POLICE COLLECTIVE BARGAINING AND POLICE VIOLENCE

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INTRODUCTION

In the summer of 2020, George Floyd's murder by a Minneapolis police officer sparked nationwide protests at a scale unprecedented in U.S. history. Activists demanded an end to police violence and systemic racism, calling for justice, accountability, reform, divestment, and sometimes full abolition of the police. The demands were not new.

Since 2015, the Washington Post has tracked 8,735 fatal police shootings, with Black and Hispanic Americans killed at disproportionate rates.[1] High-profile cases include Eric Garner, Michael Brown, and Tamir Rice in 2014; Walter Scott and Freddie Gray in 2015; Philando Castile in 2016; Elijah McClain in 2019; Breonna Taylor and George Floyd in 2020; Daunte Wright in 2021; and in January 2023, Tyre Nichols. In each case, activists have taken to the streets. And like clockwork, police unions have replied by blocking efforts to increase accountability and public oversight of police, defending officers accused of misconduct, and describing their victims as "violent criminal[s]" and their critics as "a terrorist movement." [2]

When the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) expressed even tepid criticism of police violence and the need for reform, its own affiliate, the International Union of Police Associations (IUPA), blasted labor leaders as "disgraceful" and "ridiculous" and claimed it was "patently false" to accuse police of a history of racist violence. At the same time, police unions have consistently advocated for laws and collective bargaining agreements that prohibit community oversight of police departments, restrict investigations of individual officers, mandate the erasure of disciplinary records after a period of time, and subject disciplinary actions to arbitration that in nearly all cases leads to reversal – making straightforward accountability for police misconduct almost impossible.[3]

In recent years, the national organizations Campaign Zero, the American Civil Liberties Union (ACLU), and the Legal Defense Fund (LDF), among others, have supported grassroots activists across the country who seek to counter the efforts of police unions to shield officers from accountability by engaging in the collective bargaining process and urging elected officials to reject unreasonable demands at the bargaining table. Local unions, municipal labor federations, and a few international unions even called for expelling police unions from the AFL-CIO. Some national labor leaders took this criticism very seriously, while others rejected the claim that collective bargaining was limiting police accountability. The AFL-CIO called on unions that represent police officers to "hold members accountable" for misconduct and "empower local union members to speak up and take action" against co-workers who abuse their power, but the organization did not address

the persuasive evidence that collective bargaining was being used systemically to shield police from accountability.[4]

Meanwhile, in 2022, the Minneapolis Police Federation won a new contract that failed to reform procedures that make it difficult for the city to discipline or fire officers, despite the worldwide protests triggered by its own officers' brutality. Indeed, as detailed below, the rise of police unions has generally correlated to an increase in police violence and decreased accountability for police.

In an era of declining union membership and increasing efforts to make it harder for workers to join unions, the role of police unions in shielding officers from accountability for misconduct presents a profound challenge for the labor movement and those who support it. Collective bargaining is an essential tool for workers to protect themselves and their communities from unfair treatment and exploitation. Historically, workers have used it to fight discrimination in hiring and promotion, to ensure due process in discipline and firing, and to secure decent wages, benefits, and working conditions. In recent years, collective bargaining has allowed fast food and retail workers to raise the minimum wage, teachers to increase funding for their classrooms, warehouse workers to advocate for better conditions, and health care workers to negotiate protective equipment and staffing ratios to improve care for patients and keep themselves safe during the COVID-19 pandemic. The role that unions have played in advocating for health and safety measures during the pandemic remind us that we all have an interest in protecting the collective bargaining rights of all workers.[5]

Yet, like any tool, collective bargaining can be misused. When unions use the power of collective bargaining toward ends that harm other workers and their communities, it becomes the responsibility of organized labor and its allies to ensure that such abuse does not discredit the tool for use by other workers. This was done in the past when unions bargained for contracts that denied membership to workers based on their race. While some labor leaders feared that prohibitions on such practices would divide unions and bolster efforts to destroy them, Black workers and their allies in the labor and civil rights movements secured policies that banned discriminatory bargaining while defending the rights of all workers.[6]

As with discriminatory unions in the past, concerns about the use of collective bargaining by police now threaten the rights of other workers. Early in 2020, nearly every Democrat in the House of Representatives co-sponsored a bill that would have extended collective bargaining protections to public employees, who had been excluded from federal labor law since the 1930s. Such changes are critical due to the growing backlash against public sector unions in state legislatures and the Supreme Court. Shortly after police killed Breonna Taylor in Louisville, Kentucky, however, several otherwise pro-union Democrats withdrew their support until provisions were added to restrict

collective bargaining over police discipline. "As Democrats, we're very supportive of expanding rights and protections for workers," said Texas Representative Joaquin Castro. "[But] police unions have taken advantage of collective bargaining agreements to create less accountability and transparency around police work."[7]

Members of Congress who are committed to both collective bargaining rights for public sector employees and robust police accountability – along with advocates and elected officials at all levels of government – should develop an understanding of collective bargaining and its impact on police accountability and discipline, as well as the relative influence that police unions, lawmakers, and the broader public have on the protections provided by the collective bargaining process. We also need to understand the broader history of police unions and how they have shaped the institutions of policing over time.

Key to addressing these challenges is understanding the degree to which labor relations in the public sector are influenced by the broader political process. Collective bargaining agreements are not imposed unilaterally by unions but, rather, result from negotiations between workers and employers. In the case of police contracts, a singular focus on the power of unions overlooks the responsibility of officials to reject provisions they deem inconsistent with the interests of the public they represent. Public officials have often favored limits on police accountability because they ran for office on "tough on crime" platforms and sought political and financial support from police unions, or because such measures are less costly than increased wages or benefits. Elected officials have the power—and the responsibility—to ensure that collective bargaining contracts do not insulate police from accountability to the people who they serve.[8] However, the limitations on accountability contained in many collective bargaining contracts result from the often-aligned interests of elected officials and police unions.

Similar limits are often imposed by Law Enforcement Officer Bills of Rights (LEOBORs), which are state laws aimed at protecting due process and restricting investigation and prosecution of police officers charged with abuse during the performance of their duties. Adopted solely at the discretion of legislators in states where unions often have little influence or collective bargaining rights, LEOBORs would not be affected by changes to collective bargaining.

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This report is intended to serve as a resource for activists, advocates, labor leaders, government officials, and anyone else who seeks to increase accountability for police violence without undermining the right to collective bargaining for public sector workers. We offer recommendations in three areas: (1) expanding transparency and public engagement in the collective bargaining process, (2) reforming the scope and process of collective bargaining, and (3) reforming procedures for arbitration of disciplinary actions.

Given the exclusion of police and other public employees from the National Labor Relations Act (NLRA), our recommendations would need to be implemented at the bargaining table or through changes in state laws governing collective bargaining for the public sector. In the few states and the District of Columbia where collective bargaining is governed by city statute, these reforms can be adopted at the municipal level. They can also be included in federal bills aimed at strengthening the collective bargaining rights of public employees such as the Public Service Freedom to Negotiate Act. They should be considered together, as they are mutually reinforcing.

We focus our recommendations on changes to the collective bargaining process both in the law and at the bargaining table. We do not address reforms to departmental use-of-force policies, departmental supervision and discipline policies, civil service laws, LEOBORs, qualified immunity, policing tactics and strategies, or funding levels for police departments. A discussion of those reforms is critical but belongs in a broader conversation about the role of policing in protecting and promoting public safety. Our intention is to focus narrowly on reforms to collective bargaining that will facilitate or, at least, remove barriers to these broader changes.[9]

The power of police unions in the United States extends far beyond the bargaining table. Police unions weigh in decisively in legislative fights, promote or oppose candidates for public office, and more broadly, shape the terms of the nationwide debate on public safety and law enforcement. These topics are similarly important but outside the scope of this paper.

Our proposals are compatible with, and may facilitate, broader efforts to improve public safety. By expanding the public role in collective bargaining negotiations, and by emphasizing the public interest in collective bargaining agreements, the methods and procedures of policing can potentially be brought more in line with the needs and concerns of the communities they serve. In this sense, this project aligns with the broader movement associated with "Bargaining for the Common Good," which encourages unions to align the interests of their members with those of the broader community.[10]

These proposals reflect a process of study, consultation, and debate among scholars, reformers, and longtime leaders of organized labor, including senior representatives from AFL-CIO, American Federation of Teachers (AFT), National Education Association (NEA), and Service Employees International Union (SEIU). The American Federation of State, County and Municipal Employees (AFSCME) declined to provide specific feedback to our team, citing their concerns about our project's impact on support for public sector collective bargaining. In the fall of 2020, the Center for Labor and a Just Economy at Harvard Law School convened a series of workshops to discuss the history of policing and police unions, the empirical evidence of the relationship between collective bargaining and police accountability, and various proposals for reform. In the spring of 2021, Community Change held consultations with local and national leaders in the racial justice movement to solicit feedback on various reform proposals. Throughout those conversations, we have been mindful of both the urgency to end racist violence by police and the necessity to protect the collective bargaining rights of all workers.

The generous feedback from all stakeholders helped inform our recommendations, but we want to make clear that the following recommendations are ours alone.

Overview of Recommendations

Transparency and Public Engagement:

- Establish public consultative process during the setting of departmental priorities before collective bargaining
- Ensure advance public notice of the schedule and issues to be addressed in collective bargaining
- Provide public notice and access to negotiations over use-of-force policy
- Establish public consultative process before final approval of collective bargaining agreements

New Approaches to Collective Bargaining:

- Limit bargaining over discipline policies in use-of-force violations
- Separate bargaining units for supervisory and rank-and-file officers
- Consult with and collect input from organizations representing minorities of officers during the bargaining process

Reforming Procedures for Arbitration of Disciplinary Actions:

- Ensure advance notice and public access to records of appeals and arbitration of disciplinary actions against police officers, particularly in use-of-force violations
- Create independent board for selection of arbitrators
- Set state-wide standards for use of evidence in arbitration of disciplinary actions against police officers
- Require arbitrators to consider potential patterns of misconduct in arbitration of discipline against those officers, particularly in use-of-force violations
- Mandate arbitrators to follow current disciplinary policies rather than the precedent of officers exonerated under the previous procedures
- Apply adverse inference when officers avoid or delay interviews or fail to utilize vehicle or body cameras as required by department
- Allow arbitrators to affirm a disciplinary action even where an officer has not violated a written rule in cases involving particularly severe infractions or in cases involving an officer who has received repeated complaints related to use of force. In such cases, arbitrators should be authorized to place officers with repeated complaints on unpaid leave during arbitration.

THE PARADOX OF POLICE UNIONS

Any analysis of collective bargaining by police must reckon with a paradox that has defined police and police unions since their founding in the 19th century. On one hand, a central role of police throughout history has been to discipline and disempower other workers, their communities, and their unions. Since the 1920s, that power has primarily been directed toward the Black, Latinx, Asian, and Indigenous communities, which remain the primary targets of police brutality and abuse today. On the other hand, the rights of police to join unions and bargain collectively have long been closely tied to the rights of other workers, particularly in public sector occupations that have been filled disproportionately by Black, Brown and Indigenous workers. In short, police unions have long been viewed as simultaneously antithetical to and emblematic of workers' rights in the United States.

The modern police departments that most American cities created between the 1840s and the 1880s were intended not to "serve and protect" the average citizen, to ensure safety or justice, or even to stop most crimes. They were established to protect private property and wealth and to control and discipline the mostly immigrant workers who drove the nation's industrial revolution. Their closest previous analogues were slave patrols charged with crushing revolts in the South and capturing enslaved Black workers who sought freedom in the North, and their primary tasks remained breaking strikes and protests and suppressing unions of mostly immigrant workers. Extended high levels of autonomy and authority to use violence, police were constant sources of terror and harassment in working-class communities. "Policemen on patrol, particularly in high-crime areas, were often expected to be able to physically dominate their beats and to handle suspicious persons or minor crimes without resort[ing] to arrest." [11]

Initially, the anti-worker roots of modern policing led union leaders to reject attempts to bring police into the ranks of organized labor. When the Cleveland police union attempted to affiliate with the American Federation of Labor (AFL) in 1897, labor leaders responded that it was "not within the province of the trade union movement to specifically organize policemen," as they were "too often controlled by forces inimical to the labor movement." As late as 1925, AFL President Samuel Gompers wrote that the memory of watching mounted police attack women and children who supported a strike still left his "blood surging in indignation at the brutality of the police." [12]

As increasing numbers of police formed their own associations, however, some labor leaders came to view unionization as a vehicle for reforming police and bringing them into alliance with other workers. That possibility led some elected officials to prohibit police from affiliating with the broader labor movement, out of fear that "divided loyalty" might prevent them from performing their duty to discipline other workers. Others saw this as a potential benefit of police unions. One pro-union newspaper predicted that unionization would stop police from breaking strikes and evicting renters, as they would be "solidly lined up beside the rest of the country's wage earners." Gompers hoped that unionization would simply make police less inclined to "throw their full weight" against organized labor. [13]

The hope that unionization might help to reform police gained ground from the broader movement to organize public employees, who faced similar charges of "divided loyalties" as law enforcement. Over two million public employees joined unions in the first two decades of the 20th century, mostly postal workers and teachers but also firefighters, garbage collectors, and police. Despite fears that "outside organization" would undermine discipline, the nation's leading expert on labor policy found "exactly the opposite." In addition to raising morale through better wages and working

conditions, wrote labor economist John R. Commons in 1913, unions provided an important counter to political interference in public service, "one of the greatest evils" of democratic government.[14]

The debate over public sector unionism reached a watershed in the Boston police strike of 1919, which turned the tide decisively in favor of those who viewed unionization as a threat to public safety and the public good. The strike erupted over a ban on police "coming under the direction and dictation of any organization which represents but one element or class of the community," and city officials charged that the work stoppage proved that "divided loyalty" of unionized police left the city vulnerable to unchecked violence and lawlessness. The actual "anarchy" was limited to isolated looting and illegal gambling on Boston Commons, yet Massachusetts Governor Calvin Coolidge made his role in sending troops to restore the city's image central to his bid for national office in the 1920s. Lumping police with teachers, postal workers, and garbage collectors, presidents from Franklin D. Roosevelt to Ronald Reagan echoed Coolidge's claim that the "Boston revolt" illustrated the dangers posed by unionization of any public employees.[15]

RACE, CLASS, AND POLICING

While the Boston strike marked a decline in tensions between police and organized labor, 1919 also highlighted racial conflicts that remain central to debates over police reform to this day. Six weeks before the strike began in Boston, police helped to provoke a conflict between white and Black youth in Chicago, stood by as white gangs rampaged through Black neighborhoods and workplaces, and then arrested and beat Black people who attempted to defend themselves and their community. The rioting in Chicago marked the worst of the racist violence that raged throughout dozens of American cities during the "Red Summer" of 1919.[16]

The contrasting conflicts in Boston and Chicago reflected a broader shift in the focus of policing in American cities from breaking unions and controlling workers to disciplining Black, Brown, and Indigenous communities. Police had helped to impose and enforce racial segregation and disfranchisement in the Jim Crow South, typically in a supporting role to semi-private terrorist organizations such as the Ku Klux Klan. In northern cities, racialization of law enforcement was muted by the denigration of European immigrants who were often targeted for violence and over-policing in ways similar to Black, Latinx, and Asian Americans. Those patterns were disrupted by the mass migration of African American, Mexican, and Caribbean workers to northern cities and by increased restrictions on immigration from Europe and Asia. Meanwhile, scholars, reformers, and elected officials emphasized the need to assimilate European immigrants through education and social reform while portraying Black and Latino migrants as innately and immutably criminal.[17]

The shift from policing workers of all races to policing people of color was reinforced by the routinization of labor relations in the 1930s and 1940s, which decreased the need for police involvement in strikes and aligned their economic status with that of mostly white industrial workers. Lawmakers cited the threat of a police strike to justify excluding all public employees from the NLRA, which created a legal framework for collective bargaining and strikes in the private sector. Lack of collective bargaining rights undercut the already low wages of mostly Black and Latinx public service workers in cleaning, sanitation, and food preparation. It also lowered wages and benefits of relatively privileged, and mostly white, professionals, such as policemen, firefighters, and teachers; but this brought their status in line with those of unionized industrial workers. That convergence facilitated a resurgence of police unionism in the independent Fraternal Order of Police and the AFL's AFSCME.[18]

At the same time, Black, Brown, and Indigenous communities found themselves increasingly in conflict with police. "Nothing revealed more strikingly the deep-seated resentments of the citizens of Harlem against exploitation and racial discrimination than their attitude toward the police," wrote a committee appointed by the Mayor of New York City to investigate an uprising sparked by police in 1935. In addition to subjecting Black and Latinx communities to abuse and surveillance, the committee found, police responded slowly to reports of crime and violence from local residents. Tellingly, a report on rebellions in cities across the country three decades later reached nearly the same conclusion. "In Newark, Detroit, Watts, and Harlem, in practically every city that has experienced racial disruption since the summer of 1964," conflict and mistrust between police and people of color were "a major source of grievance, tension and, ultimately, disorder," concluded President Lyndon B. Johnson's National Advisory Commission on Civil Disorders in 1968.[19]

Ultimately, the shift in emphasis from class to race renewed the paradox that had defined American policing since the 19th century. On one hand, the bureaucratization of industrial conflict facilitated a sense of solidarity between police and mostly white working- and middle-class Americans. That allowed police to join other public employees in an increasingly successful movement for collective bargaining rights. On the other hand, while police often allied with mostly white uniformed occupations, such as firefighters and correctional officers, their ties to the broader labor movement remained troubled by their roles in surveilling and disciplining mostly Black, Brown, and Indigenous working-class communities in American cities. Therefore, even as they gained collective bargaining rights and formed increasingly powerful unions, police remained, as they had been since the 19th century, both emblematic of and threatening to the economic and social concerns facing workers in the modern United States.[20]

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HAS COLLECTIVE BARGAINING MADE POLICE MORE OR LESS ACCOUNTABLE?

Starting with Wisconsin in 1959, a majority of states passed laws granting police and other public employees the rights to form unions and bargain collectively for better wages and working conditions. In contrast to the NLRA, and showing the lingering legacy of the Boston strike, most of those laws contained strict prohibitions on strikes. This meant that workplace conflicts would be resolved through bureaucratic means, such as grievance hearings and arbitration, and that influencing those procedures was often more important to public employees than wages or working conditions. This was even more so in states that did not legalize collective bargaining for public employees, forcing police and other public employees to lobby for workplace protections through civil service systems and state law. As a result, public sector unions became highly politicized and more focused on bureaucratic protections than economic issues such as wages and benefits.[21]

Early studies indicated that collective bargaining improved wages and benefits for police, although their gains were far more modest than critics had predicted. "If law enforcement officers enjoy exceptional bargaining power," one analysis concluded in 1977, "there is little evidence to indicate they have exploited their advantage up to now." This was due, in part, to the fact that police wages and benefits were already relatively generous, as departments focused their recruitment on white men and had to offer compensation similar to that available to skilled craftsmen in unionized trades and manufacturing. Some also argued that raising wages and benefits for police strengthened reform efforts by providing individual officers a greater incentive to do their jobs well.[22]

Over time, police unions shifted their emphasis from economic objectives toward resisting reforms aimed at holding police accountable to the communities they served. The legalization of collective bargaining by public employees coincided with rising criticism of police for racist abuse and neglect,

as well as for corruption and inefficiency. In the 1950s and 1960s, civil rights activists and reformist elected officials sought to professionalize policing by strengthening managerial control and by extending civilian oversight over departments. This led to the centralization of hiring, promotion, and discipline procedures; criminal prosecution of corrupt and abusive officers; and the creation of civilian review boards. Increasingly, unions responded by using collective bargaining and political power to defend the autonomy and discretion that had long defined police work.[23]

The shift in emphasis was bolstered by the "law and order" political rhetoric of the 1970s and 1980s, which blamed criticism of police and efforts at reform for political unrest and rising crime rates in American cities. Chief William Parker, who led the professionalization of the Los Angeles Police Department in the 1950s, signaled this shift by promoting the image of police as a "thin blue line" protecting society from anarchy, violence, and crime. Following uprisings against police brutality in the late 1960s and increasing with "white flight" in the 1970s, the phrase became increasingly associated with demographic change. Pointing to the growing population of African Americans and Mexican Americans in Los Angeles, Parker warned shortly before his death in 1966, "If you want any protection for your home and family . . . you're going to have to get in and support a strong Police Department. If you don't, come 1970, God help you." [24]

Since the 1970s, police unions have embraced Parker's trope of the "thin blue line" to depict any restrictions on the autonomy and discretion of individual officers as a threat to public safety and the public good. Flipping the historical narrative of the Boston strike, police unions insisted that collective bargaining and due process protections were essential to officers' ability to protect private property and public safety. A recent analysis of union contracts covering nearly half of all police officers in states that allowed collective bargaining found that nearly 90 percent "contained at least one provision that could thwart legitimate disciplinary actions against officers engaged in misconduct." The most common provisions were restrictions on interrogation of officers accused of misconduct, limitations on use of disciplinary records, and bans on civilian oversight and investigations into anonymous complaints. In many of those states, as well as those that do not allow police to bargain collectively, police unions have lobbied successfully for LEOBORs, which contain similar restrictions on disciplinary action. A third level of protection is contained in civil service law, which unions used in unison with collective bargaining agreements to insulate officers from discipline.[25]

The effects of these protections are more difficult to measure than their proliferation, but a growing body of scholarship indicates a significant impact on police behavior. A study of the 100 largest cities in the US found that police with strong procedural protections, either in collective bargaining

agreements or LEOBORs, were significantly more likely to kill unarmed civilians. Another analysis found that granting collective bargaining rights to police between the 1950s and the 1980s correlated with an increase in police killings of civilians, most of them Black, Indigenous, and other people of color. After sheriff's deputies in Florida gained collective bargaining rights in 2003, scholars found there was a 40 percent increase in complaints of violence against civilians. More study is needed to determine exactly how collective bargaining affects the use of force by police officers, but the existing literature demonstrates that it has shielded police from accountability for racist violence.[26]

SURVEY OF RECENT COLLECTIVE BARGAINING REFORM EFFORTS

Despite the longstanding influence of police unions, collective bargaining has only recently become a focus of police reform. Following protests against police killings in Ferguson, Baltimore, and other cities in 2014 and 2015, the reform organization Campaign Zero identified six barriers to accountability that were common in collective bargaining contracts. Working with local activists in several cities, they pressured elected officials to reject contracts that placed time limits on filing complaints of misconduct, allowed officers accused of misconduct to delay interrogations or review evidence not available to the public, limited public and media oversight of discipline procedures, required paid leave for officers during investigations, and eliminated records of misconduct from personnel files. By 2020, the ACLU, NAACP-LDF, and the U.S. Conference of Mayors had each launched similar campaigns aimed at increasing public awareness of and participation in collective bargaining with police unions.[27]

Even with this support and coordination, local activists found it difficult to influence collective bargaining at the local level. In 2017, local activists and Campaign Zero mobilized hundreds of residents in Austin, Texas, to testify against a police contract that contained every one of the six problematic measures. The city council voted unanimously to reject the contract but, after a prolonged standoff with the union and a threat by the governor to intervene on behalf of police, eventually conceded to a contract with only modest changes to the investigation and discipline policies. Campaign Zero claimed it was the first case where a police contract had been revised over concerns about accountability, but only one of their six demands for change had been achieved.[28]

In Austin and other cities, activists found their influence constrained by state laws governing the collective bargaining process. In Philadelphia, a coalition of local ministers and national organizations pressured the mayor and city council to insist on a contract that required police

officers to live within the city, limited arbitrators' ability to overturn discipline decisions, and required public notice and oversight of arbitration proceedings. The union walked away from negotiations, however, knowing that state law allowed them to force the city into a process of binding arbitration. Similar standoffs have stalled efforts to reform police contracts in Chicago, Columbus, and other cities where local officials have agreed to substantive changes only to face staunch resistance from police unions.[29]

In response, some have proposed changes to state laws governing the collective bargaining process. Connecticut and Vermont recently prohibited agreements that restricted the disclosure of personnel and disciplinary records, and Hawaii overturned a 1995 law that exempted records of most police misconduct from the state's open records law. Those changes have survived legal challenges from police unions. The ACLU of Connecticut recommends further changes in state law to require public notice and comment on police contracts; tracking and reporting of all complaints; investigations and discipline against police officers; a centralized system of complaints against police officers; empowerment of local review boards with subpoena power; expanded power of the state Attorney General to reduce pension benefits for police who are convicted of crimes related to police violence or civil rights violations; and legislative review of police contracts for conflicts with state law.[30]

In 2022, Colorado passed a new collective bargaining law that applied to all county employees but contained provisions specifically aimed at police accountability. These include prohibitions on contract provisions that delay interviews with employees under investigations, allow paid leave for employees found to have violated the state or federal constitutions, or stipulate the expungement of disciplinary records or time limits on investigations or discipline of employees charged with policy violations regarding the use of physical or deadly force and actions resulting in death or serious bodily harm or the deprivation of constitutional rights.[31]

Other states are considering additional restrictions on collective bargaining by police. Bills pending in New York and Oklahoma would remove the discipline of police officers from collective bargaining, and the Oklahoma bill goes further to prohibit any CBA that limits accountability for actions taken by police officers, allows the rehiring of police officers terminated for misconduct, or was negotiated without community representation. Bills pending in Oregon would prevent collective bargaining agreements from blocking the establishment of community oversight boards and allow the review of arbitration decisions by the state public safety standards agency. An Indiana bill would increase public oversight of collective bargaining by requiring a public notice and input on collective bargaining agreements before they are adopted, and an Illinois bill would prohibit agreements from taking precedence over state or local laws.[32]

In some cases, cities can implement similar reforms. In 2020, Washington, DC, amended its collective bargaining law to prohibit negotiations over discipline policy, and in 2021, voters in San Antonio, Texas, rejected a ballot measure that would have done the same. Since DC is not governed by a state, it has authority over its collective bargaining laws. The San Antonio measure relied on the discretion that Texas and some other states allow for local governments to determine what issues are subject to collective bargaining. (State legislators who opposed the measure threatened to remove that discretion if the ballot measure proceeded.) In 2021, Virginia passed a collective bargaining law that authorizes local governments to develop procedures for collective bargaining by public employees.[33]

A notable alternative to changing collective bargaining law is the approach taken recently by Massachusetts, which created a certification process aimed at increasing accountability and transparency in the hiring of police officers. While all 50 states have some process for certifying police, the process is typically dominated by police officers and removed from public view and input. In contrast, Massachusetts created a nine-member commission—with six members from outside law enforcement—with the power to investigate and adjudicate claims of misconduct; maintain records of training, certification, employment, and discipline of all police officers; and certify law enforcement agencies. The law also specified circumstances where officers could be decertified for violating restrictions on the use of physical force, certain behaviors such as chokeholds, firing into a fleeing vehicle, and the use of rubber pellets or chemical weapons.[34]

The most detailed set of proposals for collective bargaining reform comes from Catherine Fisk, Joseph Grodin, Thelton Henderson, John True, Barry Winograd, and Ronald Yank in California. While they tailor their analysis toward that state's legal and political context, they provide useful models for other states and in federal law. Our recommendations build on their proposals.[35]

RECOMMENDATIONS IN DETAIL

Transparency and Public Engagement

Given the political nature of collective bargaining, it is critical that the communities served by police be informed and consulted on the issues addressed in collective bargaining negotiations. The collective bargaining process provides three distinct opportunities for public oversight and engagement: the initial stage when both parties identify issues of concern and priorities and demands to be addressed during bargaining, the bargaining itself, and the final stage of ratifying an agreement. Each of these stages provides distinct opportunities and challenges to public engagement.

State laws governing collective bargaining for public employees should require advance public notice of the subjects and issues to be addressed through collective bargaining, as well as public hearings or other forums for the public to identify and register concerns or priorities for collective bargaining and metrics for evaluating performance of individual officers and police departments. In addition to allowing community members to raise concerns and demands, this would allow police officers and administrators to explain to the public their own priorities for the bargaining process. Currently, only eight states require public oversight of collective bargaining related to police discipline, and only four require public review of collective bargaining contracts before they are ratified.[36]

Public notice requirements should be written in a way that they cannot be exploited to avoid bargaining and delay ratification of contracts beyond their expiration date, which can derail the collective bargaining process and leave police officers with no workplace protections. Contracts can also require binding arbitration for disputes that delay agreements beyond a specified period of time.

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Though preparations for bargaining should be open to extensive public scrutiny and engagement, there is good reason to insulate the bargaining process itself from public scrutiny and input. A level of confidentiality can be important to building trust between opposing sides at a bargaining table, and negotiators may be reluctant to speak frankly and openly about their priorities or concerns when their words may become public. One way to increase public engagement while protecting the confidentiality of negotiations is to allow participation in the bargaining process by representatives of an elected community oversight board. State laws that require some form of a tripartite process, in which community representatives participate in negotiations alongside representatives of police officers and police departments, are worth serious consideration.

Public consultation and engagement are perhaps most important during the ratification of collective bargaining agreements. Particularly when negotiations are insulated from public oversight, we recommend that laws require negotiators to explain why public input was rejected or accepted. At

minimum, states should require that once an agreement has been reached between a law enforcement agency and police officers, a public hearing be held with sufficient notice and opportunities for public comment before that agreement is adopted.

Though such transparency measures should apply to any collective bargaining by law enforcement agencies, they are particularly important when they involve policies over the use of force. Most states classify use-of-force policies as "permissive subjects of bargaining," which means that agencies can decide whether or not to include them in negotiations with police unions and are not required to resolve conflicts over those policies through mediation or arbitration. One possible approach is that when state laws permit bargaining over use-of-force policies, they should be amended to require agencies to provide public notice of the time and place of said bargaining, as well as public access to all negotiations over those policies.

Reforming the Scope and Process of Collective Bargaining

All parties involved in police union collective bargaining should support provisions that serve the public interest in holding officers who engage in unjustified violence against the public accountable to the public. We believe that this increased accountability is best achieved by forming a consensus among the parties of police collective bargaining agreements to leave limitations on discipline for use of force out of collective bargaining agreements. In addition, we believe that the parties should agree to redefine collective bargaining units in law enforcement agencies and provide a voice for organizations representing officer minorities within those units. If, however, the parties fail to fulfill their responsibilities in these areas, we recommend that state legislatures consider reform to the collective bargaining process to impose these changes.

The parties to police collective bargaining should agree to remove provisions related to discipline procedures regarding use-of-force violations. This needs to be done cautiously, as employee input can be critical to the formulation of effective and fair procedures. In Washington, DC, for example, a total ban on collective bargaining over any disciplinary policies gives complete control to managers and eliminates employee input that can be critical to the development of fair and effective discipline policies. A similar policy was narrowly rejected recently by voters in San Antonio, Texas, and others are under consideration in New York and Oklahoma. A more effective approach would be for the parties to agree to take discipline specifically related to use-of-force violations out of the collective bargaining process, while allowing bargaining to continue over discipline related to other infractions. This approach creates greater accountability for elected officials and ensures that public opinion is taken into account in the creation of use-of-force policies.[37]

In place of collective bargaining, lawmakers should assert direct control over use-of-force policies and discipline related to use-of-force violations. States including Delaware, Virginia, Nevada, Vermont, and California have banned or restricted police from using neck restraints; Minnesota, Nevada, New Hampshire, and Oregon require officers to intervene or report certain use-of-force incidents to outside

parties; New York and Hawaii require the public disclosure of records related to any discipline of police officers. Of course, lawmakers are subject to the same political pressures that shape the collective bargaining process, and, in some cases, they have used legislation to restrict accountability. New Jersey prohibits the disclosure of personal information of police officers, and Kentucky restricts the disclosure of videos depicting death, assault, or abuse—including at the hands of police—unless requested by a state agency investigating misconduct. We recommend that state legislation provide clear guidelines for use of force and robust public oversight of disciplinary procedures when they are violated.[38]

We also believe that accountability would be enhanced if the parties agreed to redefine bargaining units in order to remove barriers to the implementation of effective discipline policies. Currently, supervisory and rank-and-file officers often negotiate in the same bargaining units, which can make supervisors reluctant to discipline lower-ranked officers within their own unit. We recommend that units be redefined to create separate bargaining units for supervisory (ranked above sergeant) and rank-and-file officers.

Serious consideration should also be given to reforms aimed at ensuring the representation of rank-and-file officers within police unions. Exclusive representation is a fundamental principle of collective bargaining, as it allows managers to negotiate with the democratically elected representatives of the majority within each bargaining unit. Reforms can augment that principle, however, to encourage consultation and input from organizations representing a minority of officers.[39] Police unions should commit to consultation with and input from organizations representing officer minorities during collective bargaining, which can increase input from Black, Latinx, and other groups of officers who are often marginalized in unions representing the majority of officers.

There is no impediment to these important reforms being adopted by the parties to police collective bargaining agreements, other than political will. The transparency and public input provisions that we outline in the previous section would increase the outside pressure on the parties to adopt these kinds of reforms at the negotiating table. If, however, the parties continue to resist these kinds of accountability-enhancing measures, state legislatures should consider imposing them in the most narrow and targeted form possible through statutory reforms. We do not make this recommendation lightly, as we believe strongly in the value and centrality of the collective bargaining process. But the status quo cannot persist even in service of a value as cherished as a maximally robust collective bargaining process.

Reforming Procedures for Arbitration of Disciplinary Actions

As discussed above, we advocate for legislative disciplinary processes in a narrow category of use-of-force cases. If those processes include the possibility of arbitration, it is critical that arbitration procedures follow the same principles of transparency and accountability that we recommend for the collective bargaining process. Following the proposals of Fisk et al., our recommendations focus on the standards of evidence in arbitration, the application of decisions and remedies, and the assignment of arbitrators and hearing officers.[40] In each of these areas, reforms must uphold officers' rights of due process and just cause while ensuring a fair and consistent standard of accountability.

State laws should ensure the full consideration of evidence by requiring public notice and public access to records of appeals, as well as arbitration of disciplinary actions against police officers, particularly those related to use of force. States should also establish a government agency to assign arbitrators with appropriate training and independence from police administration and police unions.

States should also establish consistent standards for use of evidence in arbitration of discipline against police officers and mandate that these cannot be contravened by collective bargaining agreements. Arbitrators should be required to consider past complaints and disciplinary actions against officers disciplined for use-of-force infractions, even when such consideration violates a collective bargaining agreement. In cases where agencies have notified officers of new disciplinary procedures, arbitrators should consider current cases on those new terms rather than following the precedent of officers exonerated under the previous procedures. In cases where officers utilize contractual provisions to avoid being interviewed until they review evidence related to an investigation, arbitrators should be required to apply an inference adverse to the officer. Arbitrators should apply a similar inference in cases where offers fail to utilize a vehicle or body camera as required by the department.

Evidence standards in arbitration should be particularly rigorous in cases involving use-of-force infractions. In cases involving particularly severe infractions or officers with repeated complaints related to use of force, arbitrators should not overturn a disciplinary action based on the absence of a violation of a written rule. In such cases, arbitrators should be authorized to place officers with repeated complaints on unpaid leave during arbitration.

CONCLUSION

The response to George Floyd's murder raised hopes for substantive reform in both policing and collective bargaining. Yet those initiatives will work at cross purposes as long as the collective bargaining rights of police are seen as protecting police from accountability for racist violence and abuse. The reforms we recommend aim to alleviate that tension by increasing public oversight and accountability of police without infringing on officers' rights to representation, due process, and just cause. Our proposals will not end police violence nor resolve all questions around the scope of collective bargaining rights for public sector employees, nor will they address the broader impacts of the outsized political power of police unions, but we hope they contribute to the vital discussion on the best path forward to ensure rights and safety for everyone.

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