www.latimes.com/california/story/2022-11-24/lapd-inspector-general-report-finds-civilian-discipline-panels-still-more-lenient> [<https://perma.cc/Z9U2-FLD5>].

116. See *id.*

117. Libor Jany & Richard Winton, *Mayor Bass Calls for Overhaul of LAPD Discipline System, More Detectives to Work Cases*, L.A. TIMES (Feb. 20, 2023), <https://www.latimes.com/california/story/2023-02-20/mayor-bass-lays-out-plan-for-lapd-public-safety> [<https://perma.cc/69L7-8RSZ>].

118. On the growth of civilian review since 2020, see Sharon R. Fairley, *Survey Says: The Development of Citizen Oversight of Law Enforcement Skyrockets in the Wake of George Floyd's Killing*, 31 S. CAL. REV. L. & SOC. JUST. 283 (2022). For recent evidence of the effect of civilian review, see Andrea M. Headley, *Accountability and Police Use of Force: Interactive Effects Between Minority Representation and Civilian Review Boards*, 24 PUB. MGT. REV. 1682 (2022). A recent effort to theorize the determinants of institutional design that create effective community control is K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679 (2020).

other scholars, including some who are perceived as being less oriented toward civil rights than some police critics, have proposed the same or similar changes.<sup>119</sup> Four categories of reform are discussed below.<sup>120</sup>

One is increased transparency. Transparency could be increased both in contract negotiation and in disciplinary record-keeping. The idea behind increasing transparency in contract negotiation is that the blame for union contracts that make it difficult to identify, discipline, and weed out bad officers should fall both on the union and on the municipal officials who negotiate with the union. The public has a way to hold the public officials to account for what they agree to even if they cannot control what the union says or does: voting. In Washington, D.C., the voters went so far as to remove all disciplinary matters from the duty to bargain.<sup>121</sup>

Transparency in collective bargaining could be achieved by requiring municipalities to make public their proposed bargaining positions far enough in advance of the contract renegotiation to allow their constituents to express their views about policies and priorities.<sup>122</sup>

Some jurisdictions have already increased transparency in record-keeping. California enacted two statutes expanding public access to police disciplinary records. The Right to Know Act of 2018,<sup>123</sup> as expanded in 2021, allows public access to records of some of kinds of police misconduct. The records that now must be disclosed include those of:

- any incident where a law enforcement officer fired a gun or used force that resulted in substantial injury or death, regardless of whether the department found the officer acted improperly;<sup>124</sup>
- sustained findings that an officer committed sexual assault on duty or dishonesty in the investigation, reporting, or prosecution of a crime or police misconduct;<sup>125</sup>

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119. See, e.g., Daniel DiSalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, MANHATTAN INST. 7–9 (Jan. 12, 2021), <https://www.manhattan-institute.org/enhancing-accountability-collective-bargaining-and-police-reform> [<https://perma.cc/6EH5-8DMQ>].

120. I will not address changes to the law of qualified immunity on the theory that qualified immunity is less directly related to labor relations than other topics addressed here.

121. Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336, 67 D.C. Reg 9148 (July 22, 2022).

122. Rachel Moran has written significant work on transparency of police disciplinary matters. See Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153 (2019); Rachel Moran & Jessica P. Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237 (2021).

123. CAL. PENAL CODE § 832.7 (West, Westlaw through Ch. 1 of 2023-24 1st Ex. Sess).

124. *Id.* § 832.7(b)(1)(A) (Westlaw).

125. *Id.* §§ 832.7(b)(1)(B)–(C) (Westlaw).

- sustained findings that an officer used unreasonable or excessive force;<sup>126</sup>
- sustained findings that an officer failed to intervene against another officer who used unreasonable or excessive force;<sup>127</sup>
- sustained findings that an officer made an unlawful arrest or search;<sup>128</sup>
- sustained findings that an officer discriminated on the basis of several protected traits.<sup>129</sup>

Effective in 2023, California has also increased data available to address the “wandering officer” problem and strengthened the agency charged with enforcing the new law.<sup>130</sup> The law disqualifies from employment as a law enforcement officer anyone convicted of specified felonies, or anyone who has been adjudicated in an administrative, military, or civil judicial process as having falsified records, bribery, or perjury.<sup>131</sup> It requires the California Department of Justice to provide the Commission on Peace Officer Standards and Training (POST) with specified conviction data for all persons known to be current or former law enforcement officers, and it creates an accountability division within POST to review investigations conducted by law enforcement agencies and conduct additional investigation into serious misconduct.<sup>132</sup> In addition, the law requires all law enforcement agencies to report to POST the employment or firing of any officer and “any complaint, charge, allegation, or investigation into the conduct of a[n] [ ] officer that could render the officer subject to suspension or revocation” of the state-mandated certification of eligibility to be a law enforcement officer.<sup>133</sup> Finally, the legislation requires California to connect to any federal database of decertified officers to prevent them from moving from state to state and regaining employment as a law enforcement officer after being decertified elsewhere.<sup>134</sup> Other states have adopted similar or more

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126. *Id.* § 832.7(b)(1)(A)(iii) (Westlaw).

127. *Id.* § 832.7(b)(1)(A)(iv) (Westlaw).

128. *Id.* § 832.7(b)(1)(E) (Westlaw).

129. *Id.* § 832.7(b)(1)(D) (Westlaw).

130. California Senate Bill 2 is codified as CAL. GOV'T CODE § 1029 (West, Westlaw through Ch. 1 of 2023-24 1st Ex.Sess); *See generally* Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676 (2020).

131. GOV'T § 1029 (Westlaw)

132. The new POST requirements and processes are explained at Senate Bill 2, POST, <https://post.ca.gov/sb-2> [<https://perma.cc/95VW-97ZC>] (last visited Mar. 20, 2023).

133. *See id.*

134. *See id.*

expansive reforms.<sup>135</sup> Illinois has created an officer misconduct database.<sup>136</sup> Connecticut has expanded its public records act to allow public requests for disciplinary records even if union contracts treat them as confidential.<sup>137</sup>

A second category of reform recognizes that transparency alone is limited for many reasons, including that the public is unlikely to effectively oversee police administration.<sup>138</sup> All (except police unions) agree it is necessary to change procedures for police disciplinary proceedings. The problems with police arbitration are by now well-known thanks to the empirical work of Professor Stephen Rushin.<sup>139</sup> In an empirical study of police arbitration, Professor Rushin found that arbitrators reduced or overturned punishment in about half of cases.<sup>140</sup> Of the 640 arbitration decisions in his data set, about half involved technical violations, but about a quarter were for use of force, and just under a quarter were for dishonesty.<sup>141</sup> The arbitrator reinstated nearly half of the officers that management fired, and 61 percent of the suspensions were reduced or overturned.<sup>142</sup> About 30 percent of arbitrators who reduced or reversed discipline cited procedural problems in the investigation, including lack of notice to the officer about the policy the officer violated.<sup>143</sup> In slightly over one third of the cases, the arbitrator found the evidence insufficient.<sup>144</sup> But in 64 percent of cases, the arbitrator found the punishment disproportionate to the infraction.<sup>145</sup>

In response, Professor Michael Green, who is also an arbitrator, asserts that the problem is not that arbitrators are consistently failing to do their job, or that they overturn discipline because they are biased in favor of

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135. See *Law Enforcement Legislation: Significant Trends 2022*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 22, 2022), <https://www.ncsl.org/civil-and-criminal-justice/law-enforcement-legislation-significant-trends-2022> [<https://perma.cc/4YSP-E38L>].

136. See *An Introduction to the Citizens Police Data Project*, INVISIBLE INST., <https://invisible.institute/police-data> [<https://perma.cc/VW7W-TQWC>] (last visited Mar. 23, 2023).

137. Section 1-213 of the Connecticut Public Records Act requires disclosure of personnel records. Conn. Gen. Stat. Ann. § 1-213 (West 2004). Although there are exemptions, there is no blanket exemption for police officers' personnel records. See, e.g., *Citizens Police Data Project*, *supra* note 136.

138. Kate Levin, *Discipline and Policing*, 68 DUKE L.J. 839 (2019).

139. See Rushin, *supra* note 7; Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019).

140. Rushin, *supra* note 7, at 1031.

141. See *id.* at 1054.

142. See *id.* at 1030, 1059.

143. See *id.* at 1061.

144. See *id.*

145. See *id.*

police.<sup>146</sup> The problem, Green contends, is that they are doing what labor contracts require them to do because management failed to follow the contract or policy in imposing discipline.<sup>147</sup> He asserts, with some basis, that “[u]nderstanding why labor arbitrators review and affirm or reverse disciplinary actions taken against police officers has been missing from the key arbitration decisions” discussed in the media and by scholars.<sup>148</sup> We do need much more transparency about police arbitration claims and decisions, as indeed I have previously proposed.

As for discipline procedures, at least three procedures should be changed. First, evidentiary standards under many arbitration systems “tilt too far in the direction of protecting the officer from [] discipline.”<sup>149</sup> Instead, the following practices should be required for arbitrations or other hearings on misconduct. Arbitrators should permit admission into evidence of all past complaints and disciplinary action involving the officer. There should be no contractual or administrative time-bar to the consideration of past complaints or discipline. Arbitrators may decide to discount evidence of long-ago discipline or other extenuating circumstances.

Additionally, arbitrators should deem irrelevant evidence of exonerations for similar conduct if the department has since taken a new approach to discipline and notified officers of the change in practice. This would allow department management to prohibit practices that previously were tolerated and increase the severity of punishment for practices that are already prohibited.

Another evidentiary concern involves the common indictment of police disciplinary procedures that officers can hide or explain away evidence of misconduct by turning off a vehicle or body camera, file false arrest reports, and then, when the misconduct comes to light in some other fashion, decline to make a statement until they have examined all the evidence.<sup>150</sup> To address this, arbitrators in disciplinary hearings should be required to apply an inference adverse to any officer who fails to use a vehicle or body camera or declines to be interviewed before reviewing the evidence.

To address Professor Rushin’s finding that 64 percent of arbitrators found punishment disproportionate to the infraction, arbitrators should be required to consider the public interest and require the officer accused of

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146. See Michael Z. Green, *Black and Blue Police Arbitration Reforms*, 84 OHIO STATE L.J. 243 (forthcoming 2023).

147. See *id.*

148. *Id.* at 25.

149. See Fisk et al., *supra* note 4; See also DiSalvo, *supra* note 119, at 8.

150. See Stephen Rushin & Atticus DesProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 678–80 (2019).

misconduct provide evidence demonstrating that he has made efforts to rectify the behavior that led to the incident before ordering his reinstatement. Courts can also take a major step toward upholding discipline by applying the well-known public policy exception to the enforcement of arbitration awards. If an arbitrator overturns or reduces the severity of discipline in any case when an officer has used excessive force, falsified evidence, filed a false report, or engaged in invidious discrimination in performance of the job, a court can find that the arbitrator's award is contrary to public policy and decline to enforce it.<sup>151</sup>

Moreover, the rules for awarding make-whole relief, including backpay, to any officer who has been suspended, demoted, or discharged should be changed to address the financial concerns departments may have about imposing discipline only to have it overturned later, resulting in the department having to pay substantial sums to the officer. For example, in the criminal prosecution of the Oakland Riders, the jury acquitted one officer.<sup>152</sup> (Others were not convicted after a hung jury.) The City of Oakland paid \$1.5 million to the officer who was acquitted, and he went on to work for other police departments.<sup>153</sup> To address this, the law should require that no back-pay shall be awarded for any period during which a criminal investigation or prosecution, or other legal proceedings, are pending against an officer. If a case is serious enough that the department suspends or fires an officer during a criminal or civil investigation or trial, even if the officer is ultimately exonerated, there should be no compensation.

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151. See *City of Seattle, Seattle Police Dep't v. Seattle Police Officers' Guild*, 484 P.3d 485, 489, *review denied sub nom. City of Seattle v. Seattle Police Officers' Guild*, 493 P.3d 740 (2021) (vacating arbitrator's decision reinstating an officer who punched a handcuffed woman in the face "hard enough to cause an orbital fracture" because the arbitrator's decision was contrary to the explicit public policy against excessive force in policing. The Court also found the officer's excuses—that he was provoked by the woman who kicked him, and his patience was exhausted—were insufficient as a matter of law to justify beating a handcuffed suspect). Under limited circumstances, the public policy exception to the enforcement of labor arbitration awards allows a court to decline to enforce the award when the award would require the employer to do something that is contrary to public policy. See also *E. Associated Coal Co. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 58 (2000) (reinstating a police officer who has engaged in the use of excessive force or has committed some other serious infraction could be deemed contrary to public policy).

152. See Henry K. Lee, *\$1.5 Million Settlement for Former "Rider" / Ex-Cop Says He Was Slandered, Wants to Move on, Raise His Kids*, SFGATE (June 29, 2007), <https://www.sfgate.com/bayarea/article/OAKLAND-1-5-million-settlement-for-former-2583817.php> [<https://perma.cc/7J84-HP9A>].

153. See Bay Area News Group, *Oakland: Where "the Riders" Are Today*, EAST BAY TIMES (Aug. 15, 2016), <https://www.eastbaytimes.com/2012/12/12/oakland-where-the-riders-are-today/> [<https://perma.cc/C6VP-FNA7>].

A third category of reform could increase accountability of unions to the officers they represent and orient the union more toward the law-abiding rather than the lawless. Law enforcement agencies are organized in a hierarchy.<sup>154</sup> Higher-ranking officers (lieutenants, captains) have authority and responsibility to supervise and discipline lower-ranking officers.<sup>155</sup> If the same union represents both the supervisor and the subordinate, the supervisor may fear alienating the union, or even retaliation by the union representatives, if the supervisor punishes another member of the same bargaining unit.<sup>156</sup> And because lower-ranking officers typically outnumber supervisors,<sup>157</sup> and unions are typically governed by majority rule,<sup>158</sup> the minority of supervisors may justifiably fear that the union leadership will consider its duty to protect the majority from discipline. To eliminate such conflicts of interest, law enforcement officers above the rank of sergeant should not be in the same bargaining unit as officers at the rank of sergeant and below.

Additionally, to the extent that police unions have used their power as the exclusive bargaining representative to create a culture of impunity, we should look for ways to empower “good cops” to work with good supervisors and management to change the culture of the department from within. Ideally, police unions facilitate accountability by protecting officers from unfair discipline when they exercise discretion and judgment or blow the whistle on misconduct. Unions prevent scapegoating a single officer when blame for misconduct lies in systemic problems. But some union leaders believe, or feel compelled to assert, that it is necessary to oppose any accountability for individual officers, even in cases of

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154. See U.S. DEP’T OF JUST., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING, POLICING 101 2 (2022), [https://www.justice.gov/file/1376626/download#:~:text=Police%20departments%20are%20organized%20in,title%20is%20Commissioner%20or%20Superintendent\).&text=Depending%20on%20the%20size%20of,within%20an%20agency%20will%20vary](https://www.justice.gov/file/1376626/download#:~:text=Police%20departments%20are%20organized%20in,title%20is%20Commissioner%20or%20Superintendent).&text=Depending%20on%20the%20size%20of,within%20an%20agency%20will%20vary) [https://perma.cc/YH9W-EVXM].

155. See *Sworn Police Officer Class Titles and Job Descriptions: Rank Structure*, L.A. POLICE DEP’T., <https://www.lapdonline.org/training-division/join-the-team/rank-structure/> [https://perma.cc/WQM6-S2QB] (last visited Mar. 23, 2023).

156. See Mark DeRosia, *Police Chiefs’ Perceptions of Supervisors’ Membership in Subordinate Officers’ Unions at 19–20* (2019) (Ph.D. dissertation) (on file with Walden University).

157. See Daniel DiSalvo, *The Problem with Police Unions*, NAT’L AFFS. (2020), <https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions> [https://perma.cc/PC75-EEGJ] (citing 2019 statistics from the Bureau of Labor which found that approximately 55% of the nation’s 712,336 officers were union members (~391,784 officers) while 40.6% of the nation’s 80,802 police supervisors and detectives were union members (~32,320 supervisors)).

158. See *Frequently Asked Questions – How Does Organizing Work?*, UNIV. OF ROCHESTER, <https://www.rochester.edu/provost/assets/PDFs/FAQonUnionElectionProcessesOnCampus.pdf> (last visited Mar. 24, 2023).

egregious misconduct, because of endemic arbitrariness in the disciplinary process.<sup>159</sup> Their distrust of management is, in some cases, based on a well-founded fear that officer discipline will be influenced by political or media pressure or personal favoritism rather than the degree of misconduct or officer culpability.<sup>160</sup> Improving communication and trust between labor and management will ameliorate the distrust that is an obstacle to effective policy implementation and accountability.

A framework for groups representing rank-and-file officers to confer regularly with management could build trust and address concerns about officer misconduct without undermining the terms of the union-management Memorandum of Understanding (MOU). Such a framework would translate the diversity of perspectives among rank-and-file officers into policymaking and implementation by improving two-way communication between rank-and-file officers and management. It could provide a voice for minority groups within a department without threatening the complex set of compromises reflected in the MOU or the hard-won gains in compensation, disciplinary protections, and other economic terms of employment. Recognition of the minority union might reduce the threat of retaliation against officers who report or refuse to go along with misconduct, although there is the possibility that officers would be dissuaded from publicly affiliating with a minority union for fear of retaliation. The minority unionism proposed here could be groups of officers organized around racial or ethnic identity or could be any group of officers who share views held by a numerical minority. Minority unionism, in other words, is not solely about racial minorities. However, it could build on the various ethnic or racial caucuses that exist in many police departments.<sup>161</sup>

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159. For a view of the importance police unions assign to labor contracts and arbitration, peruse the website of the Fraternal Order of Police. *Labor Services*, FRATERNAL ORDER OF POLICE, <https://fop.net/labor/labor-services/> [<https://perma.cc/L68T-9C52>] (last visited May 20, 2023).

160. See Darrel W. Stephens, *Police Discipline: A Case for Change*, NEW PERSPS. POLICING 8 (2011), <https://www.ojp.gov/pdffiles1/nij/234052.pdf>.

161. A number of scholars have documented the existence of identity-based groups in police departments and the way in which they facilitate debate and dissent from the position of the police union, particularly in relation to how officers should treat nonwhite communities. See, e.g., David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1230–31 (2006); David Alan Sklansky, *Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-In*, 9 SOC. CRIME, L. & DEVIANCE 13 (2007); Antonio G. Guajardo, Jr., *Incorporation of Latino Police Officers into the Milwaukee Police Department: How a Group of Latino Police Officers Shed the “Blue Shield” for a Latino Identity* (2015) (Ph.D. dissertation, University of Wisconsin, Milwaukee).



The proposed framework builds on a form of minority union representation that existed in California for teachers' unions until 1976.<sup>162</sup> It would allow representatives from an array of employee organizations, including perhaps the union chosen by the majority, to confer with management in a forum that would allow management to hear the range of views of the rank-and-file. The scope of the duty to meet and confer with minority organizations would extend to any topic relating to conditions of police employment *other than terms in the existing MOU*. The proposal would leave the majority union as the sole employee representative with the power to negotiate a Collective Bargaining Agreement (CBA), the equivalent to an MOU in California for government employees, on economic conditions and discipline. This limit on subjects of bargaining for minority unions is necessary to avoid destabilizing existing bargaining relationships and MOUs and the department's budget expectations based on the MOU. It would prevent departments from reducing economic terms of employment and job protections enjoyed by all officers in exchange for responsiveness to minority unions.

The duty to meet and confer with minority organizations over subjects not covered in the MOU would not entail entry into a binding MOU on those subjects and, thus, would not contravene court decisions regarding the mandatory subjects of bargaining, such as use of force policies and their effects. The goal would be to improve development of, communication about, and implementation of policies, not to increase constraints on management.

Scholars have found that when public sector workers, through their chosen organizations, are given a voice in areas where they have no legal right to bargain, the labor organization's role is transformed and better policies result.<sup>163</sup> For example, when school boards unilaterally impose performance standards on teachers, unions often seek to protect teachers from adverse actions based on failure to meet the standards.<sup>164</sup> A similar finding was made when Oakland used a peer review system for reviewing officer uses of force.<sup>165</sup> When the union works with the school board to

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162. California's experience with members-only representation for public school teachers prior to 1976 is described in Darrell Johnson, Note, *Collective Bargaining and the California Public School Teacher*, 21 STAN. L. REV. 340 (1969), and, more recently, in Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 ABA J. LAB. & EMP. L. 1 (2011).

163. Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369 (2009).

164. *Id.*

165. This is discussed, with citations to the literature, in Fisk & Richardson, *supra* note 6, at 760–66.

develop the standards and use peer review to implement them, unions become the protectors and stewards of the standards rather than the opponents, and this leads to greater levels of attrition among poor performers.

Song Richardson and I are not the only ones to suggest that the law should give identity caucuses an institutional role in the negotiation of union contracts. Professor Michael Green has recently proposed to empower Black police officers and Black communities to have greater influence, as collectives, in the negotiation of union contracts, the formulation of policy, and the administration of discipline.<sup>166</sup> He cites data indicating that Black and white police officers understand the role of racism in law enforcement differently.<sup>167</sup> In 2017, 92 percent of white officers surveyed, but only 29 percent of Black officers, believed that Blacks have equal rights in the U.S., and only 27 percent of white officers as compared to 70 percent of Black officers believed that protests against police violence are motivated by a genuine desire for police accountability.<sup>168</sup>

This proposal could solve many of the unique challenges facing police unions in the quest for reform. It would ameliorate the isolation that many police unions have from the rest of the labor movement, especially the disconnection from social movement unionism that has reinvigorated teachers' unions and repaired their relations with minority communities.<sup>169</sup> It is preferable to the other reform proposals that have been suggested, such as further restricting the subjects on which police labor unions are permitted to negotiate (such as by excluding discipline as a subject of bargaining).<sup>170</sup> It is essential to martial the support of the police force to implement policy. The more discretion, skill, and expertise is required for

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166. See Green, *supra* note 146.

167. *Id.*

168. *Id.* at 40 (quoting Eli Hager & Weihau Li, *White US Police Union Bosses Protect Officers Accused of Racism*, GUARDIAN (June 10, 2020), <https://www.theguardian.com/us-news/2020/jun/10/police-unions-black-officers-white-leaders>).

169. See Hamilton Nolan, *It's Time to Kick Police Unions out of The Labor Movement. They Aren't Allies*, GUARDIAN (June 13, 2020), <https://www.theguardian.com/commentisfree/2020/jun/13/police-unions-afl-cio-labor-movement> [<https://perma.cc/S2EL-7VLE>]; See also Michelle Fine & Michael Fabricant, *What It Takes to Unite Teachers Unions and Communities of Color*, NATION (Sept. 24, 2014), <https://www.thenation.com/article/archive/what-it-takes-unite-teachers-unions-and-communities-color/> [<https://perma.cc/Q2ZV-66P3>].

170. See The Editorial Board, *Don't Let Labor Agreements Thwart Police Accountability*, BOSTON GLOBE (June 4, 2020), [https://www.bostonglobe.com/2020/06/04/opinion/dont-let-labor-agreements-thwart-police-accountability/?et\\_rid=726644833&scampaign=todayshadlines:newsletter](https://www.bostonglobe.com/2020/06/04/opinion/dont-let-labor-agreements-thwart-police-accountability/?et_rid=726644833&scampaign=todayshadlines:newsletter) [<https://perma.cc/NT9T-437Z>].

the work, the more important it is to ensure that line officers are given an opportunity to voice their concerns.

Finally, as local governments consider radical reforms to the structure of policing (such as reassigning certain tasks to civilian personnel rather than sworn officers),<sup>171</sup> and state legislators propose changes to the law governing police discipline or the immunity from civil rights liability currently accorded to officers and municipalities,<sup>172</sup> it is important that police departments be engaged in equally forward-thinking changes to how they develop and implement policies in contentious areas. If, for example, changes in civil rights law increase the damages that municipalities pay for officer misconduct, there should be a strong incentive to act on the contemporary political pressure around policing and change the law and the contract terms governing officer discipline. Police departments that have built effective mechanisms to communicate with groups of officers will be better positioned to respond to whatever new budget and legal environment results from state or municipal legislative changes regarding policing.

A fourth category of possible reforms addresses the ways in which police organizations block reform through political or administrative efforts. Scholars have shown that police organizations have attempted to block the enactment or implementation of reforms by controlling information available to departments and to rank-and-file officers.<sup>173</sup> Professors Eagly & Schwartz found that two organizations controlled by police unions, PORAC and Lexipol, disseminated misinformation about policy—especially about policy changes that restrict the use of force or otherwise constrain how cops interact with the public.<sup>174</sup> By disseminating false or out-of-date information, and preventing dissemination of accurate information, these organizations prevented policy change from trickling down to behavioral change.<sup>175</sup> Moreover, when officers face discipline for violating the new law or policy, they can argue they lacked accurate

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171. See *B D Wilkerson, Civilian Services*, 63 FBI LAW ENF'T BULL. 21, 21–22 (1994), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/civilian-services> [<https://perma.cc/T6CP-LQ37>].

172. See Rashawn Ray & Neily Clark, *A Better Path Forward for Criminal Justice: Police Reform*, BROOKINGS (Apr. 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-police-reform/> [<https://perma.cc/YBG7-UQBT>].

173. See Eagly & Schwartz, *Lexipol's Fight Against Police Reform*, *supra* note 8; Eagly & Schwartz, *Lexipol: The Privatization of Police Policymaking*, *supra* note 8.

174. See Eagly & Schwartz, *Lexipol's Fight Against Police Reform*, *supra* note 8, at 52–54.

175. See *id.*

information about new legal standards.<sup>176</sup> Especially if the department has provided inaccurate information by relying on PORAC or Lexipol, officers who violate law or policy cannot be disciplined and are entitled to qualified immunity.<sup>177</sup> In addition, police union political power can influence the hiring and firing of police chiefs, which forces chiefs to balance advocating for the department and ensuring accountability.

I propose two solutions to address the serious problem that Professors Eagly and Schwartz have identified: one *ex ante* and one *ex post*. *Ex ante*, the law should prohibit the dissemination of inaccurate information. Litigation has been brought to establish that PORAC and Lexipol are responsible for disseminating accurate information, and police departments cannot rely on them to provide training materials if the materials have been inaccurate.<sup>178</sup> *Ex post*, the law could change the standard of just cause for discipline so that ignorance or misapprehension about the law is no excuse for misconduct. Further, reliance on inaccurate information after a change in law is neither the basis for qualified immunity nor an arbitrator's decision to overturn discipline. This would reduce the utility of the PORAC/Lexipol strategy.

Finally, a powerful critique of police unions concerns their political influence. It is said they exercise disproportionate influence in the formation of public policy, as all public sector unions are sometimes said to do, and they use it in particularly pernicious ways.<sup>179</sup> For example, when former San Francisco District Attorney Chesa Boudin launched an effort to investigate and prosecute police misconduct and violence, the successful campaign to recall him was shaped by police union narratives.<sup>180</sup> But this strikes me as an area of proposed reform that is unlikely to yield success as long as it is focused on limiting union power. Lobbying and campaign contributions currently enjoy significant First Amendment protection.<sup>181</sup>

I see no constitutional way to restrict police union political power. Rather, the best currently available path is to increase political pressure on

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176. *See id.* at 55 (explaining that misinformation regarding use of force policies could subject officers to criminal liability if the officers act on the misinformation and violate existing policies).

177. *See id.*

178. *See id.*

179. *See* Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, *GUARDIAN* (June 23, 2020), <https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la> [<https://perma.cc/F4RV-M2HF>].

180. *See* Akela Lacy, *What's Stopping Chesa Boudin?*, *INTERCEPT* (June 3, 2022), <https://theintercept.com/2022/06/03/san-francisco-chesa-boudin-recall/> [<https://perma.cc/GM3P-2KAG>].

181. *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 355 (2010).

the union, both through the transparency measures discussed above that will hold elected officials accountable for tolerating or enabling police misconduct, and through organizing on the other side. California is an example of the use of political power to increase police accountability. The California Legislature enacted, and Governor Newsom signed, eight bills in 2021 and another half-dozen in 2020 aimed at reducing police violence and increasing accountability.<sup>182</sup>

## V. CONCLUSION

The recent social science research finding a correlation between the extension of collective bargaining rights to police and increased police violence underscores the perception of activists and scholars that police unions enable bad cops to, quite literally, get away with murder. But the practical impossibility of abolishing police union contracts in the near term makes it even more important to consider whether there are meaningful reforms that could transform police culture and police practices. And because the research demonstrating a correlation and likely causal relationship between police collective bargaining and misconduct does not rule out the possibility that the observed correlation is because collective bargaining reinforces or helps create a toxic police culture, it is worth considering mechanisms to change the culture.

I have proposed several, ranging from relatively technical changes to the legal standards governing arbitrator or hearing officer review of discipline to broader proposals empowering minority groups within police departments. In the years to come, further empirical research may show that the reforms that have been adopted since have moved the needle. In any case, given the political impossibility of abolishing police collective bargaining or rescinding union contracts in most states in the near term, it is important to consider how legal changes might create changes in police culture.

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182. See *Governor Newsom Signs Legislation 9.30.21*, CA.Gov (Sept. 30, 2021), <https://www.gov.ca.gov/2021/09/30/governor-newsom-signs-legislation-9-30-21/> [https://perma.cc/ENF4-YZ5S]; see also *Governor Newsom Signs Critical Criminal Justice, Juvenile Justice and Policing Reform Package, Including Legislation Banning the Carotid Restraint*, CA.Gov (Sept. 30, 2021), <https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-critical-criminal-justice-juvenile-justice-and-policing-reform-package-including-legislation-banning-the-carotid-restraint/?emrc=63fa79bc73300> [https://perma.cc/3GHR-DG8R].