

Police Brutality & Unions: Collective Bargaining is the Problem, Not Law Enforcement

Falco Anthony Muscante II
Duquesne University School of Law

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Police Brutality & Unions: Collective Bargaining is the Problem, Not Law Enforcement

Falco Anthony Muscante II*

Abstract

When Derek Chauvin knelt on George Floyd's neck for more than nine minutes, and when Jason Van Dyke fired sixteen rounds at Laquan McDonald who was walking away from the responding officers, were Chauvin and Van Dyke acting exclusively of their own volition, or were their actions indicative of a deeper, systemic issue? Nearly 60% of law enforcement officers enjoy collective bargaining protections from their police unions, but these protections create a lack of accountability.

Police unions can bargain collectively with police departments because of state legislation, which typically allow for negotiation over matters affecting wages, hours, and terms and conditions of employment. This broad language has allowed many police unions to negotiate contracts that: shield law enforcement officers from liability for misconduct, permit officers to delay being interrogated for up to forty-eight hours following a critical incident, allow police departments to expunge officer disciplinary records after a few years, require all disputes to be settled in binding arbitration by arbitrators often selected by the police

* Falco Anthony Muscante II earned his J.D. in 2023 from the Duquesne University School of Law, where he served on the executive boards for the Law Review and Appellate Moot Court Board. Falco is an alumnus of Grove City College where he graduated summa cum laude with a B.S. in Management, minor in Pre-Law, and concentration in Human Resources. Falco is a litigation associate at a big law firm in Pittsburgh, Pennsylvania.

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union itself, and limit transparency of disciplinary records to the public and to civilian review boards.

One way to solve all these troubling issues is to forbid police unions from bargaining for matters affecting wages, hours, and terms and conditions of employment, or at the very least matters affecting “terms and conditions of employment.” The appendices to this Article include samples of current statutes permitting collective bargaining among police unions, a collection of statutes from all the states that forbid public unions and police unions from collective bargaining, and model statutory language that states may adopt to remedy the aforementioned harmful provisions and ultimately hold law enforcement officers like Chauvin and Van Dyke accountable.

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I. INTRODUCTION

George Floyd was murdered by former Minneapolis law enforcement officer Derek Chauvin on May 25, 2020. Chauvin pinned Floyd to the ground with a knee to Floyd's neck for nine minutes as Floyd repeatedly cried out, "I can't breathe."¹ Other officers watched the incident and onlookers tried to persuade Chauvin to remove his knee, to no avail.² Floyd had attempted to use a \$20 counterfeit bill and lost his life as a result.³ Since that day, countless articles, news stories, opinion pieces, and law review articles have been written about police brutality, racism in policing, efforts to defund the police, and police reform more generally.⁴ On April 20, 2021, Chauvin was convicted of second-degree murder, third-degree murder, and second-degree manslaughter.⁵ On July 7, 2022, the U.S. Department of Justice announced that Chauvin would serve twenty-one years in prison with credit for time served for depriving Floyd of his constitutional rights.⁶ But Chauvin is not solely to blame for Floyd's death.

Following Floyd's death, civil rights protests and cries to defund the police have been magnified to levels never seen before, and police brutality and lack of police accountability are the major sources of discontent for protestors.⁷ Police brutality is not new, as Dr. Martin Luther King Jr. recognized in his 1963 *I Have A Dream* speech when he said that "[w]e can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality."⁸ But today, those cries to defund

¹ Janelle Griffith & Corky Siemaszko, *Derek Chauvin Guilty of Murder in George Floyd's Death*, NBC NEWS (Apr. 20, 2021, 3:30 PM), <https://www.nbcnews.com/news/us-news/derek-chauvin-verdict-reached-trial-over-george-floyd-s-death-n1264565>; Jennifer Levitz et. al, *George Floyd and Derek Chauvin: The Lives of the Victim and His Killer*, WALL ST. J. (June 21, 2020, 1:44 PM), <https://www.wsj.com/articles/george-floyd-and-derek-chauvin-the-lives-of-the-victim-and-his-killer-11592761495>.

² See, e.g., Editorial Board, *George Floyd: What Witnesses Have Said in the Chauvin Trial*, BBC NEWS (Apr. 18, 2021), <https://www.bbc.com/news/world-us-canada-56581401>.

³ Griffith, *supra* note 1; Levitz, *supra* note 1.

⁴ See, e.g., Kiara Alfonseca, *Police Reform Advocates on What 'Justice' For George Floyd Really Means*, ABC NEWS (Apr. 28, 2021, 5:09 AM), <https://abcnews.go.com/US/police-reform-advocates-justice-george-floyd-means/story?id=77213617>.

⁵ *Id.*

⁶ Press Release, U.S. Dep't of Just., Former Minneapolis Police Officer Derek Chauvin Sentenced to More Than 20 Years in Prison for Depriving George Floyd and a Minor Victim of their Constitutional Rights (July 7, 2022), <https://www.justice.gov/opa/pr/former-minneapolis-police-officer-derek-chauvin-sentenced-more-20-years-prison-depriving>.

⁷ Adam Serwer, *Bust the Police Unions*, ATLANTIC, June 21, 2021, at 11, 12.

⁸ Martin Luther King Jr., *I Have A Dream* (Aug. 28, 1963) (transcript available at <https://www.americanrhetoric.com/speeches/mlkhaveadream.htm>); see also Gerard Robinson, *Hate-Love the Police, American Style*, Sept. 4, 2020, <https://thoughtpartner.medium.com/hate-love-the-police-american-style-63b439bcf486>.

the police are wrongly targeting the symptom of an even deeper issue that began to form in the couple decades following King's address. That deeper issue? Police unions took root—and with them—collective bargaining.⁹ One commentator rightly attributed police brutality to the unions who encourage and protect the police conduct: “[T]he creature we call Frankenstein [police brutality] is a misnomer. It is only an invention. The monster is the one who gave it life [police unions].”¹⁰

Reflecting on Floyd's death, Mayor Jacob Frey of Minneapolis, Minnesota identified the monster: “[P]olice collective bargaining and arbitration have prevented the city from holding officers accountable for misconduct.”¹¹ In Chauvin's eighteen years of service, he had seventeen misconduct complaints, but was only disciplined once, with a letter of reprimand, after he pulled a woman from a car and frisked her for driving 10 miles over the speed limit.¹² Unfortunately, his interaction with Floyd was not the first time Chauvin held his knee to the neck of another person. In 2017, Chauvin “willfully violated the then-14-year-old child's constitutional right to be free from an officer's use of unreasonable force . . . [by holding] his knee on the child's neck, shoulders and upper back for between 15 and 16 minutes, even though the child was face-down on the floor, handcuffed and not resisting.”¹³ In any other profession—yet alone a profession empowered to take human life—seventeen misconduct complaints and incident with a minor eerily similar to Chauvin's interaction with Floyd would have surely led to stronger reprimands including termination. Unfortunately for Floyd, law enforcement is different. The monster is deeply rooted, with nearly 60% of all law enforcement officers belonging to a public union.¹⁴ As a result, the problem of police brutality is not a series of one-off incidents. This Article will convey the stories of Derek Chauvin and another former officer, Jason Van Dyke, as case studies for considering this collective bargaining problem and proposing a solution centered on transparency and accountability.

Laquan McDonald, a seventeen-year-old teenager, was jaywalking down the middle of a street in Chicago, wielding a knife.¹⁵ At no point was

⁹ See Serwer, *supra* note 7, at 11-12.

¹⁰ Robinson, *supra* note 8.

¹¹ Editorial Board, *The Problem with Police Unions*, WALL ST. J., June 11, 2020, at A16.

¹² *Id.*

¹³ Press Release, U.S. Dep't of Just., *supra* note 6.

¹⁴ Daniel DiSalvo, *The Trouble with Police Unions*, 45 NAT'L AFFAIRS (2020), <https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions>.

¹⁵ Paris Schutz, *Chicago Police Officer Charged with Murder in Shooting Death of Laquan McDonald*, WTTW NEWS (Nov. 24, 2015, 3:11 PM), <https://news.wttw.com/2015/11/24/chicago-police-officer-charged-murder-shooting-death-laquan-mcdonald>; see also N.Y. TIMES, *Video Shows Laquan McDonald, 17, Shot*

McDonald running toward officers—or even facing the officers—when former officer Jason Van Dyke fired sixteen 9mm rounds at McDonald.¹⁶ Every round hit McDonald, and most of the rounds were fired when he was already on the ground.¹⁷ Like Chauvin, Van Dyke had fifteen misconduct complaints against him, but had never faced disciplinary action.¹⁸ The attorney representing the Fraternal Order of Police, Van Dyke’s police union, defended him: “This is not a murder case . . . I don’t want to get into his head, but when you’re in a situation where you feel the need to utilize your weapon, you do that, whether its six seconds, one second, or five minutes.”¹⁹ In these sad stories, no one wins—Van Dyke was convicted of second-degree murder, Van Dyke’s two children must now grow up without their father, the legitimacy of law enforcement is marred, Chicago (rightfully) paid \$5 million to the family of McDonald, and most troubling, a seventeen-year-old teenager, Laquan McDonald, is dead.²⁰

Repeatedly, police unions defend wayward officers like Chauvin and Van Dyke, who benefit from protections enshrined in the collective bargaining agreements permitted under state law and established by their police unions.²¹ Some of these protections, discussed in detail in Part III of this Article, shield wayward officers from liability for their misconduct,²² delay interrogations of officers suspected of misconduct for up to forty-eight hours,²³ expunge disciplinary records after a few years or when law enforcement officers move to a different department,²⁴ require binding arbitration by biased arbitrators,²⁵ and severely limit the

by *Police* | *The New York Times*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=ykkxV6oUCOs&t=23s> [hereinafter *Laquan Shot by Police Video*].

¹⁶ Schutz, *supra* note 15; see also *Laquan Shot by Police Video*, *supra* note 15.

¹⁷ Schutz, *supra* note 15; see also *Laquan Shot by Police Video*, *supra* note 15.

¹⁸ Schutz, *supra* note 15; see also *Laquan Shot by Police Video*, *supra* note 15.

¹⁹ Schutz, *supra* note 15.

²⁰ See, e.g., Editorial Board, *City Releases Laquan McDonald Shooting Video*, WTTW NEWS, Nov. 24, 2015, 6:58 PM, <https://news.wttw.com/2015/11/24/city-releases-laquan-mcdonald-shooting-video>; Charlie Wojciechowski, *Year After Van Dyke Sentence, Even His Family Doesn’t Know His Location*, NBC NEWS CHI. (Jan. 17, 2020, 1:01 PM), <https://www.nbcchicago.com/news/local/year-after-van-dyke-sentence-even-his-family-doesnt-know-his-location/2202975/>; Schutz, *supra*, note 15.

²¹ See, e.g., FRONTLINE | PBS, *An Officer Was Filmed Punching Someone. Was It Justified?* | “Policing the Police 2020” | FRONTLINE, YOUTUBE, Sept. 15, 2020, https://www.youtube.com/watch?v=mPNbO_D27nc.

²² See discussion *infra* Part III(A).

²³ See discussion *infra* Part III(B).

²⁴ See discussion *infra* Part III(C).

²⁵ See discussion *infra* Part III(D).

opportunity for civilian review boards.²⁶ These issues are systemic and therefore not isolated to a limited number of police unions or regions.²⁷

Fortunately, the good law enforcement officers who genuinely want to do the right thing outnumber the wayward law enforcement officers.²⁸ Police serve a necessary and crucial function in our cities, and those good law enforcement officers should be protected; the tension arises when wayward officers take advantage of police union protection in the face of brutality and misconduct.²⁹ Wayward officers must be identified and held accountable before they are put in a position where they ultimately choose to suffocate someone for nine minutes for attempting to use a counterfeit \$20,³⁰ or pull the trigger sixteen times on a youth simply walking away from law enforcement.³¹

Efforts to reform law enforcement are regularly met with well-reasoned critiques. Two of the more prominent concerns are that people will be less likely to pursue a career in law enforcement, and that current good officers may be less eager to enforce the law for fear of liability, especially if police are stripped of qualified immunity as some have suggested.³² Though not specifically in the purview of this Article, qualified immunity shields government workers, including the police, from certain lawsuits unless the victim can show that the rights violated were “clearly established” as illegal or unconstitutional.³³ As one criminal law expert in Pittsburgh, Pennsylvania put it, “qualified immunity is needed so cops get out of the cop car, but not to protect bad cops.”³⁴ In

²⁶ See discussion *infra* Part III(E).

²⁷ One study analyzed police contracts in 600 police departments across the country and found that “84% of police union contracts imposed at least one barrier to holding police accountable.” Campaign Zero, *Fair Police Contracts*, <https://campaignzero.org/contracts> (last accessed Nov. 4, 2021).

²⁸ See, e.g., Seth W. Stoughton et al., *How to Actually Fix America’s Police*, ATLANTIC, June 3, 2020, <https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fixamerica-s-police/612520/>; Joshua Nelson, *Tom Homan Blasts Push to Defund Police: ‘99% of Cops Are Heroes’ Who Risk Their Lives*, FOX NEWS (June 11, 2020), <https://www.foxnews.com/media/former-ice-director-tom-homan-blasts-defund-the-police-movement-99-of-cops-are-heroes>.

²⁹ See discussion *infra* Part III(A).

³⁰ Griffith, *supra* note 1; Levitz, *supra* note 1.

³¹ Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1193–94 (2017); Editorial Board, *When Police Unions Impede Justice*, N.Y. TIMES, Sept. 3, 2016, 8(L).

³² DiSalvo, *supra* note 14; see Jay Schweikert, *The Most Common Defenses of Qualified Immunity, and Why They’re Wrong*, CATO INST., June 19, 2020, <https://www.cato.org/blog/most-common-defenses-qualified-immunity-why-theyre-wrong>.

³³ Institute for Justice, *Project on Immunity and Accountability*, IJ (last visited Mar. 24, 2023), <https://ij.org/issues/project-on-immunity-and-accountability/>.

³⁴ Interview with John Rago, Associate Professor of Law, in Pittsburgh, Pa. (Sept. 7, 2021).

addition to officers' fears of being held criminally liable for legal and justifiable acts, the drastic shift in public sentiment against law enforcement has already led to a decrease in arrests and an increase in criminal activity in the nation's fifty largest cities, according to a recent study.³⁵ Police unions are quick to reply that, "qualified immunity *does not* prevent individuals from recovering damages from law enforcement officers who *knowingly* violate an individual's constitutional rights," and they are right.³⁶ As this Article will make clear, police unions and the collective bargaining agreements for which they advocate allow officers to "*knowingly* violate an individual's constitutional rights."³⁷

While it is easy and convenient to rally against law enforcement as an institution, criticize politicians on one side of the ideological spectrum, and toss around phrases like "defund the police," if we truly want to stop police misconduct once and for all, the answer lies in "reforming the collective-bargaining agreements that shelter bad cops."³⁸ This Article will address the issues inherent in police union collective bargaining agreements and propose legislation to hold law enforcement officers accountable and to prevent the troubling provisions from being included in collective bargaining agreements. Part II of this Article will examine the historical background of public labor unions, policing in the United States, and the rise of police unions in the 1960s. Part III will outline some of the more egregious provisions of the collective bargaining agreements that lead to police misconduct. Part IV will consider some possible solutions to the issue of collective bargaining and police unions through proposed statutory reform, and Part V will offer some closing reflections. The appendices to this Article include samples of current statutes permitting collective bargaining among police unions, a collection of statutes from all the states that forbid public unions and police unions from collective bargaining, and model statutory language that states may adopt to remedy the aforementioned harmful provisions and ultimately hold law enforcement officers like Chauvin and Van Dyke accountable.

³⁵ DiSalvo, *supra* note 14, at 39.

³⁶ Statement from Int'l Ass'n of Chiefs of Police, *IACP Statement on Qualified Immunity*, IACP, (last visited Mar. 24, 2023), <https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf>.

³⁷ *Id.*

³⁸ Marc A. Thiessen, Opinion, *Want to Purge Bad Cops? Fix Collective Bargaining*, WASH. POST (June 11, 2020), <https://www.aei.org/op-eds/want-to-purge-bad-cops-fix-collective-bargaining/>.

II. BACKGROUND

Public labor unions have existed in states like Wisconsin and New York from at least the 1950s,³⁹ and are “in the business of protecting members’ job security and winning members better salaries and benefits.”⁴⁰ It is important to note the fundamental difference between public labor unions and private labor unions: in the private sector, the interests of the employees, represented by their unions, and the employer are necessarily at odds—each are interested in maximizing wages or profits, respectively.⁴¹ But in the public sector, the employees vis-à-vis their union are negotiating with their employer, the government, for tax money collected from constituents.⁴² Whereas “[c]ollective bargaining in [the private sector] is adversarial, . . . public unions sit on both sides of the bargaining table since they help elect the politicians with whom they negotiate.”⁴³ George Meany, the first president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO),⁴⁴ which is the largest federation of unions in the United States representing over twelve million workers today,⁴⁵ once said, “it is impossible to bargain collectively with the government.”⁴⁶

This fundamental difference has led to criticism from prominent figures across the political and ideological spectrum; some United States Presidents, like Theodore Roosevelt, William Howard Taft,⁴⁷ Franklin

³⁹ Falco A. Muscante II, *Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, But Universities Are Not Listening* 61 DUQUESNE L. REV. 124, 129–31 (2023); Paul Moreno, *The History of Public Sector Unionism*, HILLSDALE COLLEGE, <https://www.hillsdale.edu/educational-outreach/free-market-forum/2011-archive/the-history-of-public-sector-unionism/>.

⁴⁰ DiSalvo, *supra* note 14, at 30.

⁴¹ See Brian Nichols, *218: How the Fairness Center Protects Public Sector Employees – with Nathan McGrath*, Brian Nichols Show, at 17:00–21:08 (Mar. 26, 2021), <https://www.briannicholsshow.com/218-how-the-fairness-center-protects-public-sector-employees-with-nathan-mcgrath/>.

⁴² *Id.*

⁴³ *The Problem with Police Unions*, *supra* note 11.

⁴⁴ George Meany, AFL-CIO, <https://aflcio.org/about/history/labor-history-people/george-meany> (last visited Mar. 24, 2023).

⁴⁵ *About Us*, AFL-CIO, <https://aflcio.org/about-us> (last visited Mar. 24, 2023).

⁴⁶ *The Problem with Police Unions*, *supra* note 11.

⁴⁷ Moreno, *supra* note 39 (“Presidents Theodore Roosevelt and William Howard Taft recognized the danger of these federal employee organizations lobbying Congress and issued executive orders prohibiting federal employee membership in such organizations.”).

Delano Roosevelt,⁴⁸ and Ronald Reagan⁴⁹ have both distinguished private unions from public unions and offered some degree of criticism regarding the latter. Most opponents of public unions identify at least one of these three main criticisms: public unions “drive up the costs of government by increasing the wages and benefits for public servants,” public unions promote an unhealthy resistance to change through collective bargaining,⁵⁰ and most relevant to this Article, public unions lack accountability.⁵¹

Police unions are public unions which, “[l]ike any other type of union, . . . view their duty as protecting the interests of their dues-paying members, . . . [but] are fundamentally different, because their members are armed agents of the state.”⁵² Police unions are relatively new, in part because of the negative repercussions following the Boston Police Department strike of 1919 in which over a thousand officers went on strike, causing riots, property damage, and several fatalities.⁵³

Police unions are not immune to the same fraud and corruption problems that often plague public unions generally.⁵⁴ Like public unions,

⁴⁸ Franklin Delano Roosevelt, *97 The President Indorses Resolution of Federation of Federal Employees Against Strikes in Federal Service: August 16, 1937*, in 6 *The Public Papers and Addresses of Franklin D. Roosevelt* 234, 235 (Samuel I. Rosenman ed. 1941) (“[T]he process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations”) (cited in *Nichols*, *supra* note 41).

⁴⁹ See, e.g., Philip Dray, *There is Power in a Union: The Epic Story of Labor in America* 629 (2010) (noting that President Reagan, who led the first strike as president of his private labor union, said that, “we cannot compare labor . . . in the private sector with government.”); Bryan Craig, *Reagan vs. Air Traffic Controllers*, U. OF VA. MILLER CTR., <https://millercenter.org/reagan-vs-air-traffic-controllers> (last visited Mar. 24, 2023).

⁵⁰ DiSalvo, *supra* note 14.

⁵¹ *The Problem with Police Unions*, *supra* note 11; *Nichols*, *supra* note 41 (“There’s not a lot of accountability built into the system.”).

⁵² Serwer, *supra* note 7, at 12.

⁵³ DiSalvo, *supra* note 14.

⁵⁴ See, e.g., *Seabron v. AFSCME, District Council 37: Case Summary*, FAIRNESS CTR., <https://www.fairnesscenter.org/seabron-v-afscme-district-council-37/> (last visited Mar. 24, 2023); *President of Law Enforcement Union Charged with Defrauding Union’s Annuity Fund*, IRS (last updated May 12, 2021), <https://www.irs.gov/compliance/criminal-investigation/president-of-law-enforcement-union-charged-with-defrauding-unions-annuity-fund#:~:text=Kenne%E2%80%A6> (“From at least in or about 2012 up to and including the date of this Complaint, Wynder participated in a scheme to steal, embezzle, and misappropriate money from the Annuity Fund and individual members’ retirement accounts. Specifically, Wynder made hundreds of thousands of dollars of fraudulent transfers from the Annuity Fund to LEEBA’s operating account, which he controlled, and regularly used the funds, once transferred from the Annuity Fund, to enrich himself at union members’ expense, including through unauthorized and excessive checks to himself and cash withdrawals for his own benefit.”); Jake Pearson, *A Union Scandal Landed Hundreds of NYPD Officers on a Secret Watchlist. That Hasn’t Stopped Some From Jeopardizing Cases.*, PROPUBLICA, Oct. 22, 5:00 AM EDT, <https://www.propublica.org/article/a-union-scandal-landed-hundreds-of-nypd-officers->

police unions “influence the structure and operations of police departments in two ways: from the bottom up, through collective bargaining, and from the top down, through political activity.”⁵⁵ Collective bargaining is the process by which “a union and an employer negotiate for wages, benefits, working conditions, and other employee workplace terms and conditions.”⁵⁶ Police unions are different from other public unions though: for one, law enforcement officers are armed agents of the state, but also, police unions “tend to be more bipartisan than, say, . . . teachers’ unions.”⁵⁷ For Democrats, “police unions are the redheaded stepchildren in an otherwise beneficent labor movement,” but for “[c]onservatives, on the other hand, [they] disapprove of labor unions generally but have given police unions a pass as part of their support of law enforcement.”⁵⁸ This unusual bipartisanship makes police union reform ripe for beneficial discussion from both sides of the political aisle—specifically with regard to collective bargaining agreements and the oft-dangerous provisions therein. In the years following the early rise of public unions, and specifically police unions in the 1960s and 1970s, a majority of the states have incorporated collective bargaining protections for law enforcement officers in each of their respective jurisdictions.⁵⁹ Whereas only 2% of public employees in 1960 had collective bargaining rights, 63% of those employees had collective bargaining rights by 2010.⁶⁰ In 2019, 57.5% of the nation’s 712,336 law enforcement officers and 43.3% of the nation’s 80,802 police supervisors and detectives were governed by collective bargaining contracts.⁶¹

on-a-secret-watchlist-that-hasnt-stopped-some-from-jeopardizing-cases; David A. Fahrenthold, *D.C. Police Lodge Broke the Law by Selling Hundreds of Whiskey Bottles Online, Investigation Finds*, WASH. POST (Dec. 10, 2021, 1:02 PM EST), <https://www.washingtonpost.com/politics/2021/12/10/dc-fop-lodge-jack-daniels-committee-violations/>.

⁵⁵ DiSalvo, *supra* note 14; *see also* Muscante, *supra* note 39 (discussing the nature of public union compelled political speech in the context of public university student activity fees).

⁵⁶ Muscante, *supra* note 39, at 129–30.

⁵⁷ DiSalvo, *supra* note 14 (noting that the Fraternal Order of Police (FOP), for instance, refused to endorse Mitt Romney for president in 2012 but endorsed Donald Trump in 2016. Michael Zoorob of Harvard University found that FOP support “contributed to a significant swing in vote share from Romney to Trump” in key states”).

⁵⁸ DiSalvo, *supra* note 14, at 24, 25; *see also* William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform>.

⁵⁹ DiSalvo, *supra* note 14, at 27.

⁶⁰ *Id.*

⁶¹ *Id.* at 28.

III. WHERE THINGS WENT WRONG

While criticisms of public unions may generally be apt, it is well worth drawing the distinction between other public unions representing teachers, postal workers, sanitation workers, nurses, and EMTs. Members of other public unions are fundamentally different in that they neither carry firearms nor willingly risk their lives in the name of public service each day. For instance, if a teacher were to wield a firearm and shoot a student, that teacher “cannot avoid prosecution if the school fails to investigate the incident,” nor can she be “reinstated because an arbitrator determined that management failed to properly follow procedure in firing her.”⁶² A law enforcement officer, on the other hand, could likely exercise each of those benefits, even in the face of alleged misconduct.

The president of the American Federation of State, County, and Municipal Employees, the largest public union in the country, denied that police collective bargaining agreements provide a “shield for misconduct or criminal behavior,” and analogized police unions today to the “striking African-American sanitation workers in Memphis” who marched with Martin Luther King, Jr. the day he was shot: “just as it was wrong when racists went out of their way to exclude black people from unions, it is wrong to deny this freedom to police officers today.”⁶³

At the date of this Article’s publication, police enjoy collective-bargaining rights in at least 42 states and the District of Columbia.⁶⁴ Five states prohibit collective bargaining for public employees outright, three by common law (Georgia, South Carolina, and Tennessee), and two by legislation (North Carolina and Virginia).⁶⁵ Four states neither statutorily advance nor oppose police unions: Alabama, Colorado, Mississippi, and Wyoming.⁶⁶ A lack of accountability for police unions is at the core of many of the troubling stories found in the news. Police unions and the collective bargaining agreements that they negotiate are powerful—powerful enough even to keep the Department of Justice from effectuating positive change in cities like Pittsburgh, Pennsylvania.⁶⁷ This section will

⁶² Serwer, *supra* note 7, at 16; *see also* Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1370 (2020).

⁶³ DiSalvo, *supra* note 14, at 30.

⁶⁴ *Id.*; Levin, *supra* note 62, at 1357; *Collective Bargaining*, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/collective-bargaining-database> (last visited Mar. 24, 2023).

⁶⁵ Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, CTR. FOR ECON. & POL’Y RSCH. (Mar. 2014), <https://perma.cc/SM53-2TXN>; *see also* DiSalvo, *supra* note 14; Levin, *supra* note 62, at 1357.

⁶⁶ DiSalvo, *supra* note 14; Levin, *supra* note 62, at 1357.

⁶⁷ In 1997, the U.S. Department of Justice and the Pittsburgh Bureau of Police reached an agreement to reform unconstitutional misconduct, but the agreement held the collective bargaining agreement intact and refused to limit the power and authority of police

look at five of the most egregious provisions pertaining to collective bargaining agreements—shields to liability, delayed interrogations, record expungement, mandatory arbitration, and lack of transparency for civilian review boards—to highlight the pervasiveness of police union control and to set the stage for the solution offered in Part IV of this Article and in Appendix C.⁶⁸

A. Shielding Wayward Officers from Liability

The states that do allow or require collective bargaining for law enforcement officers typically statutorily permit police unions “to bargain collectively with regard to policy matters directly affecting wages, hours[,] and terms and conditions of employment.”⁶⁹ Courts have generally understood terms like “wages” to permit public employees to bargain

collective bargaining agreements. Stephen Rushin & Allison Garnett, *State Labor Law and Federal Police Reform*, 51 GA. L. REV. 1209, 1210 (2017); *see also* Sheryl Gay Stolberg, *‘It Did Not Stick’: The First Federal Effort to Curb Police Abuse*, N.Y. TIMES (Apr. 9, 2017), <https://www.nytimes.com/2017/04/09/us/first-consent-decree-police-abuse-pittsburgh.html>.

⁶⁸ Law Enforcement Officers’ Bill of Rights (LEOBRs) in state laws and state civil service laws are also impingements to police accountability but are outside the scope of this article. *See, e.g.*, Daniel DiSalvo, *Enhancing Accountability: Collective Bargaining and Police Reform*, MANHATTAN INST. FOR POL’Y RSCH., INC. (Jan. 12, 2021), <https://www.manhattan-institute.org/enhancing-accountability-collective-bargaining-and-police-reform> [hereinafter *Enhancing Accountability*]; Rushin, *supra* note 31, at 1208-09 (“In addition to collective bargaining and civil service statutes, a handful of states have passed yet another layer of employment protections for frontline police officers: LEOBRs. Unlike civil service laws, which protect a wide range of public employees, LEOBRs provide police officers with due process protections during disciplinary investigations that are not given to other classes of public employees.”) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

⁶⁹ Rushin, *supra* note 31, at 1195, 1205; *see, e.g.*, 5 FLA. STAT. ANN. § 447.203 (LEXIS through 2022 Reg. and Extra Sess.) (cited in part in Appendix A) (“[Collective bargaining] includes the mutual obligations of the public employer and the bargaining agent . . . to execute a written contract with respect to agreements reached concerning the terms and conditions of employment”); ILL. COMP. STAT. ANN. 315/2 (LEXIS through P.A. 102-537 of the 2021 Sess. of the 102nd Legis.) (cited in full in Appendix A) (“public employees [have] full freedom of association, self-organization, and designation of representatives of their own choosing for . . . negotiating wages, hours and other conditions of employment”); MINN. STAT. ANN. § 179A.06 (LEXIS through 2021 Reg. Sess. and 1st Spec. Sess.) (cited in full in Appendix A) (“public employee[s] or the employee’s representative [have the right] to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment”); 43 PA. STAT. ANN. § 217.1 (through 2021 Reg. Sess. Act 80) (cited in full in Appendix A) (“Policemen . . . shall, through labor organizations . . . , have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes”).

about anything that directly or indirectly affects their compensation, including direct wages or salaries, fringe benefits, health insurance, life insurance, retirement benefits, sick leave, vacation time, and any indirect form of compensation,” but the “wages” and “hours” language is not controversial.⁷⁰ Rather, the language, “terms and conditions of employment,” is problematic because courts often broadly interpret the language to apply to “internal procedures used by police management to investigate or punish officers suspected of misconduct.”⁷¹ Under the guise of “conditions of employment,” these provisions often establish “disciplinary, grievance, and arbitration procedures for officers accused of misconduct,” that “shield incompetent or abusive officers” from liability.⁷² Nearly 90% of collective bargaining agreements for municipal police departments serving communities with at least 100,000 residents, and 80% of collective bargaining agreements from more than 600 other police departments,⁷³ have at least some of the provisions that are discussed in the following subsections of this Article.⁷⁴

People on both sides of the political and ideological spectrum criticize the provisions in police union collective bargaining agreements that “shield abusive officers.”⁷⁵ While there is no provision that explicitly purports to protect harmful and abusive law enforcement officers, the effects of some of the provisions, taken together, do just that. In an article published by *National Affairs*, Daniel DiSalvo identifies three issues inherent in the culture created by police unions and collective bargaining agreements: 1) good officers are encouraged to defend wayward officers by “maintaining the ‘blue wall of silence;’” 2) wayward officers who are dismissed for misconduct are rehired; and 3) “union protections . . . allow officers to act with greater impunity.”⁷⁶

In 2017, the Washington Post released a study showing that 451 of 1,881 law enforcement officers from some of the largest police departments in the country who were fired for misconduct had been reinstated because of provisions in collective bargaining agreements.⁷⁷ The same study found that forty-five percent of the officers fired for misconduct from 2006 to 2017 in Washington, D.C. were rehired on appeal—“[i]n Philadelphia, the share is 62 percent,” and “[i]n San

⁷⁰ Rushin, *supra* note 31, at 1205; DiSalvo, *supra* note 14.

⁷¹ Rushin, *supra* note 31, at 1195; *see also* DiSalvo, *supra* note 14.

⁷² DiSalvo, *supra* note 14.

⁷³ *See* Campaign Zero, *supra* note 27.

⁷⁴ Rushin & Garnett, *supra* note 67, at 1217–19; *see infra* Part III.

⁷⁵ DiSalvo, *supra* note 14.

⁷⁶ *Id.*

⁷⁷ Serwer, *supra* note 7, at 14.

Antonio, it's 70 percent."⁷⁸ Even when a police chief has cause to fire an officer and feels the officer should never be allowed to work in any jurisdiction as a law enforcement officer again, the chief often "[has] to allow them back into the workplace [due to union contracts]."⁷⁹

B. Expungement of Disciplinary Records

A more specific contractual provision commonly found in police collective bargaining agreements allows for an officer to effectively erase complaints and disciplinary actions from the officer's personnel file. As such, a police chief may not only be required to rehire an officer the chief feels is unfit for service, but also may be prohibited from saving and sharing disciplinary records with other police departments who may consider hiring the officer in the future. A 2017 Reuters investigation of some of the largest cities in America found that a majority of the eighty-two active collective bargaining agreements reviewed "call for departments to erase disciplinary records, some after just six months."⁸⁰

For example, in Jacksonville, the collective bargaining agreement requires that information relating to the formal investigation of an officer be purged after one, three, or five years, given the circumstances.⁸¹ Any purged files "may not be used as evidence by either party in any disciplinary or grievance proceeding or hearing."⁸² The Maryland Law Enforcement Officer Bills of Rights "allows police officers to remove civilian complaints from their personnel files after three years."⁸³ In Baltimore, an officer may request expungement of formal complaints lodged against her or him after three years have passed.⁸⁴ Cleveland's policy "requires management to remove all verbal and written reprimands from officers' personnel files after six months" and "mandate[s] the removal of disciplinary records from department databases after two

⁷⁸ Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says About the Connection*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/business/2020/06/10/police-unions-violence-research-george-floyd/>.

⁷⁹ Levin, *supra* note 62, at 1345; *see also* DiSalvo, *supra* note 14.

⁸⁰ Serwer, *supra* note 7, at 14.

⁸¹ Agreement Between the City of Jacksonville and the Fraternal Ord. of Police, at 41 (Sept. 30, 2014) (on file with author) [hereinafter *Jacksonville CBA*].

⁸² *Id.*

⁸³ Rushin, *supra* note 31, at 1210.

⁸⁴ Mem. of Understanding Between the Balt. City Police Dep't and the Balt. City Lodge No. 3, Fraternal Ord. of Police, Inc. Unit I, at 29 (Jan. 15, 2015), <https://web.archive.org/web/20210916224853/https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/56ad1a6542f5526b4810c5f7/1454185062931/Baltimore+police+contract+14-16.pdf> [hereinafter *Baltimore CBA*].

years.”⁸⁵ The City of Chicago agreed “to erase decades worth of records that document complaints against police officers and the resolution of these complaints,” following negotiations with the police union.⁸⁶ The Chicago police collective bargaining provides for “[a]ll disciplinary investigation files . . . [to be] destroyed five (5) years after the date of the incident.”⁸⁷ Disciplinary Action Reports in Pittsburgh are automatically removed from a law enforcement officer’s file after one year for an oral reprimand, two years for a written reprimand, or five years for a suspension.⁸⁸ In Seattle, files of investigations that are “not sustained” are destroyed after three years.⁸⁹ Other cities that mandate the removal of disciplinary records from personnel files over time include Austin, Baltimore, Cincinnati, Columbus, Honolulu, Jacksonville, Las Vegas, Louisville, Miami, Minneapolis, Washington, D.C., and at least seventy-five other cities.⁹⁰

These collective bargaining agreements that mandate the destruction of disciplinary records or prevent prior disciplinary history from affecting future employment status prevent police chiefs from using officer disciplinary records either when reprimanding an officer or when considering hiring a new officer.⁹¹ As one commentator notes, “police chiefs cannot effectively manage their workforce if disciplinary records are regularly destroyed. Without records, new police chiefs have little idea who they are dealing with. This is especially true for job seekers who come from other police departments.”⁹²

C. Delayed Interrogations of Officers Suspected of Misconduct

Whereas Part A and Part B above describe problematic protections to an officer after the officer has committed misconduct, the following two provisions describe problematic contractual provisions when officers are suspected of misconduct. First, many collective bargaining agreements

⁸⁵ Rushin, *supra* note 31, at 1197–98, 1228–29.

⁸⁶ *Id.* at 1195.

⁸⁷ Agreement Between the City of Chi. Dep’t of Police and the Fraternal Ord. of Police Chi. Lodge No. 7, at 11 (July 1, 2012), https://www.chicago.gov/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement3/FOPCBA2012-2017_2.20.15.pdf [hereinafter *Chicago CBA*].

⁸⁸ Working Agreement Between the City of Pittsburgh and the Fraternal Ord. of Police Fort Pitt Lodge No. 1, at 126 (Apr. 25, 2011), <https://web.archive.org/web/20210923010424/https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/55ca418fe4b06a5202558dfd/1439318415721/Pittsburg+contract.pdf> [hereinafter *Pittsburgh CBA*].

⁸⁹ DiSalvo, *supra* note 14.

⁹⁰ Rushin, *supra* note 31, at 1230–31.

⁹¹ *See id.* at 1228.

⁹² DiSalvo, *supra* note 14.

“delay officer interrogations [for at least twenty-four hours] after alleged misconduct and require investigators to provide officers with access to evidence before beginning interrogations.”⁹³ More simply, when a law enforcement officer is involved in a critical incident where the officer shoots a victim—regardless of whether the shooting is justified—the officer often cannot be interrogated until after a twenty-four to forty-eight hour cooling-off period.⁹⁴

These delayed interrogations are justified as protections of law enforcement officers’ “basic rights,” but in practice, delayed interrogations impugn accountability and allow law enforcement officers to develop a consistent story, even if that story later proves contrary to the facts.⁹⁵ This situation is exactly what occurred after former officer Van Dyke shot and killed McDonald.⁹⁶ Van Dyke and the six other officers present for the shooting separately filed police reports each claiming McDonald charged the officers with a knife. The Chicago collective bargaining agreement with the police department allowed a waiting period of up to forty-eight hours, which essentially gave them “time to coordinate stories after potential misconduct incidents in a way that deflects blame.”⁹⁷ However, camera footage later proved that McDonald did not charge the officers, but instead was walking away from them slowly.⁹⁸ The delayed interrogation provision in the Chicago police collective bargaining agreement enabled these officers to write “separate reports providing a nearly identical-and demonstrably false-version of events.”⁹⁹

Nearly one third of the 178 police union collective bargaining agreements analyzed in a study “limit officer interrogations after alleged misconduct, . . . and limit the length of internal investigations.”¹⁰⁰ Many of these collective bargaining agreements “delay officer interrogations anywhere from a few hours to several days after suspected misconduct—and, in many cities, even after officer-involved shootings.”¹⁰¹ For example, the Anchorage police collective bargaining agreement requires that officers under investigation for a non-criminal offense “shall be

⁹³ Rushin, *supra* note 31, at 1222; *see also* Jacob Beltran, *Officer Discipline at Issue as Talks Between City, San Antonio Police Union Stretch On*, SAN ANTONIO EXPRESS-NEWS (Oct. 28, 2021), <https://www.expressnews.com/news/local/article/San-Antonio-police-union-contract-16573040.php>.

⁹⁴ *See, e.g., infra* text accompanying notes 94–100.

⁹⁵ Rushin, *supra* note 31, at 1225–27.

⁹⁶ *Id.*

⁹⁷ *Id.*; *see Chicago CBA, supra* note 87, at 6.

⁹⁸ Rushin, *supra* note 31, at 1225–27; *Laquan Shot by Police Video, supra* note 15.

⁹⁹ Rushin, *supra* note 31, at 1225–27; *see Chicago CBA, supra* note 87, at 6.

¹⁰⁰ *See* Rushin, *supra* note 31, at 1225–27; Thiessen, *supra* note 38.

¹⁰¹ Rushin, *supra* note 31, at 1225–27.

provided with a minimum of twenty-four (24) hours notice.”¹⁰² Chicago provides that interviews in disciplinary investigations may be delayed up to forty-eight hours, except in shooting cases, which may be postponed for up to two hours.¹⁰³ Minneapolis has similar requirements, that “[b]efore taking a formal statement from any employee . . . [the City] shall provide[a written summary of the events to which the statement relates] to the employee not less than two (2) days prior to the taking of his/her statement.”¹⁰⁴ The Jacksonville police collective bargaining agreement and Florida law requires that a law enforcement officer “be informed in writing of the nature of the investigation prior to any interrogation,” and that the interrogation should take place when the officer is on duty.¹⁰⁵ Pittsburgh requires that an “officer . . . be given twenty-four (24) hours notice of an interview” for a disciplinary violation.¹⁰⁶ Other cities that allow for some form of delayed interrogatories include Albuquerque, Austin, Columbus, El Paso, Fort Worth, Houston, Kansas City, Louisville, Miami, Portland, San Antonio, San Diego, Seattle, Washington, D.C., and at least thirty other jurisdictions.¹⁰⁷

In Chicago, a task force appointed by Mayor Rahm Emanuel noted, “[t]he collective bargaining agreements between the police unions and the city have essentially turned the code of silence into official policy.”¹⁰⁸ As was true after Van Dyke shot and killed McDonald and then lied about McDonald’s actions, collective bargaining agreements encourage officers to lie by allowing them to coordinate accounts with other law enforcement officers during the delayed period that an officer is permitted to take before the officer gives testimony related to the incident.¹⁰⁹

D. One-Sided, Yet Binding Arbitration

Generally, in the private sector, arbitration is a cost-effective, fair, preferred alternative of resolving disputes that avoids costly litigation and

¹⁰² Collective Bargaining Agreement Between Anchorage Police Dep’t Emps. Ass’n, at 17 (July 1, 2015), https://web.archive.org/web/20180912003620/https://www.muni.org/Departments/employee_relations/Collective%20bargaining%20agreements/APDEA%20CBA%202015-2018.PDF.

¹⁰³ *Chicago CBA*, *supra* note 87, at 6.

¹⁰⁴ The City of Minneapolis and the Police Officers’ Fed’n of Minneapolis Lab. Agreement, at 19 (Jan. 1, 2017), https://www.minneapolispolice.org/_asset/8mhc3p/labor_agreement_park_police.pdf [hereinafter *Minneapolis CBA*].

¹⁰⁵ *Jacksonville CBA*, *supra* note 81, at 25; FLA. STAT. ANN. § 112.532 (LEXIS through 2022 Reg. and Extra Sess.).

¹⁰⁶ *Pittsburgh CBA*, *supra* note 88, at 131.

¹⁰⁷ Rushin, *supra* note 31, at 1225–27.

¹⁰⁸ *When Police Unions Impede Justice*, *supra* note 31, at 8(L).

¹⁰⁹ Rushin, *supra* note 31, at 1225–27; *When Police Unions Impede Justice*, *supra* note 31, at 8(L).

time-consuming trials. In the context of law enforcement and police unions, arbitration is anything but fair; cities such as Chicago, Detroit, and Minneapolis allow police unions to essentially select whomever they want as the arbitrator.¹¹⁰ One researcher found that nearly half of all collective bargaining agreements give officers or unions “significant power to select the identity of the arbitration,” to “provide this arbitrator with significant power to override earlier factual or legal decisions,” and to “make the arbitrator’s decision final and binding on the police department.”¹¹¹

Further, unlike court proceedings, “arbitration is typically conducted behind closed doors,” and police unions have significant control selecting arbitrators, which incentivizes those arbitrators to favor police in order to continue to end up on the police union’s short list of recommended arbitrators.¹¹² If an arbitrator disciplines too many law enforcement officers, the arbitrator may not be chosen by the police union for future arbitrations.¹¹³ Arbitration is a common method for settling contract disputes in the context of public labor unions, but using arbitration in the context of disciplinary appeals is troubling for some policing scholars.¹¹⁴

In Chicago, for example, the police union and the employer may only use an arbitrator from an “exclusive list of [five] Arbitrators to preside over the suspension grievances,” and the arbitrator’s decisions “shall be final and binding.”¹¹⁵ Minneapolis has a similar provision, as does Jacksonville.¹¹⁶ In California, Los Angeles and Oakland have similar provisions requiring that arbitration decisions are final and binding.¹¹⁷

¹¹⁰ *The Problem with Police Unions*, *supra* note 11; *see Chicago CBA*, *supra* note 87, at 84 (“The Lodge and the Employer have agreed to a panel of five (5) Arbitrators who shall comprise the exclusive list of Arbitrators to preside over the suspension grievances.”); *Minneapolis CBA*, *supra* note 104, at 126–28.

¹¹¹ *The Problem with Police Unions*, *supra* note 10 (citing Stephen Rushin, *Police Disciplinary Appeals*, 161 U. PA. L. REV. 545, 571 (2019)).

¹¹² DiSalvo, *supra* note 14; *see, e.g., Pittsburgh CBA*, *supra* note 88, at 120; *see also* Editorial Board, *A Police-Friendly Arbitrator Made An All Too Common Decision in Buffalo*, WASH. POST. (Apr. 22, 2022, 2:47 PM EDT), <https://www.washingtonpost.com/opinions/2022/04/22/buffalo-police-arbitration-process-problems/> (“We are not aware of any case where this [particular] arbitrator has ruled against on-duty police officers, so his ruling here on behalf of the police was not only expected by us, but was certainly expected by the union and city who selected and paid him . . .”).

¹¹³ DiSalvo, *supra* note 14.

¹¹⁴ Rushin, *supra* note 31, at 1238.

¹¹⁵ *Chicago CBA*, *supra* note 87, at 15.

¹¹⁶ *Minneapolis CBA*, *supra* note 104, at 126–28; *Jacksonville CBA*, *supra* note 81, at 20–22.

¹¹⁷ Memorandum of Understanding No. 24 for Joint Submission to the City Council Regarding Police Officers, Lieutenant and Below Representation Union by and Between the City of L.A. and the L.A. Police Protective League, at 83 (July 1, 2011), <https://web.archive.org/web/20210922190725/https://static1.squarespace.com/static/559fb>

Generally, nearly 65% of collective bargaining agreements from of the country's largest cities include language that permits or requires using arbitration in adjudicating officer disciplinary appeals.¹¹⁸ These collective bargaining agreements, among others, often establish procedures for challenging personnel actions like re-assignment, suspension, transfer, or firing.¹¹⁹

If a superior disciplines a law enforcement officer, the union can continue to appeal up the chain-of-command until the matter ultimately reaches binding arbitration, where arbitrators “are empowered to order reinstatement and back pay for officers found guilty of misconduct.”¹²⁰ There are many stories of law enforcement officers who are ultimately reinstated after arbitration regarding a significant disciplinary violation, such as Hector Jimenez, “an officer in Oakland, California, who killed two unarmed men in a seven-month period [in 2007-2008]—shooting one of them in the back three times.”¹²¹ Even after Jimenez lost his job and the city paid a \$650,000 settlement to one decedent's family, an arbitrator reinstated Jimenez with back pay after his union appealed and won.¹²² The current collective bargaining agreement in Oakland reads that “the decision of the arbitrator shall be final and binding on all parties.”¹²³ An investigation in 2017 found that “[forty-five] percent of the officers fired for misconduct from 2006 to 2017 [in Washington, DC] were rehired on appeal [to an arbitrator]. In Philadelphia, the share is 62 percent. In San Antonio, it's 70 percent.”¹²⁴

f2be4b08ef197467542/t/55a8afe4e4b0f61f44e1617d/1437118436980/LosAngelespolicecontract.pdf [hereinafter *L.A. CBA*]; Memorandum of Understanding Between City of Oakland and Oakland Police Officers' Association, at 42 (Dec. 12, 2018), <https://cao-94612.s3.amazonaws.com/documents/OPOA.pdf> [hereinafter *Oakland CBA*].

¹¹⁸ Rushin, *supra* note 31, at 1238.

¹¹⁹ DiSalvo, *supra* note 14; *see e.g.*, *L.A. CBA*, *supra* note 117, at 85-91; *Oakland CBA*, *supra* note 117, at 44.

¹²⁰ DiSalvo, *supra* note 14; *see e.g.*, *L.A. CBA*, *supra* note 117, at 85-91; *Oakland CBA*, *supra* note 117, at 44; *see also* Hayley Smith, *The O.C. Sheriff Fired a Deputy for Tossing Evidence. Now He Has to be Reinstated*, L.A. TIMES (Dec. 8, 2021, 1:37 PM), <https://www.latimes.com/california/story/2021-12-08/orange-county-sheriffs-department-must-reinstated-fired-deputy> (noting the outcome of a confidential arbitration that resulted in reinstatement of an officer who improperly held onto methamphetamine and failed to book various paraphernalia into evidence).

¹²¹ DiSalvo, *supra* note 14; David DeBolt, et al., *New Records in Oakland Police Shooting Raise Questions About DA's role in Investigating Cops*, SANTA CRUZ SENTINEL (July 19, 2020, 5:10 PM), <https://www.santacruzsentinel.com/2020/07/19/new-records-in-oakland-police-shooting-raise-questions-about-das-role-in-investigating-cops/>.

¹²² DiSalvo, *supra* note 14.

¹²³ *Oakland CBA*, *supra* note 117, at 47.

¹²⁴ DiSalvo, *supra* note 14.

E. Lack of Transparency to Civilian Review Boards

Through collective bargaining agreements and other advocacy, police unions have “challenged the legitimacy of transparency measures such as civilian review boards,” effectively limiting citizen oversight of the police.¹²⁵ New York police unions, for instance, repeatedly blocked efforts to repeal the state law that guarded misconduct records from release to the public, until after Floyd’s murder.¹²⁶ Van Dyke, for instance, “had more complaints than 96.7 percent of all Chicago police officers”—twenty civilian complaints since 2001—including a dozen about excessive use of force, the use of firearms, and an allegation of using of a racial slur.¹²⁷ Although Van Dyke had never before faced criminal charges, a jury awarded one man \$350,000 after determining that Van Dyke “employed excessive force during a traffic stop.”¹²⁸

The same study cited earlier in this Article also shows that a “substantial number” of police union collective bargaining agreements “ban civilian oversight, prevent anonymous civilian complaints, indemnify officers in the event of civil suits, and limit the length of internal investigations,” among other things.¹²⁹ For example, in Pittsburgh, “all information” contained in personnel files is “confidential . . . for all purposes of this Agreement.”¹³⁰ In Baltimore, “[n]otice of routine disciplinary actions shall distributed only to the affected employee [and other people within the department],” and “[n]o other publication shall be made.”¹³¹ The collective bargaining agreement in Albuquerque has similar provisions and is explicit that the “only information [that can be] released to the Police Oversight Commission,” are the allegations, the disposition of the case, and the discipline imposed.¹³² Complaint review boards in Florida must be comprised only of law enforcement officers or correctional officers.¹³³ These provisions limit accountability, restrict public access to police disciplinary records, prevent public oversight of internal police disciplinary decisions, and often prevent police chiefs from fully using disciplinary records when hiring new officers.¹³⁴

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Rushin, *supra* note 31, at 1194.

¹²⁸ *Id.*

¹²⁹ Thiessen, *supra* note 38; Rushin, *supra* note 31, at 1192.

¹³⁰ *Pittsburgh CBA*, *supra* note 88, at 94.

¹³¹ *Baltimore CBA*, *supra* note 84, at 21.

¹³² City of Albuquerque and Albuquerque Police Officers Ass’n, at 30 (July 16, 2014), <https://web.archive.org/web/20210916195326/https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/55a26c08e4b0796a90fac49a/1436707870500/Albuquerque+police+contract.pdf> [hereinafter *Albuquerque CBA*].

¹³³ FLA. STAT. ANN. § 112.532 (LEXIS through 2022 Reg. and Extra Sesss.).

¹³⁴ *See* Rushin, *supra* note 31, at 1228.

Although the accountability problem is ubiquitous among all public unions, police unions should be held to an even higher standard, which may include allowing civilians to provide input in developing and criticizing police disciplinary procedures.¹³⁵ As others have noted and as suggested in an earlier part of this Article, the nature of police conduct is fundamentally different than the nature of the conduct of other public union members.¹³⁶ Other public sector collective bargaining agreements also have established disciplinary procedures, but again, other public unions do not have members who wield firearms and are charged with enforcing the law. Considering the current contractual and political power of police unions, civilian oversight is difficult in some jurisdictions and impossible in others.

IV: SOLUTION

Since 2014, states have enacted over 130 laws to address police violence, taking up valuable legislative time only to proffer inadequate solutions.¹³⁷ A more streamlined solution is in order: eliminate the ability for police unions and police departments to collectively bargain for “any matter related to the conditions or compensation of public employment.”¹³⁸ Appendix A reproduces the statutes initially authorizing collective bargaining among police unions (and other public unions generally) and their employer from Florida, Minnesota, Illinois, and Pennsylvania, as they currently stand. Appendix B, in part, reproduces the statutes from North Carolina, Virginia, and Wisconsin, which are the only states that statutorily ban collective bargaining for public unions, and in

¹³⁵ See *id.* at 1247–48.

¹³⁶ See *supra* text accompanying notes 53–62.

¹³⁷ See *Enhancing Accountability*, *supra* note 68.

¹³⁸ See, e.g., MINN. STAT. ANN. § 179A.06 (cited in full in Appendix A).

¹³⁸ MINN. STAT. ANN. § 179A.06 (cited in full in Appendix A); see also FLA. STAT. ANN. § 447.203 (LEXIS through 2022 Reg. and Extra Sesss.) (cited in part in Appendix A) (“[Collective bargaining] includes the mutual obligations of the public employer and the bargaining agent . . . to execute a written contract with respect to agreements reached concerning the terms and conditions of employment”); 5 ILL. COMP. STAT. ANN. 315/2 (cited in full in Appendix A) (“It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.”); 43 PA. STAT. ANN. § 217.1 (cited in full in Appendix A) (“Policemen . . . shall, through labor organizations or other representative, . . . have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.”).

some cases, police unions. Appendix C suggests a workable model statute, based on some of the language found in the statutes listed in Part III, that Minnesota, Illinois, Pennsylvania, and other states can adopt to restrict collective bargaining among police unions at minimum, and perhaps other public unions, to increase transparency and accountability.

The answer is not to give less funding to police departments that otherwise pay their officers as little as \$17 an hour to carry a gun and risk their lives each day in the name of protecting and serving the public.¹³⁹ As discussed earlier, law enforcement is different from other public jobs, and because law enforcement officers often develop adversarial relationships as a result of enforcing the law, police unions prioritize protecting officers from false or exaggerated citizen complaints.¹⁴⁰ Perhaps statutory collective bargaining authorizations, and the contract provisions that arise as a result, were not promulgated with ill-intent, since “it is understandable that police officers want reasonable procedural protection when faced with internal investigations that threaten their professional livelihood.”¹⁴¹ Statutory language granting so much power to public unions and collective bargaining agreements, however, “[leads] to a substantial increase in violent incidents of misconduct” among law enforcement officers.¹⁴² The solution proposed below is an attempt at rectifying the case of these violent incidents of misconduct.

There are a handful of states that have expressly prohibited collective bargaining for law enforcement officers, and for states where the legislature would be willing to do this, prohibiting police unions (or public unions generally) from collective bargaining could be a strong solution.¹⁴³

¹³⁹ See Andrew DePietro, *Here’s How Much Money Police Officers Earn In Every State*, FORBES (Apr. 23, 2020, 2:02 PM), <https://www.forbes.com/sites/andrewdepietro/2020/04/23/police-officer-salary-state/?sh=2ff43b752010>; but see Rich Lord, *Big Raises for Disciplinary Change? Gainey’s Offer Rejected by Pittsburgh Police Union*, PublicSource (Sept. 21, 2022), <https://www.publicsource.org/pittsburgh-police-contract-arbitration-ed-gainey-raises-discipline/> (reporting that the Fraternal Order of Police in Pittsburgh rejected a proposal to raise salaries by 24% for first-year officers and 6% for lieutenants to “make our police salaries competitive with those of other police forces across the region . . . to recruit and retain officers, while helping us to diversify our police force and promote the right type of policing our city needs”).

¹⁴⁰ DiSalvo, *supra* note 14.

¹⁴¹ Rushin & Garnett, *supra* note 67, at 1217–19.

¹⁴² Thiessen, *supra* note 38; see also Dhammika Dharmapala, Richard H. McAdams, & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, J.L. ECON. & ORG. 1,1 (forthcoming) (manuscript at 30), <http://dx.doi.org/10.2139/ssrn.3095217>.

¹⁴³ Serwer, *supra* note 7 at 16; see, e.g., N.C. Gen. Stat. § 95-98 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. Of the Gen. Assemb.) (cited in full in Appendix B) (holding that collective bargaining agreements are “hereby declared to be against the public policy of the State, illegal, unlawful, void, and of no effect”).

In 2011, Wisconsin Governor Scott Walker and the state legislature significantly limited collective bargaining among employees by passing Act 10, but unfortunately, they “exempted police unions from Act 10 because [Walker] could not afford the risk of a police strike during the fight over the bill.”¹⁴⁴ Forty-eight states treat police and teachers the same when it comes to collective bargaining, but not Wisconsin.¹⁴⁵

Though this solution seems like it should be fair and nonpartisan, not all agree. Many are concerned prohibiting law enforcement from bargaining collectively will harm other employees in the public sector. Patrick Lynch, the president of the Police Benevolent Association of New York City, noted that “[t]he rhetoric that [opponents of police unions] are using now is the same rhetoric that has been used to strip union protections from teachers, bus drivers, nurses and other civil servants across this country.”¹⁴⁶ There is truth to that statement, and although law enforcement officers and their unions are fundamentally different from other public employees and public unions in the country, commentators have offered similar criticisms of public unions generally that are not within the purview of this Article, but are worth considering.¹⁴⁷ The proposed model statute below contains language that could be applied to either police unions specifically or public unions generally.¹⁴⁸

Even staunch supporters of the public labor movement have nonetheless supported stripping police unions of their ability to bargain collectively for every “term and condition of employment except for a narrow subset of issues relating to wages,” which may in fact be a more

¹⁴⁴ Thiessen, *supra* note 38; *see generally* H.R. 11, 2011 Gen. Assemb., Spec. Sess. (Wis. 2011).

¹⁴⁵ Under Act 10, school officials can hire, fire, and determine compensation based on each teacher’s performance — “Good teachers got rewarded while bad teachers got the boot.” H.R. 11, 2011 § 210, 214, 219. In the same way that good teachers should be teaching in the classroom, good law enforcement officers should be policing the streets. *See* Levin, *supra* note 62, at 1357. Unfortunately, collective bargaining agreements make it difficult to achieve those ends, and in fact, “six of 10 [Democrats] said teachers’ unions make it harder to fire bad teachers. So did three of four Republicans.” *Id.* at 1364. In addition to Wisconsin, Texas also forbids public workers from collective bargaining but excludes law enforcement. *Id.* at 1357. (See Appendix B for full text of the statutes).

¹⁴⁶ DiSalvo, *supra* note 14.

¹⁴⁷ *See, e.g.*, Muscante, *supra* note 39 (analyzing public union and university compelled fees through the lens of First Amendment compelled speech doctrine); George Leef, *One Of America’s Worst Blunders: Allowing Public Workers To Unionize*, FORBES (Sep. 3, 2015, 12:00 PM), <https://www.forbes.com/sites/georgeleef/2015/09/03/one-of-americas-worst-blunders-allowing-public-workers-to-unionize/?sh=2a907ab35a4c>; Daniel DiSalvo, *Public-Sector Unions and the Founders’ Political Science*, HERITAGE FOUND., Apr. 23, 2018, <https://www.heritage.org/node/3984505/>; DiSalvo, *supra* note 14; Nichols, *supra* note 39, at 18:05—21:08.

¹⁴⁸ *See infra* App. C.

balanced solution.¹⁴⁹ Indeed, leading professors in labor law, such as Benjamin Sachs of Harvard Law School, “advocate terminating exclusive representation for police and instituting management negotiations with multiple labor representatives,” and further support “amending state statutes to limit the subjects of police bargaining to pay and benefits so that disciplinary procedures can no longer be subject to negotiation.”¹⁵⁰ In Wisconsin, Act 10 limited collective bargaining for some public employees solely to matters of wages.¹⁵¹

Some have expressed genuine concern that eliminating police collective bargaining will deter individuals from joining the police force and eliminate the positive things that have traditionally been within the purview of police unions, namely, protecting officers from false accusations, representing law enforcement officers when they are involved in legitimate critical incidents, and providing other trainings and services to officers.¹⁵² These concerns are well-intentioned, but ill-founded. Even in jurisdictions where collective bargaining among police unions is already prohibited, police associations provide members with legal services, political advocacy, and insurance policies.¹⁵³ Law enforcement officers may also consider taking advantage of private organizations for insurance and advocacy.¹⁵⁴

Doctors, lawyers, professional drivers, and law enforcement officers are currently subject to civil liability for their actions at work. Law enforcement officers are the only profession not required to carry individual professional liability insurance, however.¹⁵⁵ Instead, law enforcement officers are either covered by a “department-wide insurance policy or indemnified by the municipality that employs them.”¹⁵⁶ Pragmatically, this means that the good law enforcement officers de facto subsidize the legal liability of riskier and more dangerous officers, and in cities that self-indemnify, “the burden of tort judgements [sic] falls not on the offending officer, but on the taxpayers—the very community whose civil rights were deemed to have been violated.”¹⁵⁷ If law enforcement

¹⁴⁹ See DiSalvo, *supra* note 14.

¹⁵⁰ *Id.*; see also Serwer, *supra* note 7, at 16.

¹⁵¹ H.R. 11, 2011 § 210.

¹⁵² See Allison Schaber, *In Defense of Police Unions, Which, After All, Have A Job To Do*, STARTRIBUNE (Sept. 11, 2020), <https://www.startribune.com/in-defense-of-police-unions-which-after-all-have-a-job-to-do/572387742/>; Deborah Ramirez et. al, *Policing the Police: Could Mandatory Professional Liability Insurance For Officers Provide a New Accountability Model*, 45 AM. J. CRIM. L. 407, 452 (2019).

¹⁵³ DiSalvo, *supra* note 14; Levin, *supra* note 62, at 1357.

¹⁵⁴ See, e.g., Ramirez, *supra* note 152, at 438.

¹⁵⁵ See Levin, *supra* note 62, at 1372 n.223.

¹⁵⁶ See Ramirez, *supra* note 152, at 436.

¹⁵⁷ *Id.*

officers were required to carry individual professional liability insurance, the insurance providers could follow market principles and charge higher rates to riskier officers, and ultimately exclude officers who are charged with misconduct.¹⁵⁸ In 2017, the Minnesota Supreme Court struck down a proposed amendment that would have required law enforcement officers in Minneapolis to carry professional liability insurance.¹⁵⁹ These types of remedies could help prevent officers like Chauvin and Van Dyke from remaining on the police force long enough to commit serious acts of violent misconduct.¹⁶⁰

Removing police unions from the purview of collective bargaining will also increase transparency. Instead of the confidentiality-laced provisions enshrined in collective bargaining agreements that keep disciplinary files accessible only to those within the department,¹⁶¹ communities could form coalitions of concerned stakeholders to promote citizens and police departments coming together to analyze, discuss, and improve the profession that affects everyone in the community.¹⁶² The National District Attorneys Association, the oldest and largest national organization comprised of 5,000 members from more than two thirds of the state and local prosecutors' offices across the country, "support[s] the collection of data on officers with prior incidents of misconduct in a way that respects privacy and due process but also ensures that the information can be shared across jurisdictions so bad actors are held accountable."¹⁶³ Disciplinary proceedings and any contract negotiations would also become more transparent to prevent cities from "using lax disciplinary procedures as a bargaining chip to secure lower officer salaries."¹⁶⁴

V: CONCLUSION

In the same way that "many of us make [a mistake] when assigning good and evil to main characters in Mary Shelley's *Frankenstein*" by

¹⁵⁸ See also Ramirez, *supra* note 152, at 438 (quoting *Bicking v. City of Minneapolis*, 891 N.W.2d 304, 307 (Minn. 2017)); see generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017) (cited in Levin, *supra* note 62 at 1372).

¹⁵⁹ See *Bicking*, 891 N.W.2d at 315. See Appendix B for full text of the proposed insurance amendment.

¹⁶⁰ See Ramirez, *supra* note 152, at 452.

¹⁶¹ See, e.g., *Albuquerque CBA*, *supra* note 132, at 30; see also *Baltimore CBA*, *supra* note 84, at 23–24.

¹⁶² See Robinson, *supra* note 8.

¹⁶³ Press Release, Nat'l Dist. Att'ys Assoc., NDAA Policy Recommendations on Improving the Criminal Justice System (June 16, 2020), https://ndaa.org/wp-content/uploads/NDAA-Criminal-Justice-Policy-Statement_Final.pdf.

¹⁶⁴ Rushin, *supra* note 31, at 1246.

labeling the creature “monster,” rather than “the one who gave it life,” we also mistakenly recognize only the individual law enforcement officers who commit misconduct as part of the problem rather than the police unions that empower and protect those officers.¹⁶⁵

Police unions are a (large) subset of public unions, which are empowered by state law to bargain collectively with police departments for all matters affecting wages, hours, and terms and conditions of employment. The bargaining matters that become entrenched in collective bargaining agreements empower some officers, like former officers Derek Chauvin and Jason Van Dyke, to make repeatedly poor choices that sometimes cost the life of another person. The vast majority of police union collective bargaining agreements often contain provisions that: shield law enforcement officers from liability for misconduct, permit officers to delay being interrogated for up to forty-eight hours following a critical incident, allow police departments to expunge officer disciplinary records after a few years, require all disputes to be settled in binding arbitration by arbitrators often selected by the police union itself, and significantly limit transparency of disciplinary records to the public and to civilian review boards.

Appendix C provides model statutory language, based on statutory language from other states which restrict public union collective bargaining, that states may adopt as a singular solution to these collective bargaining issues. Essentially, the model statute below prohibits police unions from bargaining for some of the matters affecting wages, hours, and terms and conditions of employment that lead to a lack of transparency and accountability, and enshrines additional provisions for increased transparency and accountability among law enforcement. Had either Minneapolis or Chicago limited collective bargaining protections through a statute like the model statute below, “perhaps [Derek Chauvin and Jason Van Dyke] might have been taken off the streets long ago, and [both Floyd and McDonald] might still be alive today.”¹⁶⁶

¹⁶⁵ See Robinson, *supra* note 8.

¹⁶⁶ See Thiessen, *supra* note 38.

VI: APPENDICES

A. *Selected Statutes from States Allowing Public Union Collective Bargaining*

Fla. Stat. Ann. § 447.203 (Lexis+ through 2022 Reg. and Extra Sess.) (emphasis added):

Definitions.

[. . .]

(14) “Collective bargaining” means the performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.

[. . .]

5 Ill. Comp. Stat. Ann. 315/2 (LEXIS through P.A. 102-537 of the 2021 Sess. of the 102nd Legis.) (emphasis added)

Policy. It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection.

It is the purpose of this Act to regulate labor relations between public employers and employees, including the designation of employee representatives, negotiation of wages, hours and other conditions of employment, and resolution of disputes arising under collective bargaining agreements.

It is the purpose of this Act to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all. To prevent labor strife and to protect the public health and safety of the citizens of Illinois, all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators, who shall be authorized to issue awards in order to resolve such disputes. It is the public policy of the State of Illinois that where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes

subject to approval procedures mandated by this Act. To that end, the provisions for such awards shall be liberally construed.

Minn. Stat. Ann. § 179A.06 (LEXIS through 2021 Reg. Sess.) (emphasis added)

Rights and Obligations of Employees.

Subdivision 1. Expression of views. — Sections 179A.01 to 179A.25 do not affect the right of any public employee or the employee's representative to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative. Sections 179A.01 to 179A.25 do not require any public employee to perform labor or services against the employee's will.

If no exclusive representative has been certified, any public employee individually, or group of employees through their representative, has the right to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, by meeting with their public employer or the employer's representative, so long as this is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

Subd. 2. Right to organize. — Public employees have the right to form and join labor or employee organizations, and have the right not to form and join such organizations. Public employees in an appropriate unit have the right by secret ballot to designate an exclusive representative to negotiate grievance procedures and the terms and conditions of employment with their employer. Confidential employees of the state, confidential court employees, and confidential University of Minnesota employees are excluded from bargaining. Supervisory and managerial court employees are excluded from bargaining. Supervisory, managerial, and confidential employees of Hennepin Healthcare System, Inc., are excluded from bargaining. Other confidential employees, supervisory employees, principals, and assistant principals may form their own organizations. An employer shall extend exclusive recognition to a representative of or an organization of supervisory or confidential employees, or principals and assistant principals, for the purpose of negotiating terms or conditions of employment, in accordance with sections 179A.01 to 179A.25, applicable to essential employees.

Supervisory or confidential employee organizations shall not participate in any capacity in any negotiations which involve units of employees other than supervisory or confidential employees. Except for

organizations which represent supervisors who are: (1) firefighters, emergency medical service employees certified under section 144E.28, 911 system public safety dispatchers, peace officers subject to licensure under sections 626.84 to 626.863, guards at correctional facilities, or employees at hospitals other than state hospitals; and (2) not state or University of Minnesota employees, a supervisory or confidential employee organization which is affiliated with another employee organization which is the exclusive representative of nonsupervisory or nonconfidential employees of the same public employer shall not be certified, or act as, an exclusive representative for the supervisory or confidential employees. For the purpose of this subdivision, affiliation means either direct or indirect and includes affiliation through a federation or joint body of employee organizations.

Subd. 3. Fair share fee. — An exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative. The fair share fee must be equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative. In no event may the fair share fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee to the employer and to unit employees who will be assessed the fee. The employer shall provide the exclusive representative with a list of all unit employees.

A challenge by an employee or by a person aggrieved by the fee must be filed in writing with the commissioner, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges must specify those portions of the fee challenged and the reasons for the challenge. The burden of proof relating to the amount of the fair share fee is on the exclusive representative. The commissioner shall hear and decide all issues in these challenges.

The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided. If a challenge is filed, the deductions for a fair share fee must be held in escrow by the employer pending a decision by the commissioner.

Subd. 4. Meet and confer. — Professional employees have the right to meet and confer under section 179A.08 with public employers regarding policies and matters other than terms and conditions of employment.

Subd. 5. Meet and negotiate. — Public employees, through their certified exclusive representative, have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment, but this

obligation does not compel the exclusive representative to agree to a proposal or require the making of a concession.

Subd. 6. Dues check off. — Public employees have the right to request and be allowed dues check off for the exclusive representative. In the absence of an exclusive representative, public employees have the right to request and be allowed dues check off for the organization of their choice.

Subd. 7. Concerted activity. — Public employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

43 Pa. Stat. Ann. § 217.1 (LEXIS through 2021 Reg. Sess. Act 80) (emphasis added)

Right to bargain. Policemen or firemen employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits, and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.

B. Statutes and Other Sources from States Holding Public Unions Accountable

***Bicking v. City of Minneapolis*, 891 N.W.2d 304, 307 (Minn. 2017) (quoting and striking down a proposed amendment to the city charter)**

~~Each appointed police officer must~~ *An appointed law enforcement officer must shall* provide proof of *full* professional liability insurance coverage *to the law enforcement agency* in the amount consistent with current limits under the statutory immunity provision of state law and must *shall* maintain continuous coverage throughout the course of employment as a *law enforcement officer* ~~police officer with the city.~~ Such insurance must be ~~the primary insurance for the officer and~~ *The insurance must shall* include coverage for willful or malicious acts and acts outside the scope of the officer's employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer's insurance is exhausted. This amendment shall take effect one year after passage.

Comprehensive Policing and Justice Reform Emergency Amendment Act of 2021, 68 D.C. Reg. 5837 (June 4, 2021)

TITLE I. IMPROVING POLICE ACCOUNTABILITY AND TRANSPARENCY

[...]

SUBTITLE K. AMENDING MINIMUM STANDARDS FOR POLICE OFFICERS

Sec. 115. Section 202 of the Omnibus Police Reform Amendment Act of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01), is amended by adding a new subsection (f) to read as follows:

“(f) An applicant shall be ineligible for appointment as a sworn member of ~~the Metropolitan Police Department~~ *a law enforcement agency* if the applicant:

“(1) Was previously determined by a law enforcement agency to have committed serious misconduct, ~~as determined by the Chief by General Order;~~ *or*

“(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned or recruit or probationary position with a law enforcement agency; or

“(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.”

SUBTITLE L. POLICE ACCOUNTABILITY AND COLLECTIVE BARGAINING AGREEMENTS

Sec. 116. Section 1708 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1- 617.08), is amended by adding a new subsection (c) to read as follows:

“(c)(1) *A law enforcement agency shall retain all ~~All~~ matters pertaining to the discipline of sworn law enforcement personnel for at least 20 years shall be retained by management and not be negotiable after the officer resigns, is terminated from employment, transfers to another department, or otherwise leaves the law enforcement agency.*

“(2) This subsection shall be applicable to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 20, 2020.”

[...]

N.C. Gen. Stat. § 95-98 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.) (emphasis added)

Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal. ~~Any agreement, or contract~~ *regarding terms and conditions of employment*; ~~between a division of the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina~~ *this state*; ~~and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government,~~ *a police labor organization* is ~~hereby declared to be against the public policy of the State, illegal, unlawful, and void and of no effect.~~

Va. Code Ann. § 40.1-57.2 (LEXIS through the 2021 Reg. Sess. and Spec. Sess. I and II of the Gen. Assemb.) (emphasis added)

Collective Bargaining. A. No state, county, city, town, or like governmental officer, agent, or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service unless, in the case of a county, city, or town, such authority is provided for or permitted by a local ordinance or by a resolution. Any such ordinance or resolution shall provide for procedures for the certification and decertification of exclusive bargaining representatives, including reasonable public notice and opportunity for labor organizations to intervene in the process for designating an exclusive representative of a bargaining unit. As used in this section, “county, city, or town” includes any local school board, and “public officers or employees” includes employees of a local school board.

B. No ordinance or resolution adopted pursuant to subsection A shall include provisions that restrict the governing body’s authority to establish the budget or appropriate funds.

C. For any governing body of a county, city, or town that has not adopted an ordinance or resolution providing for collective bargaining, such governing body shall, within 120 days of receiving certification from a majority of public employees in a unit considered by such employees to be appropriate for the purposes of collective bargaining, take a vote to adopt or not adopt an ordinance or resolution to provide for collective bargaining by such public employees and any other public employees

deemed appropriate by the governing body. Nothing in this subsection shall require any governing body to adopt an ordinance or resolution authorizing collective bargaining.

D. Notwithstanding the provisions of subsection A regarding a local ordinance or resolution granting or permitting collective bargaining, no officer elected pursuant to Article VII, Section 4 of the Constitution of Virginia or any employee of such officer is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents, with respect to any matter relating to them or their employment or service.

Wis. Stat. Ann. § 66.0508 (LEXIS through Act 80 of the 2021-2022 Legis. Sess.) (emphasis added)

Collective bargaining. (1) In this section, “local governmental unit” has the meaning given in s. 66.0506 (1).

(1m) Except as provided under subch. IV of ch. 111, no local governmental unit may collectively bargain with its employees.

(2) If a local governmental unit has in effect on June 29, 2011, an ordinance or resolution that is inconsistent with sub. (1m), the ordinance or resolution does not apply and may not be enforced.

(3) Each local governmental unit that is collectively bargaining with its employees shall determine the maximum total base wages expenditure that is subject to collective bargaining under s. 111.70 (4) (mb) 2., calculating the consumer price index change using the same method the department of revenue uses under s. 73.03 (68).

Wis. Stat. Ann. § 111.70 (LEXIS through Act 80 of the 2021-2022 Legis. Sess.) (emphasis added)

Municipal employment.

[. . .]

(mb) **Prohibited subjects of bargaining; general municipal employees.** The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:

1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

2. Except as provided in s. 66.0506 or 118.245, whichever is applicable, any proposal that does any of the following:

a. If there is an increase in the consumer price index change, provides for total base wages for authorized positions in the proposed collective bargaining agreement that exceeds the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement by a greater percentage than the consumer price index change.

b. If there is a decrease or no change in the consumer price index change, provides for any change in total base wages for authorized positions in the proposed collective bargaining agreement from the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement.

[. . .]

C. *Model Statute*

(A) Definitions.

1. “Contract” means a negotiated agreement, collective bargaining agreement, memorandum of understanding, or any other agreement.

2. “Governing Authority” means a division of this state [or commonwealth] including a county, city, town, borough, or other municipality.

3. “Law Enforcement Agency” includes a police department, corrections department, public safety department, or any other department or agency responsible for enforcing public safety throughout a governing authority of this state [or commonwealth].

4. “Police Labor Organization” includes an incorporated or unincorporated organization which either represents law enforcement officers in collective bargaining negotiations with a governing authority, or represents law enforcement officers in any other way.

5. “Terms and Conditions of Employment” includes:

i. Working conditions;

ii. Adjudication, adjustment, or settlement of grievances via arbitration;

iii. Incident or disciplinary investigation procedures;

iv. Maintenance of disciplinary records or personnel files; or

v. Any other benefit [including wages, compensation, benefits, hours, retirement, and pensions].

(B) Collective Bargaining Agreements Illegal and Void. A contract that includes terms and conditions of employment between a division of the governing authority of this state [or commonwealth] and a police labor organization is illegal and void.

(C) Ineligibility for Appointment. A person shall be ineligible for appointment as a sworn member of a law enforcement agency if the person:

1. Was previously determined by a law enforcement agency to have committed serious misconduct; or
2. Was previously terminated or forced to resign for disciplinary reasons from any commissioned or recruit or probationary position with a law enforcement agency; or
3. Previously resigned from a law enforcement agency before or during a disciplinary hearing to avoid potential, proposed, or pending adverse disciplinary action or termination.

(D) Transparency of Negotiations. A negotiation or collective bargaining session between a division of the governing authority of this state [or commonwealth] and any police labor organization shall be both recorded and open to the public. Recordings shall be made available to a requesting member of the public, at a cost not to exceed the reasonable cost of storing the recording, for at least 2 years.

(E) Maintenance of Disciplinary Files. A law enforcement agency shall retain all matters pertaining to the discipline of a sworn law enforcement officer for at least 20 years after the officer resigns, is terminated from employment, transfers to another department, or otherwise leaves the law enforcement agency.

(F) Transfer of Disciplinary Files. As part of the application process, a person shall affirmatively provide that person's disciplinary file from:

1. The police academy;
2. Every law enforcement agency with which the person was employed within the last 20 years; and
3. Every other place of employment with which the person was employed within the last 5 years.

(G) Professional Liability Insurance. An appointed law enforcement officer shall provide proof of full professional liability insurance coverage to the law enforcement agency and shall maintain continuous coverage throughout the course of employment as a law enforcement officer. The insurance shall include, but not be limited to, coverage for willful or malicious acts and acts outside the scope of the officer's employment.

(H) Effective Date. This statute shall be in effect for an individual, law enforcement agency, police labor organization, or other organization or governing authority in this state [or commonwealth] immediately upon the expiration of an effective contract between a governing authority of this state [or commonwealth] and a police labor organization, or within 2 years after this statute is enacted, whichever time period is shorter.

(I) Penalty. The penalty for a person violating this Act, including an amendment subsequent to the enactment of this Act, is a fine not less than

\$500, imprisonment, removal from the law enforcement agency, or a combination of them. The penalty for a law enforcement agency, police labor organization, or other organization or governing authority in this state [or commonwealth] violating this Act, including an amendment subsequent to the enactment of this Act, is a fine not less than \$1,000, decertification, or a combination of them.