

# ENHANCING ACCOUNTABILITY:

## Collective Bargaining and Police Reform

**Daniel DiSalvo**  
Senior Fellow



## About the Author



**Daniel DiSalvo** is a senior fellow at the Manhattan Institute and a professor of political science in the Colin Powell School at the City College of New York–CUNY.

DiSalvo’s scholarship focuses on American political parties, elections, labor unions, state government, and public policy. He is the author of *Engines of Change: Party Factions in American Politics, 1868–2010* (2012) and *Government Against Itself: Public Union Power and Its Consequences* (2015). DiSalvo writes frequently for scholarly and popular publications, including *National Affairs*, *City Journal*, *American Interest*, *Commentary*, *Los Angeles Times*, *New York Daily News*, and *New York Post*. He is coeditor of *The Forum: A Journal of Applied Research in Contemporary Politics*. DiSalvo holds a Ph.D. in politics from the University of Virginia.

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## Executive Summary

Protests and riots erupted in cities around the country in the wake of George Floyd's death in police custody in Minneapolis last summer. Many criticisms of law enforcement ensued, and many observers and activists focused on police unions for supposedly protecting bad cops, thereby undermining police–community relations. Today, this claim is commonplace from writers across the political spectrum.<sup>1</sup> To improve policing in the U.S., the argument goes, job protections enshrined in union contracts and state statutes, which the unions have long fought for, have to be pared back.

While these claims are plausible, we know less than we should about the role that police unions play in protecting abusive officers and undermining police–community relations. Although some academic literature on police unions exists—in which many of the findings suggest that the unions inhibit effective and accountable policing—the subject has not been intensively studied.<sup>2</sup> Therefore, we do not know exactly what the reduction of job protections for officers or the alteration of collective bargaining could achieve; reformers and the public should keep their expectations in check.

That said, state and local elected officials reacted quickly to Floyd's death and have passed new laws that seek to reduce police violence against civilians and improve public confidence in the police.<sup>3</sup> Some of the changes impinge on policies enshrined in existing collective bargaining agreements (CBAs).

This paper assesses the role of police unions in creating job protections for officers and how the recent wave of legislation interacts with collective bargaining and union contracts; and it identifies areas in which policymakers should concentrate in future rounds of collective bargaining in order to improve the performance of police departments and enhance public trust in them.

The overarching goal should be to strengthen the chain of accountability between street-level officers and their supervisors and to increase police professionalism—thereby reducing unjustified uses of force against civilians—by holding poorly performing officers to account. Achieving such goals will likely have other beneficial effects, including increased community trust in the police and reducing cities' payouts to settle officer misconduct claims, which have totaled \$2 billion from the 20 largest cities since 2015.<sup>4</sup>

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## Laws, Contracts, and Job Protections

When states mandate collective bargaining in government–labor relations, they cede a certain amount of authority to unions representing workers to determine the structure and operations of public agencies.<sup>5</sup> Unions representing police officers thus play an important role in shaping police departments. From the bottom up, collective bargaining allows unions to circumscribe the rights of management and secure grievance and arbitration procedures and other job protections.<sup>6</sup> From the top down, police unions can use their political power in lobbying and electioneering to shape aspects of law and policy that structure police departments. The result is that changing the internal procedures and the culture of police departments is tougher in jurisdictions with police unions.<sup>7</sup>

In collective bargaining, both labor and management have strong incentives to ratchet up job protections for law enforcement. For police officers, job protections are highly valuable, as those dismissed mid-career often find that their skills are not easily transferrable to other professions. For police officers with only a high school diploma, losing their job can effectively kick them out of the middle class.<sup>8</sup> For management, job protections are a way to save money: they cost nothing in dollar terms and can be offered in lieu of wage or benefit increases, which show up immediately in government budgets.

The protections, whether in contractual provisions or state statutes, govern officer discipline and misconduct.<sup>9</sup> These measures come in three forms.

The first form details the steps required to investigate an officer accused of misconduct. These provisions sometimes begin by stipulating the way a complaint against an officer must be formally filed. They further dictate when and where an officer can be interviewed, by whom, and with whom present.<sup>10</sup> Many contracts contain rights to notice of charges, legal representation, a hearing, and a right to appeal, among other things.<sup>11</sup> For example, the Chicago police contract states that an interview of an officer “shall be postponed for a reasonable time, but in no case more than forty-eight (48) hours from the time the Officer is informed of the request for an interview and the general subject matter thereof and his or her counsel or representative can be present.”<sup>12</sup> These rules were adopted because requiring officers to make statements on the record requires them, as a condition of their employment, to surrender their constitutional right to remain silent.<sup>13</sup>

Second, CBAs allow—or sometimes require—the deletion of officers’ records of past disciplinary actions or accusations of misconduct. Baltimore’s most recent CBA states that an accused officer “may request expungement of such matter from any file containing the record of the formal complaint” three years after a complaint is “not sustained” or after the officer is exonerated.<sup>14</sup>

Third, grievance and arbitration rules spell out how an officer (and his union representative) can challenge an adverse personnel action by a superior—including reassignment, suspension, transfer, or firing.<sup>15</sup> If a sergeant disciplines an officer, the officer or his union representative can appeal to a lieutenant, and so on, up the chain of command. If the matter remains unsettled, it can be appealed to binding arbitration.

In addition to, or sometimes in lieu of, contractual rights, some police unions have used political muscle to enshrine job protections in state law.<sup>16</sup> Sixteen states have enacted a Law Enforcement Officers' Bill of Rights (LEOBRs) in state law, which lays down investigatory and disciplinary procedural protections for officers greater than those afforded to other government employees through civil-service laws.

LEOBRs contain many reasonable provisions, including prohibitions on threats, harassment, or promised rewards to induce officers to answer questions, as well as rights to a hearing with the assistance of counsel. But other provisions in these statutes are less reasonable impediments to accountability. For instance, Samuel Walker (University of Nebraska criminologist) and Kevin Keenan (Vera Institute) found that some LEOBRs delay interrogation of those involved in alleged misconduct.<sup>17</sup>

In light of the above, police chiefs and their departments are not free to adopt personnel policies, especially related to misconduct and discipline, of their own choosing. Rather, department leadership is limited by a variety of contractual and statutory provisions that shape the organizations they run. As with most bureaucracies, the legal governance of police departments goes on to shape their particular culture. In Chicago, for instance, a task force appointed by then-mayor Rahm Emanuel concluded that the interaction of collective bargaining and other policies meant that “the police unions and the City have essentially turned the code of silence into official policy.”<sup>18</sup>

As a matter of public relations, police unions shape public perceptions of the police—and not always positively.<sup>19</sup> Union organizational and legal incentives drive leaders to vigorously defend officers accused of misconduct. If union leaders do not publicly defend such officers, the matter is likely to become a topic of contestation in the next union leadership election. State laws often require that all workers in a bargaining unit be represented equally, meaning that union leaders have to defend all officers, especially those accused of misconduct. However, the strong defense of such officers can foster the perception that the union (and the police more generally) is indifferent to victims of police abuse.

## Reforms: Federal, State, and Local

The nature of policing creates a necessarily adversarial relationship between officers and some elements of

the communities they serve. Police are charged with protecting public safety and are granted extensive power to do so, including using force to subdue suspects, break up fights, and halt domestic violence. The job is a dangerous one. Officers are likely to be called to deal with people at their worst and to encounter violent, aggressive, mentally unstable, and drug-addled individuals. While policing is perhaps less dangerous as a profession than logging or commercial fishing, there is a high probability that police will at some point confront hostile and threatening, perhaps life-threatening, situations.<sup>20</sup> As a result, additional job protections are reasonable for officers required to make snap judgments in tense situations. Otherwise, some police officers might be reluctant to act for fear that their job would be on the line. In addition, the absence of clear procedures with a modicum of protection could impose a barrier to recruiting officers of good character and ability to do the job.

In the wake of the 2020 summer of unrest, police reform has been at the top of the political agenda. The federal government has taken up a variety of bills—most notably, the Justice in Policing Act and the Ending Qualified Immunity Act—but so far has not been able to pass anything in an election year.

Police reform, however, is largely the province of state and local governments, which have been the biggest agents of change. According to Campaign Zero, an activist organization, at least 134 state laws have been enacted during 2014–20 to address police violence.<sup>21</sup>

Several common themes appear in legislation that has been enacted by states and cities to date.<sup>22</sup>

1. Raising the threshold for the legitimate use of deadly force and prohibiting certain police tactics, such as chokeholds. States that have acted in this area include California, Minnesota, Connecticut, New York, Iowa, and Colorado. Several major cities, including San Francisco, Seattle, and Houston, also limited police tactics.
2. Legally requiring officers who witness misconduct to intervene on the spot or report it after the fact. For instance, Oregon passed measures requiring officers to report misconduct by their colleagues, and Connecticut passed a bill requiring officers to intervene if another officer uses excessive force.
3. Ensuring that civilian complaints can be submitted anonymously; some extend the statute of limitations on submitting a complaint. Many new laws also stipulate civilian rights to video-record the police.

4. Providing new funding for police use of body cameras and detailed protocols for their use.
5. Reducing the authority of arbitrators to overturn disciplinary actions against officers. Oregon's new law prevents arbitrators from overturning disciplinary action taken against an officer if the arbitrator finds that misconduct occurred and that the discipline imposed is consistent with guidelines.
6. Allowing greater recording of and access to officer's disciplinary records. An Illinois statute, for instance, creates an officer misconduct database; Connecticut's new legislation includes greater transparency provisions, allowing Freedom of Information Act requests to prevail over CBAs and invalidating provisions in CBAs that prohibit disclosure of disciplinary records. Some states will also create databases of police officers dismissed for misconduct and prohibit these officers from being rehired. A few states will now require more data reporting by police departments on officers' actions.
7. Adopting new types of training in bias and de-escalation techniques. This has been done in Colorado, Connecticut, Maryland, New Jersey, Utah, Louisiana, California, Pennsylvania, Oklahoma, and Washington, among others.
8. Requiring independent investigations in cases where officers use lethal force. The most common method is to turn investigations over to the state attorney general's office.

Many provisions in the new state laws and local ordinances either overturn items in CBAs or will reduce the scope of what can be bargained for in the future. For example, Maryland passed a measure that opens police disciplinary hearings to the public, allows civilian representation on hearing boards, and reduces the number of days before an officer can be interrogated from 10 to five.<sup>23</sup> Similarly, Nevada revised its LEOBR to extend the statute of limitations on filing complaints from one to five years and to restrict the information provided to police prior to an interrogation.<sup>24</sup>

So far, few states have tried to remove disciplinary procedures from the scope of collective bargaining altogether. Only Washington, D.C., has adopted an ordinance that removes barriers to accountability from the police union contract by removing all disciplinary matters from the purview of future contract negotiations.<sup>25</sup>

One might say that the state legislatures have picked the low-hanging fruit. They clearly wanted to respond to popular demand to *do something* in the wake of the George Floyd tragedy and the subsequent protests and riots. But the internal operations of police departments are hard to change through state legislation alone. Some departments will require more retooling to professionalize operations and increase community trust.

## Another Way Forward

Most of the police reforms enacted to date make limited changes to existing policies. Some were sensible, but others—efforts to defund police departments by city councils and even some of the chokehold bans and prohibitions on “no-knock” raids—were hasty, ill-advised, and based on little evidence. The merits of the state and local reform efforts aside, they largely represent an effort to change departments from the top down. Another way would be to work from the bottom up, through collective bargaining.<sup>26</sup>

Few jurisdictions have enacted anything that directly alters union–management relations. Almost no bills have touched the subject of bargaining over disciplinary procedures. Few of the new measures have directly empowered police chiefs and other leaders to better manage their workforces. There may be a political reason for this, as politicians of both parties still have reasons not to run afoul of police unions. Even progressive Democrats who want to do something about police reform might be hesitant to undermine the sanctity of collective bargaining rights for public employees.

Rather than passing legislation that alters or supersedes existing CBAs, policymakers can still improve police departments during the renegotiation of the agreement. Their goal should be to enhance officer accountability. Communities, police officers, and departments will all benefit if links in the chain of accountability are stronger and tighter. Reformers should remove obstacles in the process of receiving civilian complaints, investigating them, rendering a decision, determining penalties, and recording the data. They should also seek to remove policies that undermine the authority of police chiefs to hold officers responsible.

To do all these things, local elected officials will need to drive a harder bargain. Police CBAs typically last three to five years and are negotiated on different schedules, depending on the jurisdiction. In future negotiations, policymakers should examine their existing contracts, review existing and past practices, and devise strategies to weed out obstacles to accountability.

Five areas should be at the top of policymakers' agendas as they revisit police CBAs in the coming years.

## **Grievance**

Supervisors are the principal observers of officer conduct, and the grievance process is the keystone to holding officers accountable. Therefore, grievance procedures should be revisited to ensure that they are functioning as intended. A department should review the number of grievances filed, the number that reversed supervisor actions, and assess their impact on department culture and morale. Departments might also interview supervisors to inquire whether they feel constrained in their role by existing grievance procedures. Supervisors may, in some cases, hesitate to make tough decisions that they believe justified because they do not want to fight grievances.

## **Arbitration**

CBAs typically hand over contested disciplinary decisions to arbitrators or panels of arbitrators. The arbitrators have the power to overturn decisions made by police department leadership. They can reinstate officers who have been fired, sometimes with back pay. However, the inclusion of a third party can make it difficult, if not impossible, for a police chief to uphold accountability. Many chiefs claim to have been undermined when arbitration panels overturn their decisions and return officers with multiple misconduct charges to duty.

Policymakers should ensure that new CBAs align the police chief's authority and responsibility. Punting too many crucial decisions to third parties who will not face the results of their decisions short-circuits accountability. One cannot accuse a chief of running a department poorly if several officers whom he would have disciplined or dismissed are pardoned or reinstated by arbitration panels.

## **Misconduct Reporting**

CBAs can sometimes prevent misconduct from being identified by creating excessive barriers to civilians filing complaints. These include prohibitions on anonymous complaints, requirements that the complaint come from the victim rather than a bystander, or excessive restrictions on the period in which a complaint can be filed.

While frivolous and excessive complaints are a genuine concern, policymakers need to recheck their CBAs to

ensure, before a tragedy happens, that there are no barriers to identifying bad cops.

Easing misconduct reporting will inevitably lead to more false accusations and more time wasted on investigating them. But it is arguably worth the trade-off if it makes civilians feel that they can be heard and taken seriously. Police departments, even when they choose not to take disciplinary action in a particular case, will have more legitimacy if they allow a complaint to be filed and then promptly investigate it. This will reduce the perception, unfortunately prevalent in some quarters, of the police as secretive bureaucracies with something to hide.

## **Investigatory Procedures**

CBAs often detail the processes by which any complaint is investigated. However, some steps in this process can tilt in favor of the accused officer. For instance, some steps require investigators to share evidence with officers accused of misconduct before the officer is questioned or provides a statement. When investigators are forced to tip their hand in this way, officers may not feel compelled to offer an unvarnished account.

Furthermore, policymakers should review past investigations to see how often disciplinary cases were decided on procedural, rather than substantive, grounds. If some steps in the process are overly cumbersome, policymakers should weed them out.

## **Record Keeping**

Policymakers should push to retain and store officers' disciplinary records in searchable electronic databases. The purging of officers' records deprives supervisors of the information necessary for managing their organizations effectively.

The maintenance of officers' records must be sharply distinguished from their use. Records should be kept as an archive. In a narrow set of circumstances, which policymakers should define in advance, those records could be reviewed with an eye to previous patterns of misconduct or interactions with particular individuals. Even when complaints are frivolous, it may be helpful to know if an officer has had previous interactions with particular individuals. Clearly, false and excessive complaints are a problem. Departments need to record what is happening without using such records for personnel actions.

Departments should try to require that all files be retained, whether or not civilian complaints were

substantiated and penalties imposed. In some states, this should be straightforward, insofar as some contracts that provide for the destruction of records are at odds with state laws that require their retention.

To ensure that officers are not held overly liable for misconduct allegations from long ago, departments should develop rules for who can consult past records and how they can be used. For instance, only allegations of misconduct that are sustained upon investigation should be broadly available to the public or available to other police departments as they make hiring decisions. Unsustained allegations might be consulted within departments but would otherwise not be available. Departments could also adopt guidelines for interpreting the records and the weight that they can or should play in any future personnel action.

## Conclusion

By revisiting the details of CBAs, officer accountability can be improved. Accountability is worthy in its own right but may also reduce the unnecessary use of force, changing public perceptions of police departments, and bolstering community trust in the police. Evidence suggests that a small percentage of officers generate the majority of civilian complaints and are the source of city payouts for police misconduct;<sup>27</sup> so it is with a minority of officers that the problem lies.

Of course, pressing police unions to concede protections that they have won for their members over years or decades is unlikely to occur without giving the unions something in return. These job protections are valuable, as many police would lose their middle-class status if they lost their job mid-career. Furthermore, weakening these protections might make recruiting talented individuals to become police officers even more difficult than it already is.

In exchange, policymakers should consider offering contract terms that will improve a department's ability to recruit and retain officers, such as higher starting pay or more flexible retirement arrangements for new recruits.<sup>28</sup>

To prepare for the next round of collective bargaining, policymakers at the local level should take the following steps:

1. Conduct a detailed analysis of existing contracts for obstacles to accountability.
2. Review past practice under the contract with an eye toward the operations of grievance, arbitration, and data-collection policies.
3. Identify any links between the operation of the CBA and community relations.
4. Develop a strategy to secure union buy-in for improving accountability.

Working inside the collective bargaining process, policymakers can take steps to enhance accountability and thereby improve the professionalism of local police departments. Reforming any large organization is hard, but such changes will help bolster public confidence in the police and reduce the unnecessary use of force.

## Endnotes

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