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Black and Blue Police Arbitration Reforms

MICHAEL Z. GREEN*

The racial justice protests that engulfed the country after seeing a video of the appalling killing of a Black male, George Floyd, by a Minnesota police officer in 2020 has led to a tremendous number of questions about dealing with racial issues in policing. Similar concerns arose a little more than fifty years ago when police unions gained power to respond to the civil rights protests occurring during those times by establishing strong protections for their officers in light of brutality claims. This rhythmic progression of protests and union responses is destined to continue without any lasting reforms focused on addressing workplace discipline for police officers. Instead, after Floyd's death, several politicians and public employers, including many of the police leaders in Minnesota, complained that their police disciplinary actions prove ineffective when police unions appeal to labor arbitrators who reverse disciplinary actions approximately fifty percent of the time.

This attack on labor arbitrators proceeded at a breakneck pace as Minnesota passed legislation and other states have considered similar actions to prevent the parties from selecting arbitrators. The assumption guiding these changes reflects an unsubstantiated claim that police labor arbitrators decide in favor of officers approximately half the time so they can continue to be selected by the parties. The

* Professor of Law and Director, Workplace Law Program, Texas A&M University School of Law. I value the comments and feedback from colleagues Daniel Harawa, Ariana Levinson, Vincent Southerland, and Alyssa Work on prior drafts of this paper and from participants present at the following programs: The John Mercer Langston Law Scholars' Workshop, July 7, 2022; The Quinnipiac-Yale Dispute Resolution Workshop, February 18, 2022; The 14th Annual AALS ADR Works in Progress Conference, Pepperdine Law School Straus Institute for Dispute Resolution, October 8, 2021; The 4th National People of Color Legal Scholarship Conference Panel: "Critical Topics Concerning Police and Policing," American University Washington College of Law, Washington, DC, March 22, 2019, and LatCrit Twenty-First Biennial Conference Panel: "Civil Rights and Anti-Discrimination in the Workplace," Orlando, Florida September 29, 2017. I appreciate Catherine Fisk for connecting directly with this work so carefully to provide outstanding input and to then write a thoughtful response. I also thank Texas A&M law students Ayanna Brown, Brianda Curry, Shayla Nguyen, Heather Raun, and Arielle Williams for their excellent research assistance. I am very grateful for the *Ohio State Law Journal* editors who have engaged with me to make this Article much better. I chose to focus on this subject when I conducted a Zoom anonymous poll at a plenary session presentation during the American Bar Association Section of Labor and Employment Annual Meeting Virtual Plenary Panel: "Police Officer Discipline: Suggested Best Practices," November 13, 2020. The 161 responses to that Zoom poll by labor and employment attorneys who represent employers, unions, employees, or act as neutrals when asked to choose who was most at fault for the current dissatisfaction with police discipline were: Politicians and politics 55%; Unions and their Attorneys 32%; Management and their Attorneys 8%; Arbitrators 3%; and Academics 1%.

acceptance of this attack on police arbitrators reached a crescendo with an October 3, 2020 call for reform by the editorial board of the New York Times arguing that labor arbitration should be abolished in all police disciplinary matters.

Empirical studies suggest that police disciplinary actions warrant reversal by arbitrators due to department errors and procedural limits imposed by civil service and union contract provisions. Arbitrators must adhere to these limits in proceedings offering little public transparency based upon parameters set by the parties. After seeing little to no literature defending police arbitrators, this Article embraces police arbitration and offers reforms that give Black police officers a voice in an overall more transparent process. This Article also proposes that the parties negotiate agreements to consider public values to deliver a win-win result to transform what can be understood as just cause for a disciplinary action in a police labor arbitration where race matters.

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I. INTRODUCTION: SEEKING BLACK VOICES IN POLICE ARBITRATION REFORMS

One of the most high-profile examples of racial unrest in policing occurred on May 25, 2020, when a forty-four-year-old white male Minnesota police officer, Derek Chauvin, and three other officers¹ arrested a forty-six-year-old Black male, George Floyd, for alleged forgery in using a fake twenty dollar bill.² Floyd died while on the ground after being handcuffed in Chauvin’s police custody and stating to Chauvin and the other officers involved that he could not breathe.³ A videotape of the senseless death of Floyd sparked an international level of protests for racial justice in policing after Chauvin was shown pressing his knee against the back of Floyd’s neck for more than eight minutes until Floyd’s subdued and lifeless body eventually expired.⁴

With the existing Black Lives Matter (BLM)⁵ movement already highlighting certain killings of Black persons by police officers as a racial

¹ See Nicholas Bogel-Burroughs, *Derek Chauvin, Ex-Officer Charged in George Floyd’s Death, Is Released on Bail*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/us/derek-chauvin-bail.html> [<https://perma.cc/27T3-LG3P>].

² See *id.*; Derek Hawkins, *Officer Charged in George Floyd’s Death Used Fatal Force Before and Had History of Complaints*, WASH. POST (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/officer-charged-george-floyds-death-used-fatal-force-before-had-history-complaints/> [<https://perma.cc/9S93-VHMM>].

³ See Hawkins, *supra* note 2.

⁴ *Id.*

⁵ *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/94QD-Q9MA>] (describing BLM and its “mission . . . to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes”); Adina Campbell, *What Is Black Lives Matter and What Are the Aims?*, BBC NEWS (June 13, 2021), <https://www.bbc.com/news/explainers-53337780> [<https://perma.cc/2YAV-T7ZC>] (discussing BLM and its international expansion); Kwasi Konadu & Bright Gyamfi, *Black Lives Matter: How Far Has the Movement Come?*, CONVERSATION (Sept. 8, 2021), <https://theconversation.com/black-lives-matter-how-far-has-the-movement-come-165492> [<https://perma.cc/3DDR-UNML>] (discussing the origins of BLM and its growth since 2013).

concern,⁶ massive protests seeking racial justice and police reform surged in many cities within the United States. The protests became a daily occurrence after the video of Floyd's death demonstrated the utter disregard for this Black man's life in a way that was "too timely, vivid and undebatable to ignore."⁷ The raw trauma on the video resonated with Blacks and other races who all protested as part of an overall interest-convergence where the "dominant culture" became invested in rectifying "the disparities Blacks face in [our] country."⁸ Between fifteen and twenty-six million people participated in BLM protests in May 2020, the month Floyd was killed.⁹

The Floyd protests also ignited concerns among labor lawyers and workplace scholars after Lieutenant Bob Kroll, the president of the Minnesota Police Federation, the union representative of the Minnesota police officers involved in the George Floyd death, claimed that all the officers, including Chauvin, "were fired without due process" and suggested their terminations might be reversed by labor arbitrators.¹⁰ Kroll received criticism for these comments.¹¹ Even after seeing the video, Kroll still claimed a lack of due

⁶ See Christopher E. Smith, *Blue Lives Matter Versus Black Lives Matter: Beneficial Social Policies as the Path Away from Punitive Rhetoric and Harm*, 44 VT. L. REV. 463, 464–66, 480–81 (2020) (describing the origins and impact of the Black Lives Matter movement); Adam Serwer, *The New Reconstruction*, ATLANTIC (Oct. 2020), <https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475> [<https://perma.cc/T2ZF-AAJZ>].

⁷ See Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Sign of Slowing Down*, CNN, <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/D9SQ-SRGN>] (Aug. 9, 2020) (referring to critical race icon and scholar Derrick Bell and his work espousing a theory of interest-convergence as a possible explanation for the broad support across all racial grounds including many white persons that protested George Floyd's death); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

⁸ McLaughlin, *supra* note 7 (quoting second Tyran Steward, a history professor at Williams College).

⁹ See Yelena Dzhanova, *Why Congress Hasn't Passed Police Reform that Most Americans Want*, INSIDER (Aug. 25, 2021), <https://www.insider.com/police-reform-bills-breathe-act-legislation-congress-2021-8> [<https://perma.cc/AHL9-J9TM>] (discussing surveys and polls identifying the number of people engaged in BLM protests in May 2020).

¹⁰ See Rich Schapiro, *How the Officers Charged in George Floyd's Death Could Get Their Jobs Back*, NBC NEWS (June 27, 2020), <https://www.nbcnews.com/news/us-news/how-officers-charged-george-floyd-s-death-could-get-their-n1232236> [<https://perma.cc/KZF9-HMZN>]. It is not surprising that Kroll came to the officers' defense as "police union leaders all over the country often play a role in publicly defending officers accused of excessive force or other misconduct." See Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 49 (2015).

¹¹ See Chris McGreal, *Hopeful that Minneapolis Policing Will Change? Meet the Police Union's Chief*, GUARDIAN (June 5, 2020), <https://www.theguardian.com/us-news/2020/jun/05/minneapolis-police-union-bob-kroll-us> [<https://perma.cc/62BD-YMWQ>].

process for the other officers involved in Floyd's arrest and death while backing off the question of whether Chauvin should have been terminated.¹²

By suggesting the reversal of the police officers' discharges shortly after George Floyd's death, Kroll also shined a light on one specific profession: labor arbitrators. Kroll's arbitration reversal message engendered more criticism when it became clear that Chauvin had eighteen prior complaints filed against him but had only two of those result in a disciplinary action, both a reprimand.¹³ A Minnesota news story responded to Kroll's due process and arbitration comments by identifying a couple of arbitration decisions where arbitrators reinstated Minnesota police officers despite prior acts of misconduct.¹⁴ This story also referred to a study of Minnesota arbitration awards where the researcher found that a little "more than half of the time arbitrators side in favor of the employers who fire police officers."¹⁵

One might surmise that a mutually agreed upon dispute resolution process where both parties (unions and police departments as repeat players) with relatively equal bargaining power would be pleased to discover the results indicate that either party prevails about fifty percent of the time. But politicians and police department officials, supported by media accounts, rush to blame the arbitrator when the discipline is reversed in a high-profile case such as one involving issues alleging racial misconduct by a police officer.¹⁶ These officials want to shield themselves from the political fallout rather than actually address

¹² See Samantha Michaels, *The Shield*, MOTHER JONES, Sept.–Oct. 2020, at 14, 17–18, <https://www.motherjones.com/crime-justice/2020/08/police-unions-minneapolis/> [<https://perma.cc/B78X-WXV9>]; Max Nesterak, 'I Didn't See Race in George Floyd.' *Police Union Speaks for the First Time Since Killing*, MINN. REFORMER (June 23, 2020), <https://minnesotareformer.com/2020/06/23/i-didnt-see-race-in-george-floyd-police-union-speaks-for-first-time-since-killing/> [<https://perma.cc/ZZ2A-65XE>].

¹³ See Dakin Andone, Hollie Silverman & Melissa Alonso, *The Minneapolis Police Officer Who Knelt on George Floyd's Neck Had 18 Previous Complaints Against Him*, *Police Department Says*, CNN, <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html> [<https://perma.cc/BP3J-8S55>] (May 29, 2020). *But see* Jim Hilbert, *Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms*, 47 MITCHELL HAMLINE L. REV. 222, 268 (2020) (referring to only seventeen complaints against Chauvin from 2001).

¹⁴ See Brandt Williams, *Minneapolis Police Union Head Signals Fight for Fired Officers' Jobs*, MPR NEWS (June 2, 2020), <https://www.mprnews.org/story/2020/06/02/minneapolis-police-union-head-signals-fight-for-fired-officers-jobs> [<https://perma.cc/KHT2-FEBU>].

¹⁵ *Id.*

¹⁶ See, e.g., Arthur Kane, *Here's Why Public Employees Fired for Misconduct Get Their Jobs Back*, L.V. REV. J., <https://www.reviewjournal.com/investigations/heres-why-public-employees-fired-for-misconduct-get-their-jobs-back-2493291/> [<https://perma.cc/YN9U-LJSX>] (Dec. 9, 2021) (highlighting a few high profile stories of terrible acts by employees reinstated by arbitrators but providing overall data in a 2021 review of terminations since 2015 and finding that out of 3,000 employees terminated, 270 of them appealed, and only 47 won their appeals).

the department missteps explained by labor arbitrators in carefully crafted decisions.¹⁷

These politicians and police department officials ignore the arbitrator's reasoning for their loss and focus on a general fifty percent reversal as a source of overall complaints. They also ignore the fact that unions cannot afford to bring every case to arbitration and select only those percentage of cases where they believe they have the best chance of prevailing.¹⁸ According to Minnesota labor lawyer, Jim Michels, "who represents police officers, firefighters and other public employees," in a lot of instances "the union will look at the case and say, 'yeah we think this warrants termination'" and not proceed to arbitration, and "[t]he union only challenges the termination about half the time."¹⁹

Labor arbitrations may not have been at the forefront of those matters being targeted by policing reformers before the Floyd death.²⁰ But as a result of Kroll's comments and in addition to political leaders needing someone to blame while getting the media and policing scholars and even some legislatures to join them,²¹ labor arbitrators are now being casted in a very negative light in the

¹⁷ See Haven Orecchio-Egresitz, *Some Police Chiefs Genuinely Want to Fire Their Bad Apples. Their Department's History Can Make That Almost Impossible*, BUS. INSIDER, <https://www.businessinsider.com/police-department-mismanagement-union-arbitration-firing-bad-officers-2020-6> [<https://perma.cc/P6JY-E87C>] (Sept. 11, 2020).

¹⁸ *Id.* (providing comments from long-time union attorney, Will Atchison, stating: "police unions are only taking cases to arbitration that they believe they have a chance of winning. Even after weeding out the cases they know don't have a chance, police departments and unions are often split in how often they win").

¹⁹ See Brandt Williams, *Arbitrator Orders Police Officer Reinstated After Firing*, MPR NEWS, <https://www.mprnews.org/story/2019/04/17/arbitrator-orders-police-officer-reinstated-after-firing> [<https://perma.cc/9HUJ-E9HF>] (Apr. 19, 2019).

²⁰ But see Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1198, 1238–39 (2017) [hereinafter Rushin, *Police Contracts*] (describing in a 2017 study how 115 of the 178 police union contracts reviewed had provided for adjudication of the disputes by labor arbitration and asserting arbitration's use in disciplinary appeals represents a "serious concern").

²¹ See, e.g., Martha Bellisle, *Police in Misconduct Cases Stay on Force Through Arbitration*, SENTINEL & ENTER. (June 24, 2020), <https://www.sentinelandenterprise.com/2020/06/24/police-in-misconduct-cases-stay-on-force-through-arbitration/> [<https://perma.cc/2TAD-PW2B>] (describing several police misconduct cases where officers were reinstated after arbitration and quoting Loyola University Chicago law professor and criminal policing scholar, Stephen Rushin, saying the month after the Floyd murder that "[p]olice arbitration on appeal is one of the single most important accountability issues in the country"); Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1033–34, 1034 n.69, 1076–77 (2021) [hereinafter Rushin, *Police Arbitration*] (discussing Oregon reforms after George Floyd's death that focused on "limiting the authority of arbitrators" by requiring that "if an arbitrator agrees that evidence existed to justify the punishment in question and the punishment is within the limits of [a] disciplinary matrix" to be created by the department, then the arbitrator may not "deviate from the police chief's disciplinary decision on appeal"); Williams, *supra* note 14 (describing comments of then-Chief Harteau of the Minnesota police complaining about

midst of the recent racial concerns about policing arising from the George Floyd killing.²² Nevertheless, those arguing for reform of the police arbitration process do not appear to have listened to the few voices being presented by labor arbitrators and labor law scholars.²³ Nor do these antiarbitration reformers appear to be listening to those who engage in “poring through” the rationales of the arbitrators in those cases including some community activists who have examined the actual labor arbitrator decisions in detail and concluded that “at the end of the day, inconsistent enforcement and unclear policies were to blame.”²⁴

Also, those arbitration reformists do not seem to be focusing on the systemic issues leading to Black persons being subjected to police shootings at a disproportionate number that still seem to be a problem even in Minnesota almost two years later.²⁵ Possibly, these reformists challenge arbitration as a

“arbitrators who are undoing the discipline or the termination” after an arbitrator reversed her decision while also showing two of Harteau’s terminations had been upheld by arbitrators); *see also infra* Part II.B (describing political figures in Minnesota complaining about arbitrators in responses to the George Floyd killing).

²² *See, e.g., To Hold Police Accountable, Ax the Arbitrators*, N.Y. TIMES (Oct. 3, 2020) [hereinafter *Ax the Arbitrators*], <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html> [https://perma.cc/P7AW-3UQ5] (providing *N.Y. Times* editorial board commentary seeking to abolish police labor arbitration); Bellisle, *supra* note 21 (attributing to Rushin the speculation that when looking at the work of police arbitrators it is “unclear whether some cases are overturned due to an arbitrator’s personal bias or flaws in the internal investigations, or both”).

²³ *See, e.g., Stephen F. Befort, Opinion, Counterpoint: In Defense of Arbitration*, STAR TRIB. (June 19, 2020), <https://www.startribune.com/counterpoint-in-defense-of-arbitration/571378012/> [https://perma.cc/9PVB-36ZT] (providing comments from University of Minnesota Law School labor and arbitration law scholar attempting to debunk some of the attacks on arbitration); *NAA President Daniel Nielsen Responds to Recent NYT Editorial*, ARB. INFO (Oct. 8, 2020), <https://law.missouri.edu/arbitrationinfo/2020/10/08/naa-president-daniel-nielsen-responds-to-recent-nyt-editorial/> [https://perma.cc/N8MV-HFG7] (rebuking the *N.Y. Times* editorial and its attack on police labor arbitrators in comments from the president of the National Academy of Arbitrators, Daniel Nielsen); *see also* Catherine Fisk et al., *Reforming Law Enforcement Labor Relations*, CALIF. L. REV. ONLINE BLOG (Aug. 2020), <http://www.californialawreview.org/reforming-law-enforcement-labor-relations/> [https://perma.cc/MP67-FTAV] (providing joint policing and labor reform suggestions by two law school professors and labor law scholars Catherine Fisk and Joseph Grodin and a former president of the National Academy of Arbitrators Barry Winograd as well as several others versed in police disputes from a labor perspective who did not recommend getting rid of arbitrators).

²⁴ *See* Orecchio-Egresitz, *supra* note 17 (providing comments of “Dave Bicking, the vice president of Communities United Against Police Brutality (CUAPB), who has been researching police misconduct and policy in the Twin Cities for two decades,” that for those blaming arbitrators, “he doesn’t see it that way”).

²⁵ *See, e.g., Tim Dickinson, Cops on the Amir Locke Raid Were Already Facing a Lawsuit over Alleged ‘Hunting’ of BLM Protesters*, ROLLING STONE (Feb. 8, 2022), <https://www.rollingstone.com/politics/politics-news/amir-locke-minneapolis-police-blm-protests-george-floyd-1296391/> [https://perma.cc/S5MA-5YSY] (describing shooting of

black box to those outside the labor community as it represents a private and confidential process not providing much transparency.²⁶ The parties' own choices as to what information may be considered by the arbitrator and shared with the public before or after an arbitration decision is rendered contributes to that lack of transparency.

This uncertainty about arbitration begs for more transparency and the allowance for more voices to be heard²⁷ including those within the Black community.²⁸ There is also one group of Black voices with a unique view of how to address racial concerns regarding policing: the Black police officers who must navigate roles as members of the Black community and also of the blue community.²⁹ Their voices should be heard as well.³⁰ This Article proposes that

Amir Locke in February 2022 and how two of the Minnesota police officers involved in no-knock warrant invasion where Locke was killed were facing previous charges of “hunting” BLM protesters and injuring them).

²⁶ See Fisk et al., *supra* note 23 (“Except in civil service hearings, the [police arbitration] hearing is not open to the public. The arbitrator makes a decision, usually in writing, based on the evidence and the argument. The right to appeal is usually circumscribed.”); see also Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 7 (2019) (“After all, arbitration is *private* dispute resolution: a ‘black box . . . where the proceedings are confidential and non-precedential . . .’” (citation omitted)).

²⁷ See Fisk et al., *supra* note 23 (proposing eight labor relations measures for policing reform including in proposal 5.B (Decisions and Remedies) to have arbitrators consider the “public[’s] interest in removing officers who have engaged in misconduct” and the “public’s interest in safety”).

²⁸ See Ayesha Bell Hardaway, *Time Is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 STAN. J. C.R. & C.L. 137, 190–93, 195–96, 198–99 (2019) (arguing police union attempts to assert collective bargaining rights to shield police officers in arbitration due to use of force and discipline provisions should be denied and such matters excluded from arbitration to protect the community from having constitutional rights violated).

²⁹ See Trone Dowd, *Why Black Cops Quit*, VICE (May 25, 2021), <https://www.vice.com/en/article/wx5nzm/why-black-cops-quit> [<https://perma.cc/H84L-AGS6>] (discussing the hindrances and retaliation that Black police officers face from the blue wall of silence when they speak out about racial injustice including a Black police officer who used a social media TikTok account to speak out about George Floyd and was eventually terminated); Dan Zak & Ellen McCarthy, *The Duty and Burden of the Black Police Officer*, WASH. POST (July 6, 2020), https://www.washingtonpost.com/lifestyle/style/the-duty-and-burden-of-the-black-police-officer/2020/07/05/6508b9bc-b570-11ea-aca5-ebb63d27e1ff_story.html [<https://perma.cc/F34H-TMWZ>] (describing how the code of blue silence and loyalty undermines many of the efforts of Black police officers to address fairer policing and how the leader of “a watchdog group founded by black police officers” received threats and verbal attacks).

³⁰ See Fisk et al., *supra* note 23 (proposing that police officers who had engaged in misconduct should not have the remedy of reinstatement in the arbitration process after considering other “evidence of disparate treatment on the basis of race, sex, national origin, or other protected category” and unless “it is shown that the officer has made, or has demonstrated a commitment to making, efforts to rectify the problematic behavior”).

Black police officers, via their identity caucuses and as committed individual members of the Black communities they serve, should be given a specific voice in the disciplinary process at a publicly transparent hearing where arbitrators have been given the authority to consider community values and concerns.³¹

This Article proceeds as follows. Part II examines the political actors and their veiled reasons for attacking police arbitrators while considering the dearth of empirical studies correlating any negative effects from labor arbitration in pursuing police officer accountability. Part III analyzes the nature and scope of how labor arbitration follows the parties' expectations as to what is just cause to discipline and suggests how the parties can engage to provide racial justice results if they can agree about the way to address it. Part IV of the Article explores the value of having Black police officer voices involved in the arbitration process including Black police identity caucuses and officers directly involved on the beat and within the communities they serve. Part V suggests specific measures the parties may choose to pursue at the bargaining table to amend typical expectations as to what establishes just cause when dealing with high profile policing issues related to race. This approach would provide arbitrators with the tools to consider the impact in the workplace and within society when some form of racial reckoning is expected when police misconduct occurs. Part VI concludes that incorporating Black voices into a transparent arbitration process can provide a system that offers racial justice and accountability while also being fair to police officers facing disciplinary actions.

II. POLICE DISCIPLINE DISCONNECT: ARBITRATOR REFORM OVER LABOR REFORM

With the Floyd protests reaching a fever pitch, a Gallup poll in July 2020 found that a majority of Americans wanted key "changes" in policing as reforms with "88 percent of Black Americans and 51 percent of white Americans" in agreement.³² After Chauvin's murder³³ of Floyd, several instances of other

³¹ See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 721, 779, 789 (2017) (describing Black police officers seeking to pursue accountability and racial justice reforms found aid from their affinity or identity groups and associations while also describing how an association of Black police officers in Los Angeles supported BLM even though the police union does not support it).

³² See Nolan D. McCaskill, *Police Reforms Stall Around the Country, Despite New Wave of Activism*, POLITICO (Sept. 23, 2020), <https://www.politico.com/news/2020/09/23/breonna-taylor-police-reforms-420799> [<https://perma.cc/X9WR-Z5F4>].

³³ See Jonathan Allen, Nathan Layne & Gabriella Borter, *Minneapolis Jury Convicts Ex-Policeman Derek Chauvin of Murdering George Floyd*, REUTERS (Apr. 20, 2021), <https://www.reuters.com/world/us/jurors-resume-deliberations-derek-chauvin-murder-trial-2021-04-20/> [<https://perma.cc/V5R8-BXPH>] (describing conviction of Chauvin on April 20, 2021 for second-degree murder, third-degree murder, and manslaughter in killing George Floyd).

unarmed Black persons being killed by police, and additional killings by vigilantes, have all contributed to the discussions about police reform in this horrid, toxic and racially charged environment.³⁴

Congress and various state legislatures have attempted to respond to the national disturbance that sprung from Floyd's death by pursuing legislative reforms aimed at providing racial justice in addressing policing issues in our society.³⁵ Despite general public support for police reforms after Floyd's killing, most of the federal legislative attempts have languished as pending bills in Congress, unlikely to get past a Republican Senate filibuster.³⁶ On the state level, several actions have proceeded to address police reforms after the Floyd killing.³⁷ By the end of May 2021, states had passed at least 243 policing bills addressing a variety of police reforms with many covering policing practices, such as prohibiting the use of chokeholds, limiting no-knock warrants, requiring interventions when other officers use excessive force, making officers liable in civil lawsuits for misconduct, and addressing transparency in discipline including appeals to arbitration.³⁸

With respect to the debate about arbitration reform, the *New York Times* joined the fray when it issued an editorial commentary on October 3, 2020, suggesting the abolition of labor arbitration for all police officer discipline.³⁹ In

³⁴ See Jorge L. Ortiz, *'It's Nothing but Pain': The Latest on the Cases of Violence Against Black People That Sparked America's Racial Reckoning*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002> [<https://perma.cc/ZS54-NYX2>] (Sept. 11, 2020) (describing the deaths of several Black person at the hands of police and vigilantes).

³⁵ See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/S928-KPM6>] (referring to how policing reform efforts after George Floyd's murder focused on at least one of three areas for policy change: use of force, duty of officers to intervene when there are instances of police misconduct, and policies related to addressing police officer misconduct reporting and removal).

³⁶ See Li Zhou, *This Progressive Police Reform Bill Is Pretty Popular*, VOX (June 21, 2021), <https://www.vox.com/2021/6/21/22535672/breathe-act-progressive-police-reform-bill> [<https://perma.cc/R4HX-Y9N7>] (referring to polls showing support for George Floyd Justice in Policing Act and the BREATHE Act but how neither are likely to become laws); see also Dzhanova, *supra* note 9 (discussing BLM and progressive members of Congress who support police reform bills that a majority of the public also want including the BREATHE Act, Justice in Policing Act, and The People's Response Act while recognizing that the Senate filibuster will prevent any of this proposed legislation from being passed).

³⁷ Liz Crampton, *States Passed 243 Policing Bills—and Left Activists Wanting*, POLITICO (May 26, 2021), <https://www.politico.com/news/2021/05/26/states-policing-bills-490850> [<https://perma.cc/NPP3-NV2U>].

³⁸ *Id.*

³⁹ *Ax the Arbitrators*, *supra* note 22 (arguing power of arbitrators must be reined in so that police officer discipline will be left to city officials accountable to the public because “[w]hile police officers deserve due process and protection from arbitrary disciplinary action,

a classic rush to judgment, the *New York Times* editorial failed to address the political elephant in the room by blaming the arbitrators and suggesting that arbitrator independence, without being directly subject to political accountability, is why arbitration represents a problem in police discipline.⁴⁰ The editors became so single-minded in ridding the process of the proclaimed evil without considering how the disciplinary process would work fairly or significantly different without arbitration.

The *New York Times* editorial also failed to address existing state law protections for police officers and the legislative and collective bargaining protections through various Officers' Bill of Rights (OBR) provisions that do not vanish whether a review of the disciplinary decision is made by an arbitrator, a political appointee, or the courts.⁴¹ More importantly, a letter rebuking the statements in the *New York Times* editorial seeking to abolish arbitration, was authored by National Academy of Arbitrators President, Dan Nielsen.⁴² Although the Nielsen letter is available on the web, conducting a Google search and a Westlaw search of "Nielsen" and "Ax" and "arbitrators" in January 2022 discovered that there were no media outlets that had covered Nielsen's response to the *New York Times*. There are very few media or other commentaries on the topic of police officer arbitration that cover the views of labor arbitrator institutions or labor scholars on this issue, especially as advocates for arbitration. This Article adds to that limited list.

A. Labor Contract Obstacles to Reform Regardless of Arbitration

Scholars have started to focus on how police unions and labor law protections play a key role in considering any policing reform efforts.⁴³ BLM

it is far more important that abusive or dishonest officers be removed than that they receive equal treatment").

⁴⁰ *Id.*

⁴¹ See Rushin, *Police Contracts*, *supra* note 20, 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: [Law Enforcement Officers’ Bill of Rights].”).

⁴² See Letter from Daniel Nielsen, President, Nat. Acad. of Arbitrators, to the Publisher & Ed. Bd. of the N.Y. Times (Oct. 4, 2020), <https://mailmissouri.sharepoint.com/:b:/s/CLAW-Communications-Ogrp/EXvGvOYXfIFfjwGWGACndmEBYyZupRft3glpXt1fz4ovww?e=MJSCT8> [<https://perma.cc/JT32-WM8W>].

⁴³ See Walter Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy*, 74 SMU L. REV. 419, 421–22 (2021); Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1341–43 (2020) (citing sources); Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 203–41 (2005) (identifying provisions in law officers’ bills of rights); Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 846, 858–67 (2019); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–10 (2014) (reviewing the burdens that labor law and

even launched a specific campaign, *CheckthePolice.org*, to identify labor union contract provisions that provide police officers with certain privileges that affect reform actions.⁴⁴ Some other commentators claim specifically that union disciplinary processes⁴⁵ and negotiated collective bargaining agreements with police departments create the biggest difficulties faced by those seeking policing reform.⁴⁶ Stephen Rushin has argued from an empirical assessment of labor union contracts that police OBR terms create major obstacles to those pursuing police disciplinary and officer accountability reforms.⁴⁷ All of these OBR

collective bargaining terms place on reforming policing practices); *see also* Robert M. Bloom & Nina Labovich, *The Challenge of Deterring Bad Police Behavior: Implementing Reforms That Hold Police Accountable*, 71 CASE W. RESV. L. REV. 923, 969–82 (2021) (asserting the only way to hold police accountable is through meaningful licensing and decertification statutes as well as prosecutorial actions, albeit less certain in this particular aspect due to the likelihood that prosecutors will not charge police officers).

⁴⁴ *See* Ed Krayewski, *Black Lives Matter Targets Police Union Contracts, Launches CheckthePolice.org*, REASON (Dec. 7, 2015), https://reason.com/2015/12/07/black-lives-matter-targets-police-union/?itm_source=parsely-api [<https://perma.cc/VB96-MBAM>].

⁴⁵ *See, e.g.*, Fisk et al., *supra* note 23 (referring to issues related to having public and transparent hearings and concerns about the lack of overall transparency throughout the police discipline process).

⁴⁶ *See* Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES, <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [<https://perma.cc/T965-DJSZ>] (Apr. 2, 2021) (describing police union responses to reforms including spending significant money in state and local political campaigns to challenge reform politicians who risk being labeled soft on crime and anti-police; recounting the efforts by police unions in pursuing collective actions to object to disciplinary reforms while using social media as part of “provocative rhetoric and hard-boiled campaign tactics” aimed at attacking reform politicians); Daniel DiSalvo, *Tired of Bad Cops? First, Look at Their Labor Unions*, WASH. POST (June 3, 2020), <https://www.washingtonpost.com/opinions/2020/06/03/tired-bad-cops-first-look-their-labor-unions/> [<https://perma.cc/34A4-3H92>] (blaming unions in pursuing contracts that only protect police union members’ rights to limit information about prior discipline instead of promoting broader goals of public safety); Melissa Segura, *There’s One Big Reason Why Police Brutality Is So Common in the US. And That’s the Police Unions*, BUZZFEED NEWS (June 1, 2020), <https://www.buzzfeednews.com/article/melissasegura/police-unions-history-minneapolis-reform-george-floyd> [<https://perma.cc/QJV8-CNKZ>] (identifying several instances where police unions arguably sought contracts that pursued a warrior mentality training model that placed officers’ rights over public safety); *see also* Paul Butler, *The Fraternal Order of Police Must Go*, NATION (Oct. 11, 2017), <https://www.thenation.com/article/archive/the-fraternal-order-of-police-must-go/> [<https://perma.cc/J654-PLJ3>] (calling for the abolition of the Fraternal Order of Police union and arguing that their actions have stymied policing reforms aimed at addressing racism as part of a white supremacist mentality); Ed Krayewski, *Four Police Brutality Reforms to Focus On: A Libertarian Take*, REASON (Sept. 2, 2014), <https://reason.com/archives/2014/09/02/four-issue-to-focus-on-in-police-brutali/> [<https://perma.cc/F7W8-REQ7>] (identifying police union resistance to police accountability reforms).

⁴⁷ *See* Rushin, *Police Contracts*, *supra* note 20, at 1222–24 (providing empirical review of 178 police union contracts and concluding that 158 of the contracts had disciplinary procedures

provisions give police officers unique protections from disciplinary actions that differ from other union protections and provide rights that typical citizens being charged with such acts of misconduct would not possess, such as a “cooling off” period before being interrogated.⁴⁸ In April 2021, Maryland became the first state to repeal its OBR requirements in response to the Floyd protests.⁴⁹ Other states are also considering repeals of their OBR provisions including Rhode Island and Delaware.⁵⁰ On the other end of the spectrum, Missouri became the only state to adopt certain OBR protections in response to the Floyd reform debates.⁵¹

B. *Blaming Police Arbitration in Minnesota After the Floyd Protests*

As a specific example of antiarbitration narratives by politicians and elected officials, shortly after the killing of George Floyd, the Black mayor of St. Paul,

impeding police officer accountability measures); *see also* Rushin, *Police Arbitration*, *supra* note 21, at 1046–48 (finding that there are “few existing studies to date on the outcomes of police arbitrations” after reviewing a dataset of 624 labor arbitration awards in the public Minnesota database and those published in the Bloomberg database from various jurisdictions between 2006 and 2020 to conclude that the labor arbitration system does “raise broader questions about officer accountability”); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 551, 571–77 (2019) [hereinafter Rushin, *Police Appeals*] (criticizing arbitration in police disciplinary processes after looking at “656 police union contracts collected via open record requests, searches of municipal websites, state repositories, and the web” and noting that “approximately seventy-three percent of police departments use a disciplinary appeals process that involves some sort of outside arbitration” including the “overwhelming majority of the largest American cities”).

⁴⁸ *See* Stephanie Francis Ward, *Do Police Union Contracts Inhibit Reform?*, A.B.A. J. (July 1, 2020), <https://www.abajournal.com/web/article/does-collective-bargaining-in-police-contracts-prohibit-police-reform> [<https://perma.cc/G4J9-WWR9>]; Rushin, *Police Appeals*, *supra* note 47, at 562.

⁴⁹ Matt Stieb, *Maryland Becomes First State to Repeal Its Police Bill of Rights*, INTELLIGENCER (Apr. 11, 2021), <https://nymag.com/intelligencer/2021/04/maryland-becomes-first-state-to-repeal-police-bill-of-rights.html> [<https://perma.cc/L7P4-5X8C>].

⁵⁰ Ishitaa Gupta, *RI Legislators, Activist Groups Call for Repeal of the Law Enforcement Officers’ Bill of Rights*, BROWN DAILY HERALD (Sept. 10, 2021), <https://www.browndailyherald.com/article/2021/09/ri-legislators-activist-groups-call-for-the-repeal-of-the-law-enforcement-officers-bill-of-rights> [<https://perma.cc/2ZU7-5KEG>] (discussing efforts in Rhode Island to repeal police officers’ bill of rights); Morgan R. Kelly, *New Data Shows: Delawareans Overwhelmingly Support LEOBOR Reform*, ACLU DEL. (June 22, 2021), <https://www.aclu-de.org/en/news/new-data-shows-delawareans-overwhelmingly-support-leobor-reform> [<https://perma.cc/2F4G-K6FP>] (discussing Delaware legislative reform efforts to repeal police officers’ bill of rights); *see also* Orli Sheffey, *Missouri Media Miss Story of Law Enforcement Bill of Rights That Is About to Be Signed Into Law*, PULITZER CTR. (July 8, 2021), <https://pulitzercenter.org/stories/missouri-media-miss-story-law-enforcement-bill-rights-about-be-signed-law> [<https://perma.cc/HG2M-RME8>] (describing Maryland, Delaware, and Rhode Island legislative reforms related to officers’ bill of rights).

⁵¹ Sheffey, *supra* note 50.

Minnesota and son of a retired St. Paul police officer, Melvin Carter, stated the following on May 31, 2020, during the national CBS television show, *Face the Nation*:

[W]hat we've seen when officers fall far below our expectations, . . . it's happened in St. Paul, it's happened in Minneapolis, it's happened across the country, [police chiefs] who tried to remove those officers, who tried to terminate them, end up being forced to pull them back on the force through arbitration.⁵²

With that proclamation, it became clear that a full-throttled attack on labor arbitration would proceed, at least in Minnesota.

Shortly thereafter, the Minnesota legislature introduced new arbitration legislation that “left in place arbitrators’ largely unlimited authority to reinstate officers fired for misconduct” while shifting to a system that does not allow the parties to select the arbitrator but instead creates a “roster of six arbitrators who can only serve as arbitrators in police grievance arbitrations.”⁵³ The State Bureau of Mediation Services in Minnesota now appoints the presiding arbitrator for every peace officer disciplinary grievance arbitration hearing on or after September 1, 2020.⁵⁴

The six arbitrators serve statewide on a rotation based upon the initial letters of their last names.⁵⁵ The Commissioner of the Bureau decides as to who the arbitrators are that will serve on the panel after consultation with community and law enforcement stakeholders.⁵⁶ The limitation that the six panel arbitrators may only hear peace officer cases could make it difficult for the most experienced labor arbitrators to serve on the panel because they rarely have a practice with such a narrow and limited focus.⁵⁷

⁵² See *Full Transcript of “Face the Nation” on May 31, 2020*, CBS NEWS (May 31, 2020), <https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-may-31-2020/> [<https://perma.cc/52FY-WFU3>].

⁵³ See Hilbert, *supra* note 13, at 272–73; see also Jon Collins, *Half of Fired Minnesota Police Officers Get Their Jobs Back Through Arbitration*, MPR NEWS (July 9, 2020), <https://www.mprnews.org/story/2020/07/09/half-of-fired-minnesota-police-officers-get-their-jobs-back-through-arbitration> [<https://perma.cc/QT6U-AQRF>] (describing plans for legislative session to address arbitration and other matters related to police accountability by taking the selection process for arbitrators out of the hands of the parties).

⁵⁴ See MINN. STAT. § 626.892 (2022).

⁵⁵ See D.J. Tice, *Some Actual, Practical Police Reform Deserves to Be Noticed*, STAR TRIB. (May 15, 2021), <https://www.startribune.com/some-actual-practical-police-reform-deserves-to-be-noticed/600057738/> [<https://perma.cc/JC47-ER3P>]; Hilbert, *supra* note 13, at 273.

⁵⁶ Hilbert, *supra* note 13, at 273.

⁵⁷ See *Police Reform + Arbitration*, WQED (Aug. 7, 2020), <https://watch.wqed.org/video/police-reform-arbitration-37941/> [<https://perma.cc/6L5V-NMFK>] (depicting a video report from reporter Kaomi Goetz about new arbitration statute and identifying general issues related to

All Minnesota collective bargaining agreements covering peace officers negotiated after the effective date of the law (July 24, 2020) must include the new arbitrator selection process.⁵⁸ Some police chiefs in Minnesota asserted the need for this new arbitrator roster due to what they believed to be the conflicts that labor arbitrators face in having to decide in favor of police unions half the time to continue to be selected.⁵⁹ In response, University of Minnesota Law School professor and respected National Academy of Arbitrators member, Steve Befort, debunked this assertion and noted that he had no idea how many decisions he had made on behalf of unions or management as a labor arbitrator in Minnesota police discipline cases.⁶⁰

One of the members of the new six-member arbitrator panel and the author of its first decision, Susan Gaertner, a former county attorney for sixteen years, has touted the value of not being selected by either party.⁶¹ The members of the panel, appointed to staggered terms, must “complete training” of “six hours on the topics of cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences” as well as “six hours on topics related to the daily experience of peace officers, which may include ride-alongs with on-duty officers or other activities that provide exposure to the environments, choices, and judgments required of officers in the field.”⁶² According to Gaertner, the value of the panel is that “we don’t have to keep anybody happy” as “[w]e don’t get picked” and “[t]hey’re stuck with us.”⁶³ Other jurisdictions, including the state of Washington, have followed Minnesota’s lead of focusing on the arbitrator selection process as a key problem by creating their own roster of arbitrators.⁶⁴

arbitration of police discipline in Minnesota); *see also* Kaomi Lee, *Is Arbitration a Fair Way to Decide Police Firings?*, TPT ORIGINALS (Aug. 10, 2020), <https://www.tptoriginals.org/police-reform-and-arbitration/> [<https://perma.cc/LHB5-AZC8>] (describing same).

⁵⁸ *See* MINN. STAT. § 626.892 (2022).

⁵⁹ *See* Lee, *supra* note 57; *Police Reform + Arbitration*, *supra* note 57.

⁶⁰ *Police Reform + Arbitration*, *supra* note 57; Lee, *supra* note 57.

⁶¹ Tice, *supra* note 55.

⁶² *See* MINN. STAT. § 626.892 (2022).

⁶³ Tice, *supra* note 55.

⁶⁴ *See* Veronica Barriga, *Watch: Gov. Inslee Signs SB 5055 Police Reform Bill into Law, More Legislation on the Way*, NBC RIGHT NOW (Apr. 19, 2021), https://www.nbcrightnow.com/news/watch-gov-inslee-signs-sb-5055-police-reform-bill-into-law-more-legislation-on-the/article_2cf71b1c-a17a-11eb-b93b-078f1db30bf1.html [<https://perma.cc/TB8P-QUA2>]. Washington also passed police arbitrator selection legislation creating a roster of nine to eighteen arbitrators to be selected by the Public Relations Employment Commission, not the parties. *Id.* Similar to Minnesota, Washington police arbitrators must also complete “six hours of training on implicit bias and anti-racism, along with six hours related to daily law enforcement experience.” *See* Press Release, Joe Nguyen, Sen., Wash. State Senate, Governor Signs Historic Police Arbitration Reform Bill into Law (Apr. 7, 2020), <https://senatedemocrats.wa.gov/nguyen/2021/04/07/governor-signs-historic-police-arbitration-reform-bill-into-law/> [<https://perma.cc/9NM7-RVQT>].

C. *No Political Will to Engage in Bargaining on Discipline Changes*

A real question exists as to whether the parties directly or through legislation will be able to muster the political will to make key changes in how they handle police discipline actions when race matters as exemplified by the George Floyd death and protests seeking reforms.⁶⁵ Several scholars have highlighted how difficult it is to seek lasting police reform due to the “absence of political will at the local and state level.”⁶⁶ Monica Bell has explained that Black and low-income communities rarely have the ability to choose their political representatives and obtain positive legislation on their behalf to achieve policing reforms.⁶⁷ However, some scholars think there is still a viable opportunity to pass legislation that can transform and address the concerns of the community based upon organizing and learning from the initial gains of the labor movement that addressed key issues for the working class.⁶⁸

Nevertheless, politics has hindered the development of transparent police labor processes that can recognize concerns about racial justice. These stilted developments leave arbitrators to take the blame when resolving issues the parties cannot agree to address by clear contractual terms as to what is a justified or appropriate disciplinary response.⁶⁹ Legislators also have failed the parties and their communities through political inaction due to fears of being perceived as soft on crime or alternatively being unconcerned about systemic racial justice

⁶⁵ See Anthony O’Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1343 & n.84 (2021) (noting that based on history when there is a lot of energy to pursue police reform due to a major civil rights issue, “this political energy may be short lived” while citing to some commentary suggesting legislative reform efforts based upon George Floyd protests are starting to wane).

⁶⁶ *Id.* at 1345–46; see also Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1396–406 (2015).

⁶⁷ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2143 (2017).

⁶⁸ See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 576–77 (2021) (arguing how the law may intervene to rebalance power inequities for the lower and middle class similar to how labor law facilitated the growth of collective organizations to assist working people). *But see* Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 698 (2021) (tempering any notions of the possibilities of major reform with the sobering prospect that only becoming an institution as significant as the labor movement will there be an opportunity for transformative change).

⁶⁹ See Ed Krayewski, *Police Unions Produce Rules That Protect Bad Actors, That’s How Public Unions Work*, REASON (Aug. 8, 2014), <https://reason.com/2014/08/14/police-unions-produce-rules-that-protect/> [<https://perma.cc/D729-2RSJ>] (discussing how typical union contract negotiations in the private sector involve employers with strong financial interests in having good employees and union interests in protecting workers’ rights, but how police contracts involve local governments as the “employer” seeking “a modicum of fiscal restraint” while its “officials have other interests, like securing the support of politically powerful unions to raise money and win elections”).

and hostilities presented by the number of incidents involving the killing of Black persons by police officers.⁷⁰

III. EXPERIENCED ARBITRATORS: DOING WHAT POLICING PARTIES EXPECT AND NEED

In understanding the important components regarding how police arbitrators reach their decisions, parties should consider employing the most experienced labor arbitrators they can find. Police disciplinary decisions have reached a high level of public scrutiny due to ongoing concerns about brutality. Looking at the most experienced individuals to handle these cases given the tumultuous times would add a degree of balance and professionalism by having a committed, well-practiced and neutral labor arbitrator listen to both sides of the dispute. This allows police leaders to make sure their actions aimed at dealing with police misconduct receive fair and independent confirmation while also providing police officers, similar to any other public employee, a fair opportunity to be heard and not subjected to political maneuverings that are unfair and not job-related.

A. *Blaming Labor Arbitrators Benefits Politicians*

Even before the George Floyd killing, many state and local politicians, police chiefs, and other political commentators took public positions blaming labor arbitration as the problem preventing police officer accountability for misconduct and representing a purported barrier to those seeking racial justice reforms.⁷¹ In particular, these critics referred to specific examples when a labor arbitrator failed to sustain the termination of a police officer after being charged with serious misconduct sometimes involving allegations of criminal violations for misuse of force.⁷² Any arbitration decisions issued in these circumstances

⁷⁰ See Levin, *supra* note 43, at 1372 (noting the power of police unions to influence politicians as “police are a more powerful lobby [and] politicians are more likely to support pro-police policies that hamper accountability”).

⁷¹ See Bill Cummings, *Arbitration Often Puts Fired Cops Back on the Job*, ASSOCIATED PRESS (Jan. 13, 2019), <https://apnews.com/aa0513eefe8343ab9d4e52c0e6452fe1> [<https://perma.cc/8C3R-YPWZ>] (describing comments of Mayor of Danbury, Connecticut, Mark Boughton, complaining about the role of police unions in blocking police reforms and adding additional costs for citizens in bringing grievances to arbitration); Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/> [<https://perma.cc/S3F7-DCNQ>] (criticizing union efforts to protect police officers committing some breathtaking acts of misconduct); see also Michaels, *supra* note 12 (describing difficulties in pursuing police discipline with reversals in arbitration in Minnesota).

⁷² Friedersdorf, *supra* note 71.

would become fair game for criticism regardless of what the arbitrator's thoughtful rationale for reversal of the disciplinary action taken might be as the broader public concerns at issue become the main focus.⁷³

Despite the political rhetoric, some commentators have gone beyond the blaming and looked at the actual decisions to find that labor arbitrators rarely are the problem in police discipline matters.⁷⁴ Instead, the problems that arise when arbitrators reverse police disciplinary actions must lie at the feet of municipalities and departments for their inconsistencies and failures that come forward during the arbitration review process.⁷⁵ But political leaders need cover from the fallout when those disciplinary actions get reversed.

Unfortunately, collective bargaining agreement provisions have led to pointing fingers in all the wrong places. Jim Pasco, the executive director of the Fraternal Order of Police, the nation's largest law enforcement union, explained: "It's become a blame game The thing that critics never say is that contracts aren't forced down the throats of anyone. They are negotiated."⁷⁶ As a result,

⁷³ *Id.* (describing cases); see Stephen A. Plass, *Police Arbitration and the Public Interest*, 37 HARV. BLACKLETTER L.J. 31, 50–53 (2021) (listing cases with misconduct where arbitrators nevertheless reinstated the officers for lesser violations or due to procedural missteps, and departments challenged the arbitrator's award unsuccessfully in court as a violation of public policy, which only reflected those kinds of cases even arguably looking like a public policy violation to be challenged and not capturing the overall number of cases resolved fairly that never get into the court for challenge); Ben Larson, Note, *The Illusion of the Public Policy Exception: Arbitration, Law Enforcement Discipline, and the Need to Reform Minnesota's Approach to the Public Policy Exception*, 48 MITCHELL HAMLINE L. REV. 338, 358, 362 (2022) (asserting Minnesota should broaden its coverage of public policy challenges to account for police misconduct court appeals); see also Ariana R. Levinson, Erin O'Hara O'Connor & Paige M. Skiba, *Is Labor Arbitration Lawless?*, 48 FLA. ST. U. L. REV. 443, 446, 503 (2021) (identifying "tension between private promotion of workplace harmony and the vigorous protection of other public policies").

⁷⁴ See, e.g., Alan Neuhauser, *Arbitration and the Revolving Door of Bad Cops*, U.S. NEWS (Oct. 19, 2016), <https://www.usnews.com/news/national-news/articles/2016-10-19/bad-cops-back-on-the-street-dont-blame-arbitration> [<https://perma.cc/R4CH-BRU9>] (discussing how to not blame the arbitrators); see also Mara H. Gottfried & Sarah Horner, *How Often Do Arbitrators Reinstate Fired Cops? Just Under Half the Time*, TWINCITIES.COM (June 23, 2019), <https://www.twincities.com/2019/06/23/how-often-do-arbitrators-reinstate-fired-cops-just-under-half-the-time/> [<https://perma.cc/S7TF-S76G>] (noting from a five-year study of arbitrations involving police discipline that the Pioneer Press conducted and finding that while there may be an occasional high-profile case where officers are reinstated, across the board "fewer than half of law enforcement workers were allowed to return to their jobs after being fired and having appealed their cases to an independent arbitrator," a number "on par for all public- and private-sector union employees who contested their terminations to arbitrators").

⁷⁵ Schapiro, *supra* note 10 ("Dave Bicking, a former member of the Minneapolis Civilian Police Review Authority, said he believes the problem lies not with the arbitrators, but with police departments' history of doling out discipline in an inconsistent fashion.").

⁷⁶ Reade Levinson & Michael Berens, *Special Report: How Union, Supreme Court Shield Minneapolis Cops*, REUTERS (June 4, 2020), <https://www.reuters.com/article/us->

politicians have folded arbitration into their blaming narratives rather than focusing on the terms they have agreed to and allowed to become part of their contracts with police officers.⁷⁷

Police unions do not and cannot afford to take every case to arbitration.⁷⁸ As a result, one could surmise that police unions choose carefully and wisely in deciding which disciplinary cases they will challenge by taking the case to arbitration. One empirical study in Oakland from 2010 to 2015 indicated that arbitrators upheld only seven out of twenty-six disciplinary actions taken by the police, and another study of Philadelphia police arbitrations found the arbitrators reinstated nineteen out of twenty-six police officers between 2008 and 2014.⁷⁹ However, the “investigation in Oakland blamed not the arbitrators, but the city and the police department.”⁸⁰ That study found that the arbitrators’ reversals resulted from “vague or inconsistent” policies and agency leadership that “did not make it a priority to fix the system.”⁸¹ Despite the limited number of cases that end up in arbitration as a result of thoughtful selection by police unions, some municipal and political leaders, appealing to their constituencies, act as if their possible mishandling of the disciplinary action played no role in the final result despite being identified by the arbitrator’s ruling as a rationale for the reversal.⁸²

The police department managers and politicians attacking the arbitrators rarely acknowledge to the media that the police departments have taken missteps with respect to the disciplinary protections and OBR terms that police officers are provided within union contracts and civil service laws.⁸³ By attacking labor arbitrators without acknowledging their own missteps, these police and political leaders have failed to deal with the underlying problem of not being consistent in administering their policies to address growing concerns about racial justice

minneapolis-police-culture-specialrep/special-report-how-union-supreme-court-shield-minneapolis-cops-idUSKBN23B2LL [https://perma.cc/4DHF-Z63Q].

⁷⁷ Katz, *supra* note 43, at 422 (“[P]olicymakers have avoided critiquing their own role in giving police unions the power to define not only the extent of accountability measures but also the methods through which their members police neighborhoods with large populations of Black, Brown, or poor people.”).

⁷⁸ See Schapiro, *supra* note 10 (“The Minneapolis police union says only a small number of cases go to arbitration—roughly two a year.”); Neuhauser, *supra* note 74.

⁷⁹ See Neuhauser, *supra* note 74.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Gottfried & Horner, *supra* note 74 (reviewing reversals where police department failed to follow disciplinary precedents or treated previous misconduct differently but police officials criticize arbitrators as tending “to favor employees” in ways that fail to “match[] what . . . our reasonable expectations are for peace officers in our community” with changing times, suggesting police departments should “have the right and the ability to have some pretty high expectations for law enforcement” in serious incidents).

and not negotiating key changes with police unions to make their policies work best for the public while treating officers fairly.

Focusing merely on blaming arbitrators or even unions as the key problem that leads to the reversal of police disciplinary actions ignores the key roles of “elected officials who capitulate to union demands and sacrifice community will on the altar of political expediency.”⁸⁴ By accepting these antiarbitration narratives, it “would effectively let politicians off the hook.”⁸⁵ Instead, politicians should listen to a civilian reform activist, Dave Bicking, Vice President of Minnesota Communities United Against Police Brutality (CUAPB), who carefully studied the actual police labor arbitrator decisions in Minnesota to reach the following conclusion: Departmental mismanagement, not the arbitration process, is to blame in most cases where an officer gets reinstated, [Bicking] said. “There were cases that I read where what the officer did was absolutely chilling, just horrifying, and at the end I agreed with the arbitrator not to fire the officer.”⁸⁶

B. Arbitrators Do Not Need to and May Not Curry Party Favoritism

Rushin has repeatedly offered a rationale suggesting police arbitrators could issue decisions to curry favor with the parties in a way to continue to be selected.⁸⁷ He has identified others who support this theory.⁸⁸ However, he has also explained that he is not connoting any “bad faith” by arbitrators:

To be clear, this is just a theory. It is not intended to suggest bad faith on the part of any individual arbitrator. For one thing, this kind of incentive may operate unconsciously. And even if arbitrators are acting in good faith within the system as currently established, this does not mean that the system as a whole serves the public interest. A system of well-intended individuals acting in good faith may still produce undesirable results.⁸⁹

⁸⁴ See Levin, *supra* note 43, at 1399.

⁸⁵ *Id.*

⁸⁶ Orecchio-Egresitz, *supra* note 17.

⁸⁷ See Rushin, *Police Arbitration*, *supra* note 21, at 1065 (“Either selection method may incentivize rational arbitrators to reach compromise results in the aggregate in order to increase their chances of being selected as arbitrators for future cases.”); Rushin, *Police Appeals*, *supra* note 47, at 566 (“Such a selection process may contribute to arbitrator decisions that split the difference between supervisor and union demands, since siding too frequently with one side or the other might endanger an arbitrator’s selection in future cases through an alternate strike system.”).

⁸⁸ See, e.g., Rushin, *Police Arbitration*, *supra* note 21, at 1029 n.38, 1066 & n.259 (citing Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. CRIM. L. & CRIMINOLOGY 215, 235, 240 (1998)).

⁸⁹ *Id.* at 1066 n.261.

Unfortunately, this theory ignores the realities for dedicated and committed police labor arbitrators such as members of the National Academy of Arbitrators (NAA), a nonprofit organization founded in 1947.⁹⁰ NAA members tend to have the most experienced labor arbitrators in the United States and Canada.⁹¹ NAA members also must adhere to stringent ethical requirements to remain impartial.⁹²

As a result, these NAA arbitrators are not beholden to any particular business from a single employer and union relationship as arbitrators with this level of experience are handling numerous cases and matters involving multiple employers and unions.⁹³ This lack of an economic incentive for these experienced arbitrators ameliorates any purported desire, consciously or unconsciously, to go against their ethical obligations and instead seek to curry favor with both unions and police departments by ruling in favor of each side half the time. Operating under a favoritism dilemma would force experienced and busy arbitrators to focus on keeping a running tally of their results for each party they provide arbitration services. This would distract the arbitrators from focusing on calling the matter as they see it each time and moving on to the next matter on their crowded arbitration dockets.

Although Rushin has speculated that a need to curry favor with both sides “might” or “may” be a rationale or incentive for explaining the splits in arbitrators deciding for unions nearly as much as employers in police matters, he does not justify this rationale in practice.⁹⁴ While unions tend to lose in police arbitrations nearly as much as police departments have their disciplinary actions

⁹⁰ See *Who We Are*, NAT’L ACAD. OF ARBS., <https://naarb.org/who-we-are/> [https://perma.cc/SG7J-FXF6]. In full disclosure, I am an NAA member.

⁹¹ See *Membership Guidelines*, NAT’L ACAD. OF ARBS., <https://naarb.org/membership-guidelines/> [https://perma.cc/9N52-FJQG]. The NAA has rigorous membership standards that include the following: “(1) The applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities. (2) The applicant should have substantial and current experience as an impartial arbitrator of labor-management disputes, so as to reflect general acceptability by the parties.” *Id.*

⁹² See *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, NAT’L ACAD. OF ARBS., <https://naarb.org/code-of-professional-responsibility/> [https://perma.cc/SK9S-WWUR] (stating in section 1, Arbitrator’s Qualifications and Responsibilities to the Profession, subsection C, the following: “[a]n arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator’s impartiality”). Also, the NAA Committee on Professional Responsibility and Grievances processes ethical complaints against its members and decides penalties, including possible expulsion from NAA membership, if a violation has occurred. See *Committee on Professional Responsibility and Grievances*, NAT’L ACAD. OF ARBS., <https://naarb.org/committee-on-professional-responsibility-and-grievances/> [https://perma.cc/Y9VY-YTHH].

⁹³ See *Membership Guidelines*, *supra* note 91 (describing typical membership requirements for NAA members of “at least five years as an arbitrator and at least 60 decisions in a six-year period”).

⁹⁴ See Rushin, *Police Arbitration*, *supra* note 21, at 1065 & n.257.

reversed, police unions do not seem to be publicly blaming the arbitrator when they do not like the result or arguing that arbitrators must be seeking to curry favor with police departments for future selections. Also, the datasets being considered do not include all disciplinary matters, only the ones a union believes there is enough mishandling by the police department to warrant challenging it.⁹⁵

Should arbitrators be assumed to be biased when they follow time-honored and important concepts of just cause and “due process” that all parties are aware of and which guarantee fairness even when it may lead to a lax response to some “bad apples?”⁹⁶ Police union attorney, Will Aitchison, suggests the answer to that question is no.⁹⁷ Aitchison has studied police arbitrations in the United States and found that since the 1980s, arbitrators either change the discipline to a less harsher penalty or completely reverse the disciplinary action in about “60 percent of cases.”⁹⁸ Aitchison has noted that after working for the Portland Police Association and their more than 950 members for more than thirty-four years, he “handled just seven arbitrations out of an estimated 3,000 disciplinary actions handed down by lieutenants, captains and chiefs.”⁹⁹ In fact, the underlying assumption that percentage results indicate currying favor to continue being selected does not match all the criticism being levied. If police managers and chiefs become so upset with an award an arbitrator has issued and think it was an unjust and inappropriate attempt to throw a bone to the union and police officer employees rather than decide the case on the merits, the arbitrator would not continue to be selected as both parties typically must agree to the selection, not just one party.¹⁰⁰

Also, an underlying premise of this theory assumes that the percentage results reflecting who prevails in these disciplinary appeals should, in practice, reflect only a small percentage of police department reversals, if at all. Because the public and other outsiders only see a violent action that most individuals could not engage in and keep their jobs, they may assume that a police department decision to take disciplinary action against a police officer after conducting an internal investigation should rarely be overturned. The problem

⁹⁵ See *id.* at 1064–65 (noting that “not all disciplinary appeals necessarily proceed to arbitration” as parties “frequently settle . . . before they proceed to arbitration” and “high rates of union success may be an outgrowth of case selection”).

⁹⁶ Neuhauser, *supra* note 74 (quoting former National Academy of Arbitrators President, Arnold Zack).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Rushin, *Police Arbitration*, *supra* note 21, at 1065–66.

is that a number of cases show department missteps in procedure and proof to suggest that this assumption is unwarranted.¹⁰¹

C. Why Labor Arbitrators Reverse Police Disciplinary Decisions

Stephen Befort has explained that although labor arbitrators tend to uphold department disciplinary decisions a little more than fifty percent of the time, there are clear reasons why arbitrators may also reverse police management decisions.¹⁰² Those reasons tend to be because of the following management mistakes: (1) finding the alleged misconduct did not occur or was not as severe as alleged; (2) failing to apply existing mitigating factors such as a long and successful work history before the misconduct at issue occurred; and (3) due process concerns such as faulty investigations or pursuing disciplinary penalties inconsistent with previous cases that were similar.¹⁰³ After being involved in one arbitration where he reinstated a police officer charged with using excessive force despite having several prior disciplinary actions and then he sustained a termination of the same officer in another arbitration three years later, Befort explained the challenges arbitrators face: “These cases are difficult and every arbitrator I know agonizes over the appropriate outcome.”¹⁰⁴ Those relying on just the percentages and complaining about arbitrators reversing disciplinary actions assume wrongly that arbitrators were not presented with hard cases and appear to suggest the arbitrator should have just rubber-stamped the department’s decision. If the role of the arbitrator would essentially become limited to merely approving the department’s actions, then why have an arbitration appeal in the process?

Understanding why labor arbitrators review and affirm or reverse disciplinary actions taken against police officers has been missing from the critiques of various arbitration decisions by politicians, police supervisors, the media, scholars, and others who rush to blame arbitrators rather than examine their analysis in more detail.¹⁰⁵ There has also been no clear assessment as to

¹⁰¹ See Orecchio-Egresitz, *supra* note 17 (noting the suggestion of Dave Bicking, Vice President of CUAPB, that well-reasoned arbitrator decisions explain why “[d]epartmental mismanagement” should receive blame when a disciplinary action is reversed).

¹⁰² See Befort, *supra* note 23.

¹⁰³ *Id.*

¹⁰⁴ Levinson & Berens, *supra* note 76.

¹⁰⁵ See, e.g., Rushin, *Police Arbitration*, *supra* note 21, at 1069–71 (criticizing several arbitrator decisions by focusing on the allegations of misconduct by the officers involved rather than trying to comprehend with any certainty as to why the arbitrator should not have found it necessary to reverse or reduce the discipline). Specifically, some of Rushin’s criticism of arbitrators has referred to decisions involving an officer engaging in domestic violence, using excessive force, cheating on exams, or exposing genitals in public without providing the arbitrator’s reasoned rationale in each case other than merely saying “proportionality” played a role in the arbitrator’s conclusion to overturn or reduce the

whether the arbitration process hinders or helps in addressing the overall concerns about police accountability related to racial justice.¹⁰⁶ Even after his detailed study of 624 disciplinary appeals to over two hundred arbitrators between 2006 and 2020 and from a diverse range of law enforcement agencies and a catalogue of reasons for the reversals, Rushin still concluded that he could not determine “[h]ow often *should* arbitrators overturn or reduce the discipline.”¹⁰⁷

In viewing the criticism of arbitrators, a recent and provocative comment suggested correctly that police officers have more rights than other workers, but it also suggested incorrectly that labor arbitrators treat police officers differently than other workers:

Police unions are unlike any other form of organized labor. A teacher who pulls out a gun and shoots a student cannot avoid prosecution if the school fails to investigate the incident within five days. A librarian with a tendency to throw large books at visitors who refuse to heed demands for silence will not be reinstated because an arbitrator determined that management failed to properly follow procedure in firing her.¹⁰⁸

discipline. *Id.* at 1070–71. Arbitration reviews of this ilk apparently assume, incorrectly, that any discipline for police misconduct should rarely be overturned or reduced by an arbitrator who should instead just find the nature of the particular offense at hand so shocking that termination on its face should be affirmed. *Id.* at 1071 & n.291 (discussing an arbitrator’s acknowledgement that the offense might “‘shock the conscience’ of most citizens” in discussing a case of excessive force with an officer “deploying a canine on an unarmed man” while only identifying, without more explanation, that this arbitrator still reduced the discipline because of “proportionality concerns”). Such criticisms also appear to assume that an arbitrator should never consider “proportionality” or dissimilar disciplinary treatment of other officers as a fairness check on the administration of police discipline without reviewing whether the parties or their agreements require arbitrators to consider these matters. *See id.* at 1073 (criticizing an arbitrator’s decision to reduce a disciplinary penalty merely because the arbitrator stated “he felt such a severe punishment was inappropriate, largely because he could not find evidence that the city had similarly punished other officers”).

¹⁰⁶ *See id.* at 1029, 1046 (acknowledging the importance of not just studying outcomes as many media reports have done rather than really assessing the reasons). *But see* Tyler Adams, Note, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?*, 32 A.B.A. J. LAB. & EMP. L. 133, 135–54 (2017) (reviewing various explanations for why labor arbitrators overturn police department disciplinary decisions in ninety-two police labor arbitration decisions on the Bloomberg database; finding that reasons for reversal included poor investigations, lack of proof related to the violation charged, and mitigating factors; suggesting the media and critical sensation with arbitrator results is misplaced and should look instead at the context of the actual and specific cases and what the arbitrator found and why).

¹⁰⁷ Rushin, *Police Arbitration*, *supra* note 21, at 1029, 1068.

¹⁰⁸ Adam Serwer, *The Authoritarian Instincts of Police Unions*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2021/07/bust-the-police-unions/619006/> [<https://perma.cc/QHE6-5AV7>] (June 22, 2021).

This commentator offered no justification for the claim that a librarian would “not be reinstated” even if “an arbitrator determined that management failed to follow procedure in firing her.”¹⁰⁹ These comments reflect a disconnect that arises when associating fault by the arbitrator rather than criticizing the procedural device the parties have incorporated into their agreement that stymies a disciplinary action.

The reality is that compared to non-union employees, “[n]early every worker represented by a union has vastly broader protection” from “[a]n employer’s reprimand, demotion, suspension, or discharge of a union-represented employee.”¹¹⁰ This protection arises from the collective bargaining agreement and the fact that these disciplinary actions “may be overturned if an arbitrator concludes the action was undertaken without ‘just cause.’”¹¹¹ While arbitrators may consider a procedural violation as a basis for overturning a disciplinary action (and it is not uncommon for arbitrators to do so, possibly even with a librarian who throws a book at patrons if other librarians have committed much more egregious actions without being disciplined or certain agreed-upon procedures were not followed), the librarian comment suggests that arbitrators apply procedure in an arbitrary fashion to protect police union members more than other union workers. There is simply no empirical or other proof to support this suggestion. The particular contract provisions control, and whether a librarian or a police officer, if the employee is denied procedural protections under the parties’ agreement, an arbitrator may reverse the disciplinary action regardless of the employee’s job title.

Unfortunately, second-guessing labor arbitrators when they agonize over disciplinary actions to provide a fair and just result benefits no one. Labor arbitrators provide reasoned decisions explaining their awards and have no motivation beyond looking at the facts presented and arguments made by the parties in deciding the final discipline. While police managers and politicians may be unhappy with the result, blaming the arbitrator appears counterproductive. Instead, the parties should focus on the reasoning of the arbitrator and look to correct whatever management mistakes or unfair treatment of officers led the arbitrator to reverse the discipline.¹¹² If the parties truly believe an arbitrator was acting arbitrarily, then they always have the option of never choosing to work with that arbitrator again.

¹⁰⁹ *Id.*

¹¹⁰ See LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 306 (4th ed. 2020).

¹¹¹ *Id.*

¹¹² See Rushin, *Police Arbitration*, *supra* note 21, at 1030 (noting that key reasons for reversing decisions in arbitration include “failing to conduct sufficiently robust investigations” so that “[a]rbitration may be merely providing necessary relief to officers aggrieved by a faulty disciplinary system”).

D. Discipline Decisions Abolishing Experienced Arbitrators

For those who want to abolish arbitration, they should consider who would decide whether a disciplinary action taken against a police officer is fair, if not decided by an arbitrator. The New York Times editors asserted the disciplinary decision should “be left in the hands of [someone] who is accountable to the community. That’s where it belongs.”¹¹³ This approach fails to understand how some police unions, applying tremendous bargaining power, negotiate contract provisions providing for a unique set of police OBR protections.¹¹⁴ The concern really focuses on OBR disciplinary procedures that shield misconduct and block transparency.¹¹⁵ But in applying the suggestion to abolish arbitration while still recognizing that in many jurisdictions police officers have OBR provisions and other legal protections, the result of reversing disciplinary actions would appear to be the same whether it is a politician or a police chief or an arbitrator or a

¹¹³ See *Ax the Arbitrators*, *supra* note 22.

¹¹⁴ See, e.g., Steven Cohen, *The Next Fight for Racial Justice: Police Union Reform*, NEW REPUBLIC (Dec. 2, 2015), <https://newrepublic.com/article/124811/next-fight-racial-justice-police-union-reform> [<https://perma.cc/GZV5-ZANM>] (discussing Chicago contract provisions protecting police officers’ rights in the disciplinary process and considering how those rights might apply to limit accountability after discrepancies and missing footage from a videotape all suggesting a cover-up had occurred when seeking racial justice; addressing allegations of police misconduct involved in the shooting of a young Black man, LaQuan McDonald); see also KELCEY DUGGAN, RESEARCH MEMO: POLICE UNIONS AND THE OBSTACLES THEY POSE 1–2 (2020), https://communityresourcehub.org/wp-content/uploads/2020/09/2020_FINAL_Unions_Obstacles_Memo.pdf [<https://perma.cc/M3LN-SR5L>] (discussing review of fourteen states with police OBR legislation and suggesting how those provisions make it more difficult “to hold police officers accountable”); Levin, *supra* note 43, at 1345–46 (referring to OBR issues for police labor unions); Keenan & Walker, *supra* note 43, at 203–41 (referring to various provisions in state law OBRs).

¹¹⁵ See Kallie Cox & William Freivogel, *Police Misconduct Records Secret, Difficult to Access*, ASSOCIATED PRESS (May 12, 2021), <https://apnews.com/article/us-news-police-reform-police-government-and-politics-fa6cbd7e017b85aa715e23465a90abbe> [<https://perma.cc/32BX-6VGF>] (describing how “[l]egal experts say transparency of police misconduct records is one of the keys to police reform” and identifying how several states block or prevent access to police officer discipline records); Martin Austerhuhle, *New D.C. Bill Would Mandate A Public Database of Police Misconduct Records*, NPR (July 14, 2021), <https://www.npr.org/local/305/2021/07/14/1015782291/new-d-c-bill-would-mandate-a-public-database-of-police-misconduct-records> [<https://perma.cc/W5DX-Y6YL>]. But see Danny Wicentowski, *St. Louis Sues Missouri over Controversial ‘Police Bill of Rights’ Law*, RIVERFRONT TIMES (Dec. 6, 2021), <https://www.riverfronttimes.com/stlouis/st-louis-sues-missouri-over-controversial-police-bill-of-rights-law/Content?oid=36714595> [<https://perma.cc/W5DX-Y6YL>] (describing a St. Louis lawsuit challenging Missouri law providing for less transparency and more protection of police officers); Jim Salter, *Critics Worry Missouri Measure Reduces Police Accountability*, ASSOCIATED PRESS (July 1, 2021), <https://apnews.com/article/george-floyd-michael-brown-police-reform-death-of-george-floyd-police-90c0f995766bb6ea0c6338dc2d7496d1> [<https://perma.cc/9FUZ-MLXH>] (describing police reform legislation that provides more protections for police officers including a Missouri provision prohibiting disclosure of investigations).

civilian review board, or eventually a court.¹¹⁶ A police OBR includes “special labor protections for law enforcement that effectively set traps for city attorneys who not only may not specialize in labor law but haven’t pored over the sometimes Byzantine rules for police officers.”¹¹⁷

Overall, these OBR rules do offer some laudable benefits in that the “arbitration protects individual officers from retribution or capricious discipline” when being fired “without much due process.”¹¹⁸ Also, the adversarial nature of the disciplinary process between police management and the union in some sectors has impeded efforts aimed at determining workable accountability measures to address appropriate disciplinary actions.¹¹⁹ These OBR provisions provide protections that grant police officer union members’ due process rights to prevent arbitrary disciplinary actions in a broad fashion.¹²⁰ When Rushin considered the impact of arbitration processes, he also found no correlation between arbitration decisions and unjustified departures from police discipline processes.¹²¹

The recent case of Rayshard Brooks is one that may be helpful to show that the union contractual or civil service protections, and not the arbitrators, may represent the reason why police disciplinary decisions are overturned even in

¹¹⁶ See Kim Barker, Michael H. Keller & Steve Eder, *How Cities Lost Control of Police Discipline*, N.Y. TIMES, <https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html> [<https://perma.cc/WXR5-XL8N>] (Mar. 10, 2021) (discussing how civil rights riots in the 1960s led to the formation of several police union collective bargaining agreements with protections for police officers including: (1) expanding secrecy by requiring removal of prior discipline from an officer’s records even after two years; (2) delaying statements by giving the officer the right to wait for up to thirty days after an incident before having to respond to a disciplinary charge; and (3) allowing officers to use force even if the victim is unarmed as long as reasonable officers in that situation could have concluded that they feared for their lives).

¹¹⁷ Neuhauser, *supra* note 74.

¹¹⁸ *Id.* (quoting second Rocky Lucia, an attorney who represents police officers).

¹¹⁹ See Ward, *supra* note 48.

¹²⁰ See James Surowiecki, *Why Are Police Unions Blocking Reforms?*, NEW YORKER (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform> [<https://perma.cc/8736-UG59>] (describing how police unions have negotiated rights allowing police officers to not be interrogated after use-of-force incidents and purging disciplinary records after three to five years).

¹²¹ See Rushin, *Police Arbitration*, *supra* note 21, at 1068–69 (noting that “this study . . . falls short of proving causation” while speculating that the percentage of reversals may be due to the broad standard of review arbitrators have or “[t]he unpredictable and sometimes arbitrary nature of some departments’ internal disciplinary systems”); Rushin, *Police Appeals*, *supra* note 47, at 579 n.196, 581 (discussing whether various police departments may have engaged in incomplete processes and suspect actions in an unfair manner, warranting the protection for police officers provided by arbitration due to “arbitrary, excessive, or unreasonable disciplinary decisions”).

the highest profile racial incidents.¹²² Brooks, a twenty-seven-year-old Black male, was killed by an Atlanta police officer, Garrett Rolfe, on June 12, 2020.¹²³ Brooks' death occurred only a little over two weeks after the murder of George Floyd and caused a tremendous level of protests in Atlanta.¹²⁴ Rolfe, a white male, had responded to a call about a man asleep in his car.¹²⁵ Brooks' car was presenting an obstacle to other vehicles seeking to access the drive-thru lane at a Wendy's restaurant.¹²⁶ Brooks appeared "cooperative and even congenial" while speaking to Rolfe.¹²⁷ Brooks asked if he could lock his car and walk to his sister's house, but Rolfe chose to pursue a breath test instead.¹²⁸

Rolfe then told Brooks "he 'has had too much to drink to be driving'" and attempted to handcuff Brooks.¹²⁹ Brooks began to struggle with Rolfe and another officer as they all went to the ground. Rolfe said "stop fighting" as Brooks got away with the other officer's Taser.¹³⁰ Within a few seconds, Rolfe switched his Taser to his left hand and reached for his handgun with his right hand while chasing Brooks.¹³¹ While running away from Rolfe, Brooks turned and fired the Taser back at Rolfe and it did not appear to be even close to hitting Rolfe.¹³² Then Rolfe dropped his Taser and pulled out his handgun and fired three shots at Brooks as he was running away with his back towards Rolfe.¹³³ Two of the shots hit Brooks, and he fell to the ground and died later in the hospital after surgery.¹³⁴

¹²² See Chas Danner, *Everything We Know About the Killing of Rayshard Brooks by Atlanta Police*, INTELLIGENCER, <https://nymag.com/intelligencer/2020/06/what-we-know-about-the-killing-of-rayshard-brooks.html> [<https://perma.cc/9CVK-44PA>] (June 18, 2020).

¹²³ See *id.*; Malachy Browne, Christina Kelso & Barbara Marcolini, *How Rayshard Brooks Was Fatally Shot by the Atlanta Police*, N.Y. TIMES, <https://www.nytimes.com/2020/06/14/us/videos-rayshard-brooks-shooting-atlanta-police.html> [<https://perma.cc/8ZW9-VHMA>] (May 5, 2021).

¹²⁴ Danner, *supra* note 122; see also Ortiz, *supra* note 34.

¹²⁵ Danner, *supra* note 122.

¹²⁶ *Id.*

¹²⁷ Ortiz, *supra* note 34.

¹²⁸ Browne, Kelso & Marcolini, *supra* note 123.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Browne, Kelso & Marcolini, *supra* note 123.

The City of Atlanta decided to fire Rolfe the next day.¹³⁵ Eventually, the Civil Service Board (CSB)¹³⁶ issued a decision reinstating Rolfe.¹³⁷ Christian Boone from the Atlanta Journal-Constitution summarized the CSB's finding:

'Due to the City's failure to comply with several provisions of the Code and the information received during witnesses' testimony, the Board concludes the Appellant was not afforded his right to due process,' the board concluded. 'Therefore, the Board grants the Appeal of Garrett Rolfe and revokes his dismissal as an employee of the APD.'¹³⁸

This summary highlights how, unfortunately, the City of Atlanta police made some procedural missteps. First, the Chief of Police, Erika Shields, had resigned the day of the firing and did not sign the termination form for Rolfe.¹³⁹ Assistant Chief, Todd Coyt, signed the termination form, but in contrast to his signature, Coyt also testified against the termination by stating to the CSB that he believed Rolfe and the other officer involved "acted accordingly and . . . were trying to show compassion and did everything they could to calm the situation down."¹⁴⁰ Essentially, Rolfe's lawyer used this evidence to argue to the CSB that the City of Atlanta dismissed Rolfe without conducting a proper investigation.

City of Atlanta Mayor Keisha Lance Bottoms had made it clear that there was no time to waste in quelling the unrest resulting from Rolfe's actions.¹⁴¹ Coyt issued a notice of proposed adverse action recommending termination on

¹³⁵ Ortiz, *supra* note 34.

¹³⁶ The CSB is Atlanta's "official protector of the civil service system" and it "shall consist of five (5) members, who shall be appointed by the Mayor with the consent of the Council and shall hold office for a term of three (3) years." *See Civil Service Board*, CITY OF ATLANTA, GA, <https://www.atlantaga.gov/government/boards-and-commissions/civil-service-board> [<https://perma.cc/GGQ3-7Q9C>]. "The Mayor can also assign three (3) additional ad hoc board members." *Id.* "The Civil Service Board is made up of citizens of the City of Atlanta recommended by the Mayor and confirmed by the Atlanta City Council." *Id.*

¹³⁷ *See Read the Civil Service Review Board Order Reinstating Atlanta Police Officer Garrett Rolfe*, ATLANTA J.-CONST. (May 5, 2021) [hereinafter *Read the Civil Service*], <https://www.ajc.com/news/read-the-civil-service-board-order-reinstating-atlanta-police-officer-garrett-rolfe/FA4FUVVGNBG6DB53DA6YKIW5TA/> [<https://perma.cc/MGA4-8VAN>]; *see also* Christian Boone, *Fired Atlanta Police Officer Who Shot Rayshard Brooks Reinstated*, ATLANTA J.-CONST. (May 5, 2021), <https://www.ajc.com/news/crime/fired-apd-officer-who-shot-rayshard-brooks-reinstated/DRIIURYISNC6FOR2OHIMZTPU2U/> [<https://perma.cc/956V-QZYB>].

¹³⁸ Boone, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.* An Atlanta internal affairs police officer also gave favorable testimony for Rolfe suggesting the City had made missteps in not following required procedures in terminating Rolfe because it wanted "to accommodate a 5 p.m. press conference by the mayor announcing Rolfe's termination." *Id.*

¹⁴¹ *Id.*

June 13, 2020, for violation of a work rule regarding mistreatment or unnecessary use of force.¹⁴² Coyt also issued a final termination letter later that day.¹⁴³ The CSB found this termination process definitely violated the Atlanta City Civil Service Code as:

Section 114-530 (a) of the Code clearly outlines procedures and protocols for administering adverse employment actions: ‘An employee against whom an adverse action is to be taken shall be given a written notice of proposed adverse action [NPAA,] signed by the appointing authority or designee, at least ten working days prior to the effective date of the proposed adverse action.’ In this case, the effective date of the discipline was June 14, 2020, and the NPAA and the [final adverse action] were issued to the Appellant’s Union Representative at virtually the same time on June 13, 2020. As such, the City’s actions were not compliant with the ten days prior notice period as required by the Code.¹⁴⁴

Did the political upheaval and racial unrest going on in Atlanta justify cutting the procedural corners required? Could the City of Atlanta place Rolfe on leave with pay while it completed the procedural steps to effectuate his termination by giving him proper notice of a proposed termination and sufficient time to respond before making the termination final? Was it more necessary to send a message to the community in an uproar that Rolfe had been terminated? These are all good questions.

Whether the decision was made by the CSB or by an arbitrator, the result from the City’s failure to comply with its own procedures in the Brooks case could lead to the same type of reversal of a disciplinary action taken. As a result, the Brooks case demonstrates how even leaving the decision at the feet of a civil servant (Mayor Lance Bottoms or Atlanta Police Department Chief Erika Shields or Assistant Chief Todd Coyt) will not change the concerns about reversing high-profile disciplinary decisions made by police leadership. Also, obviously giving the decision to a civil service board will not alleviate the concerns about reversing the decisions either or result in allegedly circumventing the problem of arbitrators reversing the decisions half the time. The problem is not who decides and how, but whether police officers such as Rolfe should be able to resist disciplinary actions due to procedural missteps by police department leaders when those procedures are guaranteed by civil service codes or contracts.

Mayor Lance Bottoms clearly felt that the political climate after the killing of George Floyd and other killings of Black individuals in the Atlanta area leading up to the Brooks shooting warranted the immediate termination of

¹⁴² See *Read the Civil Service*, *supra* note 137.

¹⁴³ See *id.*; Boone, *supra* note 137.

¹⁴⁴ *Read the Civil Service*, *supra* note 137.

Rolfe.¹⁴⁵ Apparently, the decision was necessary to Lance Bottoms regardless of procedure or comparison of dissimilar treatment of other Atlanta police officers under similar facts because of the level of racial unrest and the threat to public safety that had arisen.¹⁴⁶ Mayor Lance Bottoms stated shortly after Rolfe's reinstatement by the CSB:

'Given the volatile state of our city and nation last summer, the decision to terminate this officer, after he fatally shot Mr. Brooks in the back, was the right thing to do. Had immediate action not been taken, I firmly believe . . . the public safety crisis . . . during that time would have been significantly worse.'¹⁴⁷

On the other hand, Georgia Governor Brian Kemp responded to the CSB decision to reinstate Rolfe by stating: "Police, and everybody, deserve due process."¹⁴⁸ Do these statements by public officials from opposing political parties suggesting contradictory results lead anyone to believe that having a civil servant, accountable to the community, will make the disciplinary decision a better result or lead to a more polarizing outcome? Rather, these responses by politicians acknowledge how existing political pressures on accountable public officials may exacerbate the problem.

E. Just Cause: Conscientious or Rogue Arbitrators Need Not Apply

When parties agree in a labor contract to discipline an employee only when there is "just cause" to do so, a failure to follow procedures is a common reason to find the employer did not have just cause to proceed, regardless of the type of employee or industry involved.¹⁴⁹ The arbitrator's role is to interpret the terms of the parties' agreement and not exceed the terms the parties have agreed

¹⁴⁵ See Press Release, Keisha Lance Bottoms, Mayor, City of Atlanta, Civil Service Board, Statement on Civil Service Board's Reinstatement of Officer Rolfe (May 5, 2021), <https://www.atlantaga.gov/Home/Components/News/News/13701/672> [<https://perma.cc/MX84-GRQC>].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Boone, *supra* note 137.

¹⁴⁹ See, e.g., *Using 'Just Cause' to Fight Unfair Discipline*, TEAMSTERS LOC. 96, https://www.teamsterslocal96.org/using_just_cause_to_fight_unfair_discipline [<https://perma.cc/VRK4-BPKU>] (referring to a book by Robert Schwartz, *JUST CAUSE: A UNION GUIDE TO WINNING DISCIPLINE CASES* (2d ed. 2018), in which Schwartz studied over 20,000 labor arbitration decisions and identified common reasons to challenge disciplinary actions as not being made with just cause, including failure to provide fair notice, consistent enforcement, due process, management's failure to meet its burden of persuasion to show substantial proof, equal disciplinary penalties, progressive discipline, and mitigating or extenuating circumstances).

to be bound by in the contract.¹⁵⁰ The arbitrator is not the one who agreed to provide certain provisions that protect due process for the worker. The parties include and expect those terms as part of assessing just cause. The arbitrator is merely acting as a “contract reader”¹⁵¹ in applying the terms in the fashion the parties agreed for the arbitrator to do when they entered into the agreement.

A classic example of how labor arbitrators can reverse a discharge decision as a result of the “just cause” requirement when an employer fails to follow certain procedures occurred in the dispute that reached the Supreme Court in its 1987 decision, *United Paperworkers International v. Misco*.¹⁵² The Court endorsed a labor arbitrator’s decision to overturn an employer’s decision to terminate an employee for violating the Company’s policy of having drugs on the employer’s premises.¹⁵³ The employee notified the employer that he had been arrested for having possession of marijuana at his home.¹⁵⁴

The employer learned five days before the arbitration hearing that when the police arrested the employee, they also checked the employee’s own car in the employer’s parking lot and “found a plastic scales case and marijuana gleanings” that led to his “arrest[] and charge[s] of marijuana possession.”¹⁵⁵ The arbitrator decided to uphold the employee’s grievance and reinstate the employee in a reversal of the termination on what some may consider a procedural technicality.¹⁵⁶ According to the labor arbitrator, the employer terminated the employee before learning of this evidence, and the arbitrator refused to consider it after learning of it at the hearing because the employer was unaware of this information at the time of the discharge decision.¹⁵⁷ Specifically, the labor arbitrator explained his reasoning for not considering the information was as follows:

¹⁵⁰ See Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator’s Several Roles*, 44 MD. L. REV. 873, 898 (1985) (referring to the arbitrator’s role as reading the agreement, but noting that role is limited by the duty to “be true to his charter from the parties,” and arguing that if an arbitrator follows his own thoughts rather than those of the parties, he “will have done a disservice to the parties who selected him to resolve the dispute”); *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 92 (requiring an ethical duty for arbitrators to adhere to the parties’ terms).

¹⁵¹ See Martin H. Malin & Jeanne M. Vohnof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 203, 210–11 (2005) (referring to a “typical CBA provision requiring just cause for discipline and discharge” and referring to comments by a former National Academy of Arbitrators president Theodore St. Antoine stating that the role of the arbitrator is one of being a “contract reader” and why the arbitrator’s decision should be “treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract”).

¹⁵² *United Paperworkers Int’l v. Misco*, 484 U.S. 29 (1987).

¹⁵³ *Id.* at 33–36.

¹⁵⁴ *Id.* at 33.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 34.

¹⁵⁷ *Id.*

One of the rules in arbitration is that the Company must have its proof in hand before it takes disciplinary action against an employee. The Company does not take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions. In addition, the use of the gleanings evidence prevented the Grievant from knowing the full extent of the charge against him. Who knows what action the Grievant or the Union would have taken if the gleanings evidence had been made known from the outset of the Company's investigation.¹⁵⁸

The Supreme Court ruled that it would not overturn the award "because the arbitrator, in deciding whether there was just cause to discharge, refused to consider evidence unknown to the Company at the time [the employee] was fired."¹⁵⁹ The Court also accepted that the arbitrator's decision was "consistent with the practice followed by other arbitrators."¹⁶⁰

While "just cause" allows an arbitrator to reverse an employer's disciplinary action, there is the question of whether just cause should evolve to address the changing times to effectuate justice.¹⁶¹ One commentator in a student note, Allyson Raphael, has argued that societal concerns such as the COVID-19 pandemic should factor into a labor arbitrator's assessment of what is just cause.¹⁶² More recently, Stephen Plass has referred to this issue with respect to police arbitration as a concern of "how arbitrators do not deploy their authority to interpret the labor contract broadly to protect the public's interests[,] [p]articularly in cases of discriminatory policing."¹⁶³

Experienced labor arbitrators, law professors and scholars Dennis Nolan and Roger Abrams explained several years ago that there are some who believe that an arbitrator's role is to also serve a public function by applying public values when determining "the meanings of such terms as 'just cause.'"¹⁶⁴ In one approach to explaining an arbitrator's role as identified by Nolan and Abrams and also advocated by Edgar A. Jones, the arbitrator would act as the "community conscience" by seeking to "apply 'contemporary community attitudes of what is fair in procedure and equitable in result.'"¹⁶⁵ This approach would follow values that also conform with the "the expressed intentions of the

¹⁵⁸ *Misco*, 484 U.S. at 34 n.6.

¹⁵⁹ *Id.* at 39.

¹⁶⁰ *Id.* at 39–40, 40 n.8.

¹⁶¹ See Alyson Raphael, Note, *Arbitrating "Just Cause" for Employee Discipline and Discharge in the Era of Covid-19*, 34 GEO. J. LEGAL ETHICS 1237, 1258 (2021) (discussing how the COVID-19 pandemic suggests the need for evolving applications, given the times, to do "justice" in assessing just cause and arguing as a matter of arbitral ethics rules should codify justice requirements).

¹⁶² *Id.*

¹⁶³ See Plass, *supra* note 73, at 37.

¹⁶⁴ See Nolan & Abrams, *supra* note 150, at 882.

¹⁶⁵ *Id.* at 883–84 (quoting Edgar A. Jones, Jr., *Power and Prudence in the Arbitration of Labor Disputes, A Venture in Some Hypotheses*, 11 UCLA L. REV. 675, 741 (1964)).

parties, but ‘only so long as that intent remains within the bounds of generally deducible public policy.’”¹⁶⁶

If the community values of justice conflicted with the intentions of the parties, then according to Jones, the “arbitrator’s decisions will bring private agreements into conformity with community mores.”¹⁶⁷ Unfortunately, taking this approach creates problems in selecting arbitrators who may not be in the best position to assess community mores. This may lead to questions about their “(1) accountability and legitimacy; (2) rationality and adequacy; and (3) effectiveness,” suggesting that “[a]rbitrators . . . should not try to be policy makers.”¹⁶⁸ According to Nolan and Abrams, those problems have not been answered, and labor arbitrators have not adopted this community conscience arbitrator model.¹⁶⁹ The parties continue to select experienced labor arbitrators while knowing that the system does not expect them to apply community conscience standards unless the parties clearly desire that model and have contracted for it.¹⁷⁰

Nevertheless, Stephen Plass levels several criticisms aimed at the use of labor arbitration in police discipline actions because of its failure to address community concerns.¹⁷¹ In particular, Plass argues that reinstating police officers for procedural errors after they have committed misconduct should be against public policy.¹⁷² However, Plass also acknowledges that “labor contracts or public laws do not command discharge for public law violations.”¹⁷³ As a result, an arbitrator must adhere to what the parties or the public law requires—not their own personal ideas of what should happen—regardless of any errors the employer made. Even if it was not an arbitrator making the decision, the union and the police department have negotiated certain rights and guarantees that do not go away merely because an arbitrator is deciding the issue.¹⁷⁴ The parties do not expect in general that the arbitrator will serve as a policy maker or as an activist or what might be negatively viewed

¹⁶⁶ *Id.* at 884 (quoting Jones, *supra* note 165, at 741).

¹⁶⁷ *Id.* at 883–84 (characterizing the views of Edgar A. Jones).

¹⁶⁸ *Id.* at 894 (citing Paul Weiler, *The Role of the Labour Arbitrator: Alternative Versions*, 19 U. TORONTO L.J. 16 (1969)); *see also* COOPER ET AL., *supra* note 110, at 253 (referring to comments of union lawyer Judith Vladeck expressing concerns about labor arbitrators seeking to ensure more fairness than the agreement explicitly provides by applying external standards as representing a form of “bastardiz[ing]” the process by “taking arbitration away from its creators”).

¹⁶⁹ Nolan & Abrams, *supra* note 150, at 895.

¹⁷⁰ *See* Plass, *supra* note 73, at 49 (“The arbitrator is confined to the contract and the parties’ past practices, so if the contract bars the admission of data that support discharge, it will be excluded.”).

¹⁷¹ *See id.* at 39–44.

¹⁷² *See id.* at 40–44.

¹⁷³ *Id.* at 42.

¹⁷⁴ *See id.* at 34–35.

as a rogue arbitrator.¹⁷⁵ Arbitrators instead just call the dispute as they see it as presented to them and within the authority granted by the parties under the terms of their agreement or by a governing statute.¹⁷⁶

If the parties want to include a public interest provision or consideration of community values into their agreement that would guide an arbitrator's decisions, they are free to do so. In addressing police arbitrations, the community values and public concerns about the racial consequences can and should be addressed by the parties, not the arbitrators. Blaming the arbitrators when the parties are the ones who need to make community values a concern just exacerbates any disconnect that has led to the calls to abolish arbitration.

It is incumbent on the parties to agree to include these factors out of fairness so that the officers (similar to any union employee with just cause protections) know what standards they are expected to uphold and what the penalty will be if they fail to meet those standards. Blaming arbitrators rather than emphasizing negotiating clear terms in police accountability and disciplinary reforms tends to distract from the goal of seeking racial justice when officers commit misconduct while also providing fair procedures to protect the top performing officers.

IV. REFORMS SHOULD CONSIDER BLACK POLICE VOICES IN ARBITRATION

I know outside this uniform, I'm still a Black man. At the same token, I love my profession and I want to use it for good.

– Sergeant Stanley Jean-Poix¹⁷⁷

The input of Black police voices in the disciplinary process, if positively received, could add some key value to the overall working relationship for police officers who must interact with different races in the communities they serve.¹⁷⁸ Such voices could include Black police officer identity or affinity

¹⁷⁵ See Nolan & Abrams, *supra* note 150, at 894.

¹⁷⁶ See Cummings, *supra* note 71 (reporting comments from professional arbitrator Dennis Murphy, who serves as part of a Connecticut state board of mediation and arbitration that includes two members representing unions, two representing management and two representing the general public, saying: “We call them as we see them”).

¹⁷⁷ Trymaine Lee, *Transcript: A Black Officer and an Activist's Honest Conversation about Police Reform*, MSNBC (June 30, 2021), <https://www.msnbc.com/podcast/transcript-black-officer-activist-s-honest-conversation-about-police-reform-n1272709> [<https://perma.cc/RN6H-QDN3>] (comments from Black Miami police officer, Sergeant Stanley Jean-Poix, President, Miami Community Police Benevolent Association, the second oldest Black police officer union in the country).

¹⁷⁸ See Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 978, 1015 (2013) (“[R]esearch shows that high levels of [accepting and vulnerable] engagement can result in more positive impressions in interracial interactions than lower levels of engagement.”). Other parts of the Black community could also be allowed to have voice in

caucus participants as well as commentaries from Black police beat officers engaged in community policing in the neighborhoods where alleged police misconduct may be at issue.

A. *Black Police Officers' Caucuses*

Black police officers have long played a major role in addressing concerns about policing especially in “black communities” after “the first black mayors of major cities were elected in the late 1960s and early 1970s.”¹⁷⁹ Although they represent only about ten percent of police, Black officers have recognized that with the growth of BLM, their voices have become necessary if real change will proceed.¹⁸⁰ The National Black Police Association has addressed law enforcement issues within the community as an identity caucus of Black police officers who are union members.¹⁸¹ Various chapters also exist including, as an example, the Black Police Association of Greater Dallas, which seeks to bridge the gap between the community and law enforcement in an effort to promote justice and fairness for their members and the communities they serve.¹⁸² Sonia

police disciplinary decisions including local activists, church groups, and families. *See infra* notes 229–31 and accompanying text. But a detailed discussion of Black voices beyond Black police officer caucus voices is beyond the scope of this Article.

¹⁷⁹ See Taylor Hosking, *The Long History of Black Police Officers Reforming Policing from Within*, ATLANTIC (Dec. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-long-history-of-black-officers-reforming-policing-from-within/547457/> [https://perma.cc/96ZK-NZDH].

¹⁸⁰ *See id.* Many Black police officers realize it is a “chess game” to pursue change from within while dealing with discriminatory forces especially in police union leadership. *Id.* (quoting former Orange County, Florida Sheriff Jerry Demings). But they see an important role in supporting BLM from within. *Id.*

¹⁸¹ *See Our Purpose*, NAT'L BLACK POLICE ASS'N, <https://web.archive.org/web/20131014211754/http://www.blackpolice.org/about-us/our-purpose> (on file with the *Ohio State Law Journal*); *National Black Police Association* (@NationalBPA), FACEBOOK, <https://www.facebook.com/NationalBPA/> [https://perma.cc/C4BT-N8H7]. There are other Black police officer affinity and caucus groups as well. *See, e.g.*, NAT'L ASS'N OF BLACK L. ENF'T OFFICERS, INC., <http://nableo.org/> [https://perma.cc/3WVW-7GMR]. The National Association of Black Law Enforcement Officers, Inc. (NABLEO) has weighed in regarding an objection to the Providence, Rhode Island mayor's choice of a Black civilian to serve in a role as a police major. *See* Donita Naylor, *Providence Mayor Appoints Civilian to Major's Post; Black Police Association Objects*, PROVIDENCE J. (Sept. 7, 2021), <https://www.providencejournal.com/story/news/crime/2021/09/07/black-police-association-sees-disrespect-choice-civilian-major/5747682001/> [https://perma.cc/SBH4-TPMK]. There is also the National Organization of Black Law Enforcement Executives (NOBLE) which focuses on how “black law enforcement executives could have a significantly more effective impact upon the criminal justice system through a unified voice.” *See The History of NOBLE*, NAT'L ORG. OF BLACK L. ENF'T EXECS., <https://noblenational.org/history/> [https://perma.cc/2GMU-NJ25].

¹⁸² *See* BLACK POLICE ASS'N OF GREATER DALL., <https://www.bpadallas.org> [https://perma.cc/4LAV-79J9].

Pruitt, a former national chairperson of the National Black Police Association, has lamented how most police unions rarely have a Black officer at a leadership level.¹⁸³ According to Pruitt, “[i]t is to the detriment of policing, period, that our community is not represented at police union tables” when they could have said, “[l]isten, what happened to George Floyd was absolutely terrible,’ officers would follow.”¹⁸⁴

Black police officers and white police officers have different views about racism as a 2017 survey found that “92% of white officers believe[d] the United States has already achieved equal rights for black people” when “only 29% of black officers” believe that.¹⁸⁵ Also, “only 27% of white officers believe protests against police violence are motivated at least in part by a genuine desire for accountability.”¹⁸⁶ In contrast, “70% of black officers” believe that “protests against violence are motivated at least in part by a genuine desire for accountability.”¹⁸⁷ Because of the lack of representation among Black officers in police union leadership, the formation of identity caucuses such as the Black Police Association or the National Association of Black Law Enforcement Officers can exist even though they tend to have less influence and viability when an incident occurs.¹⁸⁸ By making it a major priority to rely upon Black police officers and their identity caucuses¹⁸⁹ as key voices in pursuing policing

¹⁸³ See Eli Hager & Weihua Li, *White US Police Union Bosses Protect Officers Accused of Racism*, GUARDIAN (June 10, 2020), <https://www.theguardian.com/us-news/2020/jun/10/police-unions-black-officers-white-leaders> [<https://perma.cc/Q9DW-J2KH>].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also Drew Desilver, Michael Lipka & Dalia Fahmy, *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), <https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> [<https://perma.cc/7X8P-TTDE>] (finding from a 2016 survey that “57%” of Black police officers viewed fatal encounters between Black people and police as “evidence of a broader problem” while “only 27% of white officers” found the encounters to represent a concern).

¹⁸⁶ Hager & Li, *supra* note 183.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; see NAT’L ASS’N OF BLACK L. ENF’T OFFICERS, INC., *supra* note 181.

¹⁸⁹ See Erik Ortiz, *‘Embrace the Change’: Some Black Officers Sidestep Unions to Support Police Reform*, NBC NEWS (June 15, 2020), <https://www.nbcnews.com/news/us-news/embrace-change-some-black-officers-sidestep-unions-support-police-reform-n1231024> [<https://perma.cc/32CX-BTFC>] (describing several associations/identity caucuses for Black police officers and how they responded to George Floyd’s death); see also Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 94–100, 113 n.148 (2002) (describing how identity caucuses based upon race developed to provide voices for Black workers who are union members and referring to how “the uniquely conservative nature of police and fire unions make them anomalous case studies of identity caucuses within unions”); Michael Z. Green, *Chapter 33, Union Commitment to Racial Diversity*, in THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY 381, 388–89 (Richard Bales & Charlotte Garden eds., 2020) (describing how a racial identity caucus, whether it “exists within a local union or as a partner organization acting as a constituency group with the national or international union” may “help in developing

reforms and within the labor arbitration process, this action can provide the kind of win-win disciplinary system that will be helpful for all the key stakeholders to embrace these changes in some fashion.¹⁹⁰

Specifically, Catherine Fisk and other labor law scholars, arbitrators, and other concerned labor relations professionals have proposed that police labor arbitrators should be allowed to consider when “there is evidence that the officer engaged in misconduct, no order of reinstatement should be made unless it is shown that the officer has made, or has demonstrated a commitment to making, efforts to rectify the problematic behavior” and the department’s “evidence of disparate treatment on the basis of race, sex, national origin, or other protected category, by the officer may be considered an aggravating factor.”¹⁹¹ These disciplinary considerations would provide excellent opportunities for Black police officers through their identity caucuses to give information that would assist the arbitrator in deciding whether to reinstate the police officer consistent with the proposals provided by Fisk and her co-authors.

This Article does not deny that individual Black police officers could be as much of the source of a racially divisive policing action as a white counterpart. This goal of incorporating Black police officer voices does not suggest that *individual* Black officers represent a “monolithic”¹⁹² voice as they must navigate conflicts presented by being both Black and blue. Devon Carbado and Song Richardson have explained the dynamic of desiring “to fit into and become a part of the law enforcement community of ‘blue,’ . . . [as] [B]lack police officers may [feel they] have to marginalize the concerns of and disassociate themselves from the community of ‘black.’”¹⁹³ However, the *collective* voice of Black police officers as an identity or affinity caucus with broader interests would allow some additional information to be considered that unfortunately does not currently exist in police disciplinary reform discussions. Catherine Fisk and Song Richardson have also identified the potential benefits in focusing on

model fair dispute resolution processes” that unions can negotiate with employers that also creates an arbitration process allowing arbitrator selection from “a critical mass or cadre of diverse neutrals”).

¹⁹⁰ See Fisk & Richardson, *supra* note 31, at 778–79, 792–93 (discussing proposal for union-led reforms especially by appealing to rank-and-file officers including Black police officer and other identity associations). Although this Article focuses on Black police officer caucuses for input, it is understood that such input should not be limited to a single race and all relevant caucuses should play a role to allow their voices to be heard. Discussing other caucuses is beyond the scope of this Article.

¹⁹¹ See Fisk et al., *supra* note 23 (describing proposals 5.B.3 and 5.B.4).

¹⁹² See Fisk & Richardson, *supra* note 31, at 779 (recognizing this issue but seeking some “mechanism to translate the diversity of perspectives” within police departments).

¹⁹³ See Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 HARV. L. REV. 1979, 1991 n.29 (2018) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

the role of Black police officers and their identity caucuses and associations.¹⁹⁴ These officers offer a unique constituency that should be given more voice in developing the reforms at issue.¹⁹⁵

The change asserted here would help to provide a mechanism for united input from Black police officers in the process of assessing what disciplinary action may be appropriate leading up to and as a consideration by an arbitrator when a police officer challenges the discipline. Departments should also seek to hire more Black police officers to provide an even greater critical mass of voices for Black police caucuses. There are already efforts being made to prime the supply for more Black police candidates in many cities.¹⁹⁶

Also, while increasing efforts to employ more Black officers who come from and live within the communities they serve should continue to be a part of any focus of reforms as Carbado and Richardson acknowledge,¹⁹⁷ the parties may have to allow for limits under the strictures of current law or contracts in

¹⁹⁴ Fisk & Richardson, *supra* note 31, at 721, 777–79, 789 (describing how Black police officers seeking to pursue accountability and racial justice reforms found aid from their Black police officers’ affinity or identity groups and associations; describing how an association of Black police officers in Los Angeles supports Black Lives Matter even though the police union does not support it). Under the proposal of Fisk and Richardson, a minority (not the majority) union, which could encompass an identity association of Black officers, could meet with police management to explore key topics of policing reform under a duty to confer with these officers that would be limited to use of force, policing techniques, and community relations. *Id.* at 721, 791.

¹⁹⁵ See McCormick, *supra* note 10, at 58 (“[Black] officers have their own professional associations . . . and those professional organizations sometimes speak out against positions taken by white-dominated police unions.”); Zak & McCarthy, *supra* note 29 (describing frustrated efforts of various Black police officers and their associations and similar groups founded by Black police officers aimed at seeking reforms from within police departments including the work of St. Louis homicide detective, Heather Taylor, “[a]s the head of the Ethical Society of Police, a watchdog founded by black police officers in 1972” as the group has called for “cultural competency and bias training” while bringing attention to the “silence and misconduct” leading fellow officers to call Thomas a “‘c---’ and ‘b----’”).

¹⁹⁶ See Melissa Chan, ‘I’m Going to Make a Change.’ *Police Departments Struggle to Recruit Black Cops, so This HBCU Came Up with a Plan*, TIME (Apr. 9, 2021), <https://time.com/5952208/hbcu-black-police-academy/> [<https://perma.cc/3KP2-A25X>] (describing efforts by a historically Black college or university (HBCU) Lincoln University to start a police academy because of the need for more Black cops especially after the death of George Floyd); David A. Graham, *America Is Losing Its Black Police Officers*, ATLANTIC (Oct. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/america-is-losing-its-black-police-officers/620291/> [<https://perma.cc/XZS9-RBHQ>] (describing increasing decline in number of Black police officers and comments from Black police officers and identity caucus leaders asserting how it is “both more pressing and challenging” to recruit Black officers after the murder of George Floyd).

¹⁹⁷ Carbado & Richardson, *supra* note 193, at 2024 (“[W]e are not arguing against efforts to diversify the police. Our point is that it would be a mistake to stop there.”).

pursuing such hiring.¹⁹⁸ Meanwhile, broader efforts aimed at community policing and diversity that will result in hiring more Black police officers overall to serve the communities that raised them can generate more systemic reforms than a focus on attacking labor arbitration.¹⁹⁹

B. *Black Officers Connecting to the Communities Served*

There have been some examples where Black police officers who are heavily invested in the communities they serve show they are making a difference. One example is Winston “Blade” Bowen, a Black police officer in Mesquite, Texas.²⁰⁰ On Memorial Day 2018, Bowen went to a local apartment complex on a call responding to a noise complaint.²⁰¹ Bowen found some people having a barbecue, playing music, and approximately twenty teenagers boxing.²⁰² Bowen became familiar to the community residents he served by

¹⁹⁸ See Sean Collins Walsh & Chris Palmer, *Philly Cops Will Get Raises in Their New Contract. It's a Mixed Bag for Kenney's Police Reform Hopes*, PHILA. INQUIRER, <https://www.inquirer.com/news/philadelphia/philadelphia-police-union-contract-raises-discipline-2021-0914.html> [https://perma.cc/Y7GU-LXHE] (Sept. 14, 2021) (describing attempts in Philadelphia to go beyond 5-year residency requirement when first being employed and seeking unsuccessfully to negotiate an overall requirement that police officers live in Philadelphia while employed); see also Grace Hauck & Mark Nichols, *Should Police Officers Be Required to Live in the Cities They Patrol? There's No Evidence It Matters*, USA TODAY (June 13, 2020), <https://www.usatoday.com/story/news/nation/2020/06/13/police-residency-data/532764002/> [https://perma.cc/TU7T-BXXN] (discussing historical and present developments for police officer residency requirements, difficulties in enforcing the requirements, and whether residency requirements improve policing while noting more calls for residency requirements due to a lack of white officers living in the mostly Black communities they serve after George Floyd's death, including a bill to require police officer residency in Philadelphia).

¹⁹⁹ See Carbado & Richardson, *supra* note 193, at 2012; Fisk & Richardson, *supra* note 31, at 777–79 (discussing the role of more diverse identity-based groups as police officers who can work within Black communities suffering from officer-involved killings to help pursue racial justice policing reforms with their unions); see also WESLEY G. SKOGAN & SUSAN M. HARTNETT, *COMMUNITY POLICING, CHICAGO STYLE* 148–58 (1997) (describing community district advisory committees where police commanders chose participants, in part, based upon “ethnic and geographic representation,” and referring to meetings where officers attended and engaged with the communities and beats they served to change perceptions about the police in many instances and developed into key working relationships between the community and the police despite initial hiccups along the way).

²⁰⁰ See Winston Hervey, *Mesquite Police Department Hold Boxing Camp*, MESQUITE NEWS (July 20, 2021), https://starlocalmedia.com/mesquiteneews/news/mesquite-police-department-hold-boxing-camp/article_162688ce-e9b8-11eb-8aef-cbc1c3e9a76b.html [https://perma.cc/ZAT4-846S].

²⁰¹ *Id.*

²⁰² Joshua Rhett Miller, *Cop Has Impromptu Boxing Match with Teen After Noise Complaint*, N.Y. POST, <https://nypost.com/2018/05/30/cop-has-impromptu-boxing-match->

regularly spending quality time with them while helping to respond to criminal acts and protecting their safety.²⁰³ Community residents began to refer to him affectionately as “Blade,” a fictional Marvel Comics Black superhero and a vampire hunter.²⁰⁴

On the Memorial Day 2018 visit, Bowen approached the boxing teens and asked if he could “try” to take on whoever was the champ if they gave him some gloves.²⁰⁵ A video of the “14-year department veteran” sparring in boxing gloves with the Black teen went viral.²⁰⁶ Unbeknownst to the teens, Bowen was a “longtime recreational boxer” who had started boxing when “he was just 13.”²⁰⁷ The sparring with the teen went back and forth as Bowen decided to debunk “[the] perception that police officers have guns, . . . [and] a badge, but . . . can’t fight.”²⁰⁸ While landing some jabs as community watchers “jeer[ed]” his successful efforts, it ended when Bowen’s police radio was “knocked off his hip” and the crowd came forward to “rush both Bowen and the teen to congratulate them.”²⁰⁹ One witness said that “everybody” in the neighborhood loves and greets Bowen when he arrives in the neighborhood by saying, “Aw, there’s Officer Blade.”²¹⁰

Bowen’s union, the Mesquite Police Association, appreciated his actions by posting a message on their website stating their pride in Bowen and how Mesquite is fortunate to have officers like this that “fully engage with the communities they serve!”²¹¹ The Mesquite police department also praised

with-teen-after-noise-complaint/ [https://perma.cc/CH7K-HFFG] (May 30, 2018); Hervey, *supra* note 200.

²⁰³ See *It Began With a Noise Complaint . . . Mesquite Officer’s Unique Method Goes Viral*, MESQUITE NEWS (May 30, 2018), https://starlocalmedia.com/mesquiteneews/news/it-began-with-a-noise-complaint-mesquite-officer-s-unique-method-goes-viral/article_1f08c774-6462-11e8-8a1e-e764814e813e.html [https://perma.cc/8YMM-Q47N] (describing how Officer Bowen applies an “unorthodox way of patrolling” as he does not “just stay in the car, [he goes] out on foot” to “interact with people in the community” to begin to “know a lot of the people over there and they know [him]”). According to Bowen, the community members started to learn who he was “around 10-12 years” before the 2018 boxing matter as he started to use his unorthodox approach to policing to address an ongoing problem with drug crimes by being on foot and hiding in the “breezeways and stuff” so he could “pop out of everywhere in the dark” to stop the area from being a “drug zone.” *Id.*

²⁰⁴ *Id.*; Miller, *supra* note 202; see also *Blade (Eric Brooks)*, MARVEL, <https://www.marvel.com/characters/blade-eric-brooks/in-comics> [https://perma.cc/E5QT-RNE2] (describing Marvel character Blade a.k.a. Eric Brooks).

²⁰⁵ Hervey, *supra* note 200.

²⁰⁶ Miller, *supra* note 202 (describing how a few days after the video was posted, it “had been viewed more than 1.8 million times on Facebook”).

²⁰⁷ *Id.*; Hervey, *supra* note 200.

²⁰⁸ Miller, *supra* note 202 (quoting Officer Winston Bowen).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*; see also *Community Policing*, MESQUITE POLICE ASS’N (May 29, 2018), <https://thempa.org/community-policing/> [https://perma.cc/Q4D9-K5EJ].

Bowen's actions and a spokesperson explained that Bowen returned to the area after the boxing video and brought chips and sodas to the teens.²¹²

Three years after the viral video incident, the Mesquite police department held a boxing camp for middle school teens on July 20, 2021 at the Thomas Boxing Gym.²¹³ Although the Mesquite police department has offered other summer camps, this is the first boxing camp it has offered.²¹⁴ Bowen worked with the Thomas Boxing Gym as a volunteer during his off hours and secured their involvement in the boxing camp after asking police leadership about "introducing kids to boxing as an interaction with law enforcement and as a way to build self-esteem."²¹⁵ According to Bowen, this boxing training "allow[s] kids to learn discipline, determination and build their character while having positive interaction with law enforcement."²¹⁶

Winston "Blade" Bowen might be the type of Black police officer, connected with the Black community, who would have a valuable voice in assessing whether a police officer should have deescalated a matter. Bowen could likely understand how the community he serves would know about the misconduct of a fellow officer. Bowen is not the only example of Black officer voices that can add value. We should start listening and involving the Black police officers in healing the communities they serve. These officers and their caucuses have an excellent position to understand the dynamics of being a Black person subjected to police misconduct when they go home to their own communities without wearing their police uniforms.²¹⁷

In the midst of the debates about policing after George Floyd's death, Black Dallas police Sergeant, Ira Carter, stated:

First and foremost, being an African American guy and understanding what the protesters are talking about and understanding where the protesters are coming from, I do think it's up to me to have those conversations. I don't think it's up to me to just see what's going on and just ignore it. Once you ignore something it's like you really don't care about it[.] . . . So yeah, it's my duty to have those conversations. It's my duty to try to help fix some of the problems that we have.²¹⁸

²¹² Miller, *supra* note 202.

²¹³ See Hervey, *supra* note 200.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See, e.g., Allie Spillyards, *Dallas Officer Speaks Up to Bridge Gap Between His Two Worlds*, NBC DFW (June 9, 2020), <https://www.nbcdfw.com/news/local/dallas-officer-speaks-up-to-bridge-gap-between-his-two-worlds/2385685/> [<https://perma.cc/HJ6S-SS2W>].

²¹⁸ *Id.*

In response to Carter's statement and suggestions that the seventeen-year veteran might face retribution for his comments, the Dallas police chief at the time, Renee Hall, stated:

Under no circumstances, will the Dallas Police Department keep Sergeant Ira Carter or any officer from working to build partnerships and de-escalate tension between the police and the community at this difficult time. We own and atone for law enforcement's role in the pain that our protesters feel. We are working together to make positive change in Dallas and it starts with building strong relationships.²¹⁹

Ira Carter also later described openly how he took a knee in solidarity with BLM protesters.²²⁰

When an off-duty female police officer, Amber Guyger, mistakenly entered the apartment of a Black male, Botham Jean, in the Dallas area and shot and killed Jean while he was eating ice cream on his couch because she thought he was in her apartment, her Union president, Mike Mata, allegedly appeared and ordered one of the arresting police officers, Breanna Valentine, to turn off the squad car camera where Guyger was sitting.²²¹ Black police officer, Sr. Corporal Larry Bankston, Jr., weighed in to complain about the actions of Mata.²²²

When a Black female community activist in the City of Chicago, Aleta Clark, visited local police departments in her neighborhood and found two Black male police officers willing to take a knee in solidarity with her, she viewed their willingness as such a positive interaction.²²³ Clark posted on social media the picture she took with her head down, fist raised in the air, and resting on one knee in a kneeling pose while placed between the two Black male police officers kneeling next to her with their fists also raised.²²⁴ Clark captioned the picture when she posted it: "That Moment when you walk into the police station

²¹⁹ *Id.*

²²⁰ See FOX 4 Dall.-Fort Worth, *Here & Now Dallas Police Sergeant Takes a Knee During Protests*, YOUTUBE (June 23, 2020), <https://www.youtube.com/watch?v=j2L58Ia0BZo> [<https://perma.cc/GS7B-EWD5>] (interview of Dallas Black police Sergeant Ira Carter who notes how important it is for police to own some of the violence occurring and work to have a dialogue to listen to the communities they serve, and to be familiar with the crises in the communities they serve while also discussing how he took a knee with BLM protesters).

²²¹ See Steve Monacelli & Trace Miller, *A Pocket Guide to Police Unions*, CENT. TRACK (Sept. 1, 2020), <https://www.centraltrack.com/a-pocket-guide-to-dallas-police-unions/> [<https://perma.cc/ZVX7-8YJH>].

²²² *Id.*

²²³ See Fran Spielman, *Emanuel Says Two Kneeling Cops Caught Between Principles 'In Conflict'*, CHI. SUN-TIMES (Sept. 26, 2017), <https://chicago.suntimes.com/2017/9/26/18420217/emanuel-says-two-kneeling-cops-caught-between-principles-in-conflict> [<https://perma.cc/W8WH-JNNH>].

²²⁴ *Id.*

and ask the Men of Color are they Against Police Brutality and Racism & they say Yes . . . then you ask them to Kneel!”²²⁵ Unlike the response by Dallas police to Ira Carter, the City of Chicago reprimanded the two unnamed Black Chicago officers who knelt with Clark in the picture.²²⁶

Then-Chicago Mayor Rahm Emanuel supported the reprimand of those two Black police officers despite their heartfelt attempt to connect with members of the Black communities they served.²²⁷ Emanuel explained that he understood the dilemma the officers faced as well because they were caught between two policies, one of building better community relations and another of not showing favoritism toward a political view while in uniform.²²⁸ A Chicago police spokesman compared the acts of kneeling with a fist raised as warranting the same reprimand for all other political speech including mentioning a prior incident where another officer had been found with a “Make America Great Again” slogan on the dashboard of a police vehicle.²²⁹

Regardless of these efforts by individual Black police officers and their caucuses, you do not see police unions as a whole making any statements suggesting that they need to understand what the protesters are saying and offering to try to find common solutions as did Dallas Black police officer Sergeant Carter.²³⁰ But Black officers and their identity or affinity caucuses and associations are speaking out.²³¹ A twenty-six-year veteran and Black Chicago police officer, Carmella Means, explained that Black police officers should be heard because they want things to be better for the community and the police: “Unfortunately, on this job, a lot of us have that mentality, if you criticize the police you are anti-police, you hate the police[.] . . . Really? I am pro-police because I want it to be better.”²³² Means practiced what she preached when she decided to take a knee in support of BLM and take a picture of it outside the

²²⁵ *Id.*

²²⁶ *See id.*; *see Spillyards, supra* note 217.

²²⁷ Kate Shepherd, *Emanuel Stands by Police Decision to Reprimand Two Cops Pictured Kneeling in Protest, and Other Chicago News*, CHI. READER (Sept. 27, 2017), <https://chicagoreader.com/blogs/emanuel-stands-by-police-decision-to-reprimand-two-cops-pictured-kneeling-in-protest-and-other-chicago-news/> [<https://perma.cc/66Y2-YT4W>].

²²⁸ Spielman, *supra* note 223.

²²⁹ *See* Anne Branigin, *Black Chicago Cops Will Be Reprimanded for Taking a Knee, Chicago Mayor Issues Statement*, ROOT (Sept. 26, 2017), <https://www.theroot.com/black-chicago-cops-will-be-reprimanded-for-taking-the-k-1818777813> [<https://perma.cc/8EVX-A5M9>].

²³⁰ Spillyards, *supra* note 217.

²³¹ *See, e.g., id.* (discussing Carter’s statements); Monacelli & Miller, *supra* note 221 (discussing Bankston’s statements).

²³² *See* Annie Sweeney, *Punished by FOP for Kneeling in Protest, Chicago Police Officer Fights to Have Suspension Reversed on Principle*, CHI. TRIB. (Oct. 6, 2021), <https://www.chicagotribune.com/news/criminal-justice/ct-met-fop-suspension-officer-protest-20211006-clzni3yucvg15jjsicqyk3dpcq-story.html> [<https://perma.cc/A46U-G8BF>].

police union headquarters after her white male union President had threatened to take disciplinary action against any union member who supported BLM.²³³

The views of any individual Black officer may not match community concerns about better policing due to race in the same way that Bowen, Bankston, Carter, Means or the two officers reprimanded in Chicago for taking a knee with a community activist have pursued.²³⁴ Their collective voices may be heard through their identity caucuses as a concerted and united group of Black officer voices. Their caucus can explain how they understand the tumultuous and deadly situations that many dedicated and conscientious police officers must face on a daily basis and how split-second decisions by those officers should also have protections. These perspectives could provide a helpful voice in arbitration analysis.²³⁵

The brave Black officers who have already spoken out while in conflict with and despite retaliation from their unions should be applauded and embraced rather than have their voices suppressed.²³⁶ The ability to gain input from the community as part of a transparent response to policing issues has long been a concern for those seeking police reforms.²³⁷ Whether Black police officer caucuses can provide some of that perspective would, at a minimum, represent a nice next step to seeking some sustaining changes. In criminal trials, parties

²³³ *Id.*

²³⁴ *See, e.g.,* Sweeney, *supra* note 232 (referring to Black Chicago police officer, Frederick Collins, who filed a complaint with his union against a fellow officer and a Black female, Carmella Means, after Means decided to take a knee in support of BLM and take a picture of it outside the union headquarters because Miller felt Means should remain neutral and Miller had negative views of BLM); *see also* Zak & McCarthy, *supra* note 29 (describing how some Black police officers may also be part of the problem as they get indoctrinated into the “blue cone of silence—and the blue code of wanting to be accepted by your peers” culture and those “black officers also behaved in racist ways towards members of the black community”).

²³⁵ *See* Rushin, *Police Contracts*, *supra* note 20, at 1211 (discussing how the extensive protections for police officers in disciplinary proceedings that unions pursue are premised on the idea that police need wide latitude to exercise their discretion in handling difficult and dangerous situations, and therefore should not be second-guessed if, in retrospect, it appears to be incorrect).

²³⁶ *See* Ortiz, *supra* note 189 (referring to police union leader, John Catanzara from Chicago, who took the position that if any of his union member officers knelt with protesters, they would be disciplined by the union and removed from union membership); *see also* Fisk & Richardson, *supra* note 31, at 777 (referring to several Black police officers who were retaliated against for raising concerns about race).

²³⁷ *See* Ayesha Bell Hardaway, *Creating Space for Community Representation in Police Reform Litigation*, 109 GEO. L.J. 523, 576 (2021) (discussing the “the need to enable impacted communities to build positive working relationships with their local law enforcement agencies” and criticizing when “reform efforts serve only to reinforce the authoritative and hierarchical frameworks that divide community and law enforcement by relegating impacted communities to nonparty status”); Katz, *supra* note 43, at 429 (asserting that police unions repeatedly attempt to prevent the community from being involved in accountability measures).

are allowed to give victim impact statements at the sentencing phase.²³⁸ It is not unusual at a court trial involving allegations against a police officer to see not only the wall of blue in support of the officer but also the “displays of support among victims’ family members, perhaps wearing large pins with photos of the victim.”²³⁹ It is also not unusual for churches and other groups to get involved in community policing efforts.²⁴⁰ Providing Black police officers input from their identity caucuses represents just another step toward more Black voices being heard in the process of dealing with police misconduct in a time of racial reckoning.

V. NEGOTIATING JUST CAUSE MODIFICATIONS TO CONSIDER BLACK VOICES

Many calls have been made for police unions to come forward and take the lead in pursuing the reforms that will give the best result for all involved either in a general manner²⁴¹ or sometimes in a more aggressive manner.²⁴² The union

²³⁸ See Leigh Goodmark, “*Law and Justice Are Not Always the Same*”: *Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 728–29 (2015) (describing the value of giving voice through victim statements); NAT’L CRIME VICTIM L. INST., SURVEY OF SELECT FEDERAL AND STATE LAWS GOVERNING VICTIM IMPACT STATEMENTS AND A VICTIM’S RIGHT TO BE HEARD POST-CONVICTION REGARDING THE IMPOSITION AND COMPLETION OF SENTENCE 1–3 (Aug. 2018), <https://law.lclark.edu/live/files/26753-right-to-be-heard-post-conviction-survey-qr> [<https://perma.cc/6QGD-QGJX>] (finding that all fifty states and the federal system allow for victim impact statements at sentencing).

²³⁹ See Susan A. Bandes & Neal Feigenson, *Virtual Trials, Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1335–36 (2020).

²⁴⁰ See Skogan & Hartnett, *supra* note 199, at 138–46 (discussing involvement of churches, client-service organizations, block clubs, merchant associations, and the Boys and Girls Club).

²⁴¹ See, e.g., Martin H. Malin & Joseph E. Slater, *In Defense of Police Collective Bargaining*, CHI. SUN-TIMES (Aug. 12, 2020), <https://chicago.suntimes.com/2020/8/12/21365763/chicago-police-fop-collective-bargaining-rights> [<https://perma.cc/TF86-KDSL>] (asserting that police unions and police management should follow the lead of school districts and teacher unions to partner in creating clear and demonstrative evaluation standards to address those union members whose performance warrants appropriate actions); see also Fisk & Richardson, *supra* note 31, at 759–66 (describing past efforts where unions and their leaders took the lead in pursuing accountability measures and building relationships with the Black community including efforts in Oakland, Milwaukee, Newark, Los Angeles, and primarily in Seattle); McCormick, *supra* note 10, at 60 (“imagin[ing] how effective [police unions] could be if harnessed for reform” but noting “there is little evidence to suggest that police unions actually have been involved in efforts at reform, either as an effort of the union or reformers” even if “[t]here have been calls . . . to increase police union participation in federal police reform efforts, and other efforts at democratic policing”).

²⁴² See “*There Will Be a Reckoning for the FOP, Lightfoot Says*,” NBC CHI. NEWS (June 11, 2020), <https://www.nbcchicago.com/news/local/chicago-politics/there-will-be-a-reckoning-for-the-fop-lightfoot-says/2288369/> [<https://perma.cc/CL5B-X4JM>] (discussing comments

movement as a whole is embracing ways to join with BLM.²⁴³ The mostly white leadership and the conservative political focus of police unions has led to efforts to remove them from broader union organizations focused on workers' rights out of concerns for their members of color and their communities.²⁴⁴ Regardless, police unions, after the George Floyd murder, are facing broader reform efforts aimed at removing some of the authority they have currently to bargain over discipline matters.²⁴⁵ If police unions do not embrace the effort to pursue reform, they may also find they will be subject to having their voices limited when others consider or push certain reforms.²⁴⁶

Police negotiations are “shrouded in secrecy.”²⁴⁷ With lack of access to the negotiation process, the public can experience feelings of “apathy” when they have no ability to have a voice in lasting change.²⁴⁸ Outside and community groups rarely have any mechanism to understand and give input about the

of Chicago Mayor Lightfoot stating “[w]e’ve got to get unions to understand that they’ve got to be part of the solution, and not part of the problem” as a response to statements of a police union leader suggesting that any officer seen kneeling in support of protesters while in uniform would be disciplined by the union); *see also* Matthew Cunningham-Cook, *The AFL-CIO’s Police Union Problem Is Bigger Than You Think*, INTERCEPT (June 18, 2020), <https://theintercept.com/2020/06/18/afl-cio-police-labor-union/> [<https://perma.cc/8TB3-ZTSP>] (suggesting AFL-CIO union address concerns about policing with their police union affiliated members or seek to remove those police unions from AFL-CIO membership); *see also* McCaskill, *supra* note 32 (describing comments of criminal justice organizer, Scott Roberts, asserting that the failures to enact police reform legislation are due to police unions who “to my knowledge, haven’t seen a reform yet that they like” and are not “really a group that’s going to come to the table and say, ‘Hey, let’s compromise’”).

²⁴³ *See* Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 675 (2017) (describing coalitions between BLM and labor unions); *see also* Fisk & Richardson, *supra* note 31, at 789 (describing possible BLM and identity or affinity group collaborations).

²⁴⁴ Levin, *supra* note 43, at 1336, 1346–47 (describing mostly white-led police unions with conservative agendas critical of racial justice and efforts to denounce their actions and remove them from the AFL-CIO).

²⁴⁵ *See* Benjamin Sachs, *Police Unions: It’s Time to Change the Law and End the Abuse*, ONLABOR (June 4, 2020), <http://www.onlabor.org/police-unions-its-time-to-change-the-law/> [<https://perma.cc/XVD9-DHMC>] (“[F]or a labor movement committed to building a more equitable economy and society—and for scholars who support that movement—*now is the time to demand that power of collective action not be available to [police] unions who would abuse it.*” (emphasis added)).

²⁴⁶ *See, e.g.*, Bernie Pazanowski, *City’s Refusal to Bargain over Police Discipline Constitutional*, BLOOMBERG L. (Nov. 5, 2020), <https://news.bloomberglaw.com/us-law-week/citys-refusal-to-bargain-over-police-discipline-constitutional> [<https://perma.cc/UR4Y-LMJM>] (describing how the District of Columbia adopted a law in the wake of George Floyd’s death that reserved “all matters concerning the discipline of sworn law enforcement officers, and excluded the issue from future collective bargaining” that left the union without any power or voice to affect any discipline of police officers).

²⁴⁷ Katz, *supra* note 43, at 436.

²⁴⁸ *Id.* at 437.

collective bargaining process related to policing.²⁴⁹ While legislators have been concerned about how arbitrators are selected, they have not sought systematic changes to limit by law or negotiate with unions in a transparent manner as to what police arbitrators may consider in deciding what represents just cause for officer discipline when key public and community values also matter.

Minnesota's reform efforts merely switched disciplinary decisions to those arbitrators who can serve only on the Minnesota police arbitration panel and then may only be selected for a particular hearing on a rotational basis.²⁵⁰ Cincinnati changed to have a three-arbitrator panel issue an anonymous decision as a goal of making sure that no arbitrator will be perceived as pro-police or pro-management.²⁵¹ Cincinnati acknowledged that arbitration can be more efficient and that any attempts between the union and the police department in "negotiating" an even better arbitration process that the public can believe in would be a great thing.²⁵² Unfortunately, Cincinnati's negotiated changes to arbitration focused on the arbitrator selection process by buying into the unsubstantiated narrative that arbitrators may be biased in making sure they rule for police unions because "their livelihood depends on being acceptable to the union."²⁵³ Unfortunately, this narrow mindset ignores that an arbitrator selected

²⁴⁹ See *id.* at 439.

²⁵⁰ See Tice, *supra* note 55. There have been other critics of arbitration selection processes that have focused on the lack of diversity in selecting arbitrators. See, e.g., Sarah Rudolph Cole, *Arbitrator Diversity: Can it Be Achieved?*, 98 WASH. U. L. REV. 965, 968–69 (2021); Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 FORDHAM L. REV. 2255, 2255, 2258 (2020); Homer C. La Rue & Alan Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 HOW. L.J. 215, 216–17 (2020); see also Michael Z. Green, *Arbitrator Diversity Matters for Justice Perceptions and Realities*, HILL (June 28, 2021), <https://thehill.com/opinion/judiciary/560603-arbitrator-diversity-matters-for-justice-perceptions-and-realities> [<https://perma.cc/Q8RC-MA3F>] (discussing various concerns about diverse arbitrator selections but not suggesting that they might favor splitting their results to not make one side unhappy as a concern).

²⁵¹ Cameron Knight, *New Cincinnati Police Union Contract Toughens Officer Discipline, Gives Raises*, ENQUIRER (Dec. 11, 2020), <https://www.cincinnati.com/story/news/2020/12/11/cincinnati-police-contract/3893368001/> [<https://perma.cc/CH9G-P9NN>] (describing how a police union "understood the perception the current arbitration process creates" by allowing the police and union to receive a random listing of arbitrators and jointly strike names until one was picked, but noting that "not every officer wanted to give this concession" in negotiations, although they agreed to a "new process [that] will use a panel of three arbitrators who will issue an anonymous decision, so no one arbitrator can be pinpointed as pro-police or pro-management").

²⁵² *Id.* Cincinnati police union president Dan Hills explained: "We wanted to work on this problem [arbitration] together. It's a balance, it's a negotiation[.] . . . If that gives the public more trust in their police force, I think it's a win across the board". *Id.*

²⁵³ *Id.* (quoting a 2020 Report on Police Reform and Racial Justice co-authored by then-Mayor John Cranley and other mayors).

must also be acceptable to the police management as well because ongoing selection involves approval by both unions and police management.²⁵⁴

Another example of progressive negotiations occurred in Philadelphia after the murder of George Floyd. Philadelphia's negotiated changes required the creation of a Police Termination Arbitration Board with an arbitration roster that consists of forty percent women, people of color, or other underrepresented groups.²⁵⁵ The City attempted unsuccessfully to require that all its police officers live in Philadelphia as a reversal of a prior agreement that allowed officers to change their residency after five years of service.²⁵⁶ Although the new contract in Philadelphia continues the "internal panel that reviews evidence and rules on disciplinary cases," a significant change to the make-up of this Police Board of Inquiry was achieved at the bargaining table.²⁵⁷

The Philadelphia police contract now "puts a civilian on the police department's disciplinary panel for the first time" and provides for "civilian participation in every aspect of the (discipline) process."²⁵⁸ Before this change, the panel was internal, with only police officers including a captain, a lieutenant, and rank-and-file officers serving.²⁵⁹ Now the panel prohibits service by any officer of the same rank as the officer being charged with an offense that could result in discipline.²⁶⁰ Also, the new contract now "allows non-sworn witnesses and even advocates to present evidence" to this discipline panel.²⁶¹

²⁵⁴ As Dennis Nolan and Roger Abrams explained in debunking a criticism that labor arbitrators may have incentives to curry favor by ruling for management, their response also applies in this instance with respect to police arbitrators allegedly acting to curry favor with unions: "Arbitrators are selected by the parties themselves. If arbitrators were so biased in management's favor, would unions continue to accept them or, indeed, would unions even continue to negotiate arbitration clauses? More to the point, if arbitrators act 'consistently on the side of management,' why do unions win so many awards?" Nolan & Abrams, *supra* note 150, at 895 (quoting Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1565 (1981)). Similarly, if arbitrators were deciding police cases merely to appease unions even half the time, why would employers continue to agree to use those arbitrators?

²⁵⁵ Max Marin & Ryan Briggs, *Philly Police Get Raises in New City Contract—with a Few Disciplinary Reforms*, BILLYPENN (Sept. 14, 2021), <https://billypenn.com/2021/09/14/philadelphia-police-contract-raises-reform-kenney-outlaw-fop-mcnesby/> [<https://perma.cc/3UH9-8XXN>].

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Brian X. McCrone, *Win-Win in New Police Contract? True Civilian Oversight for 1st Time, More Money*, NBC PHILA. (Sept. 14, 2021), <https://www.nbcphiladelphia.com/news/local/win-win-in-new-police-contract-civilian-oversight-for-1st-time-more-money-for-fop/2958108/> [<https://perma.cc/MS5U-69BV>] (quoting Philadelphia Deputy Managing Director for Labor, Rich Lazer).

²⁵⁹ Marin & Briggs, *supra* note 255.

²⁶⁰ *Id.*

²⁶¹ *Id.*

The collective bargaining agreement reached between the City of Philadelphia police and the FOP union representing Philadelphia police officers was approved through an interest arbitration proceeding where contested final terms of the contract were decided by a three-member panel of arbitrators, chaired by neutral arbitrator, Alan Symonette.²⁶² In deciding the terms of this Philadelphia agreement, the first one negotiated for the city and its police force after the Floyd protests, the interest arbitration panelists considered the impact of the “murder of George Floyd . . . along with other high-profile incidents involving police and people of color around the country and in Philadelphia” and concluded those matters “have led to community distrust of the police in many areas.”²⁶³

The panel also accepted “the need to reform the discipline and arbitration process to restore the community’s faith in the police.”²⁶⁴ The panelists recognized “the difficult and dangerous work performed by Philadelphia’s police officers, and the need for police officers to view the disciplinary process as trustworthy and credible.”²⁶⁵ Importantly, the panelists decided “that the creation of an arbitration panel to hear police discharge cases with arbitrators who are selected by the parties and trained to understand the disciplinary code and police directives will give both the public and police officers additional confidence in the arbitration process.”²⁶⁶

Finally, the Philadelphia interest arbitration panelists also decided to reject any efforts to provide for easy challenge of an arbitrator’s decision by “declin[ing] to limit the authority of those arbitrators to issue awards consistent with the discipline code.”²⁶⁷ The Philadelphia agreement also has a requirement that out of the ten arbitrators selected to serve on the police arbitration panel, “[a]t least forty percent (40%) of the . . . arbitrators will be people who identify as women, people of color, members of the LGBTQ+ community, or other underrepresented groups.”²⁶⁸

A. *Transparency and Access*

Walter Katz has recently argued that the best mechanism to achieve police reform that also offers transparency and accountability will have to allow public access to the negotiation process.²⁶⁹ This approach to reform focuses on “elected

²⁶² See *Fraternal Ord. of Police Lodge 5 v. City of Philadelphia*, No. 0-21-0002-3120, slip op. at 1–2 (Sept. 14, 2021) (Am. Arb. Ass’n.), <https://www.phila.gov/media/20210913125918/FOP-Award-Executed-9-14-21.pdf> [<https://perma.cc/BD93-EH6Y>].

²⁶³ *Id.* at 6.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 7.

²⁶⁷ *Id.*

²⁶⁸ See *Fraternal Ord. of Police Lodge 5*, slip op. at 15.

²⁶⁹ Katz, *supra* note 43, at 443–44.

officials who have acquiesced in moving what are political questions that should involve open debate into closed-door negotiations.”²⁷⁰ Any reforms could and should address the private nature and lack of transparency that shields the public from understanding what happens in arbitration to examine whether the actions taken regarding police officer discipline were appropriate.²⁷¹ A recent proposal regarding police reforms should be considered as it offers excellent changes to the police discipline process based upon providing public arbitration hearings and other matters related to offering complete transparency to the public.²⁷² Arbitration hearings could be addressed in an open and public manner that allows responses to community voices with legitimate criticisms about how police officer discipline can be improved in arbitration or even if arbitration should be abolished.²⁷³

Police unions will likely balk at any transparency measures for various reasons that will need to be debunked. Policing reform will have to examine the ongoing role of police unions, many of which developed specific actions to limit and stifle public accountability measures seeking more civilian oversight

²⁷⁰ *Id.* at 423.

²⁷¹ See Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 111, 117–20 (2017) (asserting the need for more sunshine laws to highlight and make available to the public exactly what happens to police officers involved with allegations of misconduct and their disciplinary records); Ryan Briggs, *Changes to Police Arbitration Sought*, PHILA. TRIB. (June 13, 2020), https://www.phillytrib.com/changes-to-police-arbitration-sought/article_23169f51-d653-5721-9334-0baca35f058d.html [https://perma.cc/98B8-Z6KF] (describing policing reform efforts by Pennsylvania state representative Donna Bullock from Philadelphia who was “in the process of drafting legislation to, at minimum, add transparency to a process of secretive arbitration hearings with case files that are typically heavily redacted and private arbitrators whose identities are rarely disclosed”); see also Bell, *supra* note 67, at 2144–45 (“Transparency measures, including data collection and ‘hot ticket’ reforms such as police officer body cameras, can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement.”); Rushin, *Police Contracts*, *supra* note 20, at 1204, 1235 (seeking transparency to address the protections that collective bargaining agreements offer police officers that limit reforms).

²⁷² See Fisk et al., *supra* note 23. In discussing proposal 4 in their overall suggestions, Fisk and her co-authors state: “We propose that all arbitrations and civil service appeals related to discipline of law enforcement officers be open to the public. Just as a civil or criminal trial is a public proceeding, so too should be disciplinary proceedings against law enforcement officers.” *Id.*

²⁷³ *Id.* (referring to issues related to having public and transparent hearings and overall transparency throughout the police discipline process including public discussions of negotiations with unions about terms). An arbitrator cannot decide to make the hearing public as an ethical matter; but if the parties or law requires a public hearing, the arbitrator would be able to proceed. See *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 92, at para. 2C (“All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.”).

approximately fifty years ago in the 1960s and 1970s.²⁷⁴ Although there may be some concerns with just offering total transparency regarding a police officer's disciplinary record by making it publicly available through an arbitration proceeding,²⁷⁵ Rachel Moran and Jessica Hodge have conducted an empirical study to determine whether public disclosure of police disciplinary actions will help with accountability or end up harming the privacy rights and concerns of police officers.²⁷⁶

Moran and Hodge “surveyed 344 law enforcement administrators (primarily police chiefs and sheriffs) in twelve states that permit public access to some or all law enforcement misconduct records.”²⁷⁷ The researchers allowed those responding to do so “anonymously to a variety of questions regarding whether they disclose misconduct records to the public and, if so, how disclosure has harmed or benefited their law enforcement agency or the community it serves.”²⁷⁸ Moran also conducted follow-up phone interviews with thirty-three of the respondents.²⁷⁹

Their results found that twenty-four percent of the respondents believed that public disclosure of their records was a benefit for their law enforcement communities and only sixteen percent of the respondents believed that there was any harm that might occur to their officers by the disclosure.²⁸⁰ For those mentioning harms, they were referring to either embarrassment or damaged reputation rather than any physical harm as a result of disclosure, which was reported by only one of the 344 respondents.²⁸¹ Despite finding “[m]ore administrators than not” being supportive of laws requiring public access, there were some who expressed concerns about “distrust and frustration over the media misconstruing misconduct records.”²⁸² These concerns included feelings that those seeking the information may have no desire in determining the truth and may instead be focused on “digging for information that could discredit their officers.”²⁸³

²⁷⁴ Surowiecki, *supra* note 120; Katz, *supra* note 43, at 427 (“Prior to the 1960s, police officers faced significant obstacles in organizing, partially due to general hostility toward public-employee labor organizing and from the legacy of police officers striking in the early twentieth century.”).

²⁷⁵ Levine, *supra* note 43, at 855–57 (asking for caution in seeking transparency regarding police disciplinary records out of speculation that this could result in privacy concerns for police officers).

²⁷⁶ See Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1240 (2021).

²⁷⁷ *Id.* (footnote omitted).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1241.

²⁸¹ *Id.*

²⁸² Moran & Hodge, *supra* note 276, at 1241.

²⁸³ *Id.*

Those participating in the phone interviews expressed a strong support for transparency and disclosure of misconduct records.²⁸⁴ Approximately, two-thirds of those from the phone interviews believed that disclosure had benefitted their departments.²⁸⁵ These law enforcement administrators also recognized that their increasing recognition and appreciation for the right and expectation to disclosure of information about their officers to the public represents a change from previous generations of administrators.²⁸⁶

Finally, these administrators also contended that despite their increasing acceptance and appreciation for public disclosure, the rank-and-file officers disagree with the efforts to provide public disclosure.²⁸⁷ Because of this study, requests for more transparency seem to be a valuable aspect of police discipline. This empirical study also demonstrates that the disclosure represents a more helpful process for law enforcement, and this disclosure does not result in any measurable harm to those officers who have their disciplinary records disclosed.

Now, some aspects of making the process more transparent could involve removing items regarding policing from collective bargaining and moving those measures into the legislative process.²⁸⁸ The parties would likely have to not only agree to remove union-negotiated privacy protections but also address some state open records law exemptions.²⁸⁹ Unions may also still use their political power to obtain what they would like through legislation and may be more likely to influence policy makers than members of Black and poor communities. But at least those negotiations with the legislature might provide more transparency and accountability than what collective bargaining negotiations between the police and unions have historically tended to offer.²⁹⁰

An excellent example of changing this narrative to allow the public to be involved in the police officer negotiations occurred in Austin, Texas with the Austin Justice Coalition (AJC) which sought to influence the terms of collective bargaining agreements in 2016.²⁹¹ The AJC was able to encourage key changes

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1241–42.

²⁸⁶ *Id.* at 1242.

²⁸⁷ *See id.* These administrators wish that their voices about wanting disclosure were heard more in this discourse. *Id.*

²⁸⁸ *See* Katz, *supra* note 43, at 441–42 (describing recent legislative efforts by Illinois seeking to limit what may be bargained).

²⁸⁹ *See* Cox & Freivogel, *supra* note 115 (criticizing the current lack of transparency as “the majority of law enforcement agencies still close records or make them hard to obtain” by asserting “they are personnel matters, privacy violations, or ongoing investigations that could be compromised. They are backed by strong law enforcement unions and the law enforcement bills of rights that protect the privacy rights of officers over the public’s right to know”); *see also* Kane, *supra* note 16 (discussing how Nevada considers information in arbitration to be public but not if a union is involved).

²⁹⁰ *See* Cox & Freivogel, *supra* note 115.

²⁹¹ Katz, *supra* note 43, at 443.

including the establishment of a civilian oversight office, rescission of a prior practice of downgrading short suspensions to confidential written reprimands, and the provision of more time for investigators to pursue complaints alleging criminal conduct.²⁹² Providing similar measures for transparent negotiations about how arbitration of police disciplinary appeals may proceed could be a satisfying option for those currently concerned about these matters.

B. Assessing *Just Cause as Conscientious Arbitrators*

One approach at the bargaining table could be to provide arbitrators with the tools to consider the impact in the workplace and within society when some form of racial reckoning is expected when police misconduct occurs. Changing police disciplinary actions via reform may also represent a daunting prospect in certain situations given the political pressures and fallout for those legislators who pursue any statutory adjustments.²⁹³ With a steadfast community and public investment to navigate the societal challenges being faced, any reforms aimed at addressing police misconduct may still succumb to the political power and tremendous financial influences that some police unions wield.²⁹⁴ Even with the significant impetus provided by the Floyd death and related protests, the Minnesota legislature bickered along partisan lines in enacting minimal police reforms.²⁹⁵ Failure to address major reforms via clear language in an

²⁹² *Id.* at 444.

²⁹³ See, e.g., David Unger, *Which Side Are We On: Can Labor Support #BlackLivesMatter and Police Unions?*, NEW LAB. F. (July 2020), https://newlaborforum.cuny.edu/2020/07/02/which-side-are-we-on-can-labor-support-blacklivesmatter-and-police-unions/#_ednref13 [<https://perma.cc/KE8H-4G4V>] (suggesting how police unions in “Los Angeles, New York, and Chicago” have used lobbying and political pressure to stymie police reform legislation).

²⁹⁴ See Scheiber, Stockman & Goodman, *supra* note 46 (describing how police unions spend significant money in state and local political campaigns to challenge reform politicians who risk being labeled soft on crime and anti-police); Michaels, *supra* note 12 (describing political influence of police unions); see also Rushin, *Police Contracts*, *supra* note 20, at 1222–24 (providing empirical review of 178 police union contracts and concluding that the vast majority of them impede police accountability measures); DiSalvo, *supra* note 46 (blaming unions in pursuing contracts that only protect members rights to limit information about prior discipline instead of promoting broader goals of public safety); Segura, *supra* note 46 (identifying several instances where police unions arguably sought contracts that placed officers’ rights over public safety).

²⁹⁵ See Nicholas Bogel-Burroughs & Jack Healy, *Minnesota Lawmakers Vowed Police Reform. They Couldn’t Agree on Any*, N.Y. TIMES, <https://www.nytimes.com/2020/06/20/us/minnesota-police-george-floyd.html> [<https://perma.cc/64WL-9UE7>] (June 21, 2020) (describing legislative failures aimed at police reform that reflected partisan positions in the Minnesota legislature); see also Steve Benham, *Police Reform Plan Restricts Arbitrator from Overturning Discipline Decisions*, KATU (June 22, 2020), <https://katu.com/news/politics/police-reform-plan-restricts-arbitrator-from-overturning-discipline-decisions> [<https://perma.cc/7JNH-E5ZH>] (describing unsuccessful legislative attempts to limit arbitrator’s ability to reverse discipline issued).

agreement or a civil service statute will leave an arbitrator at the front line with little authority to address broader public concerns.

Using experienced and neutral labor arbitrators (such as members of the NAA) who have independent and established businesses not susceptible to the whims of needing to satisfy a particular group of parties to keep that business going provides a fairer approach than focusing on a so-called accountable civil servant subject to political pressures. As mentioned with the competing political pressures seen in the Brooks case in Atlanta, would leaving the matter in the hands of political appointees provide a fairer system? Experienced arbitrators' decisions are based upon neutral applications of the terms of the parties' contracts and legal requirements as they face not being employed if they stray from this approach.²⁹⁶ If the underlying critique asserts that an approximately fifty percent dispute resolution process result is unacceptable as police department and government leaders imply, then they should provide stronger procedures to guarantee more satisfying results. Obviously, police unions will have something to say about that.

For example, the parties could agree to place the burden on the union to show that the department did not have just cause in such arbitrations or make the arbitrator's review standard one of having the union demonstrate that the department's actions were arbitrary and capricious.²⁹⁷ In reality, there is no demonstrated basis for showing that labor arbitrators have caused systemically bad results in addressing police officer disciplinary matters. This lack of causation is present even when a reversal may extend the racial hostilities between the Black community and their police departments such as in the Brooks decision.²⁹⁸

²⁹⁶ See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1196 (1993) (quoting "Judge Harry Edwards, a noted labor law scholar and former arbitrator" in *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 6 (D.C. Cir. 1986) describing how "the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it" and as the "contract reader," the arbitrator's "interpretation of the law becomes part of the contract" and if "they are not satisfied with the arbitrator's performance," they can negotiate new terms or "hire a new arbitrator"); Malin & Vonhof, *supra* note 151, at 210–11.

²⁹⁷ See Adrienne Baker, Note, *Police Accountability: How Narrowing the Scope of Arbitration and Limiting the Procedural Protections Can Promote Social Trust and Justice*, 43 MITCHELL HAMLINE J. PUB. POL'Y & PRAC. 117, 129 (2022) (describing how Bloomington, Illinois and Fullerton, California have limited the scope of their arbitrator's review to "arbitrary" actions and other limits placed by other municipalities including Grand Rapids, Michigan, and Ocala, Florida).

²⁹⁸ See discussion *infra* accompanying note 304 (referring to comments from Republican Governor Brian Kemp and Democratic Mayor Keisha Lance Bottoms about the decision to reverse the termination of the police officer who shot Brooks, and neither questioned the validity of that reversal despite the very difficult racial climate).

Another option, rather than getting the parties to agree on addressing community concerns in policing by incorporating such concerns into their arbitration procedures, would be to have the courts find that an arbitration award failing to incorporate such community value concerns about racial justice in policing is a violation of public policy.²⁹⁹ However, dealing with this concern at the back end after an award has been issued by allowing a challenge in court as a violation of public policy would waste time and resources. If the parties choose to incorporate such public concerns or the law requires them to do so before the matter reaches an arbitrator, the arbitrator will have the parties' own agreement and the demands of the law to support making a decision based upon those public concerns.

Paul Butler has explained how important it is to racial justice that police discipline not be hindered through the efforts of police unions.³⁰⁰ Racial justice reforms related to policing could also be aimed at legislation that addresses exactly what arbitrators may consider in terms of what is just cause for police officer discipline.³⁰¹ These reforms could identify the limits on rights that might prohibit consideration of past discipline at some point as well as the impact of prior inconsistencies in administering discipline when compared to the nature of the alleged misconduct at issue in arbitration.³⁰²

Rather than engaging in the heavy legislative lifting, politicians, police managers, and their representatives have criticized arbitration without addressing the underlying issues about what rights can and should be protected in the arbitration review process. If police departments and politicians want to exert the power to make these disciplinary decisions without independent review or arbitration, all they need to do is pursue the legislative changes or collective bargaining changes necessary to make that happen.³⁰³

On the other hand, unfair treatment of top performing officers would also be blamed directly on the police management and politicians or political appointees and all those involved in the bureaucratic management chain if arbitration was not really available as a check on management abuses. The

²⁹⁹ See, e.g., Plass, *supra* note 73, at 33; Larson, *supra* note 73, at 341.

³⁰⁰ See Butler, *supra* note 46; see also Hardaway, *supra* note 28, 190–93 (arguing to limit union rights).

³⁰¹ See Baker, *supra* note 297, at 129; Rushin, *Police Appeals*, *supra* note 47, at 576–92 (discussing negotiating changes to arbitration terms and reviewing municipalities with limits on an arbitrator's review).

³⁰² See Fisk et al., *supra* note 23 (proposing similar changes).

³⁰³ See Pazanowski, *supra* note 246 (describing an example of how the District of Columbia adopted a law in the wake of George Floyd's death that reserved "all matters concerning the discipline of sworn law enforcement officers, and excluded the issue from future collective bargaining" and despite constitutional challenges, a federal district court found the action of the city was constitutional); see also Hardaway, *supra* note 28, at 190–93 (arguing exclusion of use of force and discipline from arbitration to make sure those in the community not party to such agreements have their constitutional rights protected).

Brooks case is again an excellent example where political counterparts, the Republican Governor of Georgia, Brian Kemp, and the Democratic Mayor of Atlanta, Keisha Lance Bottoms, took opposing positions after the police officer who shot and killed Brooks was reinstated by a civil service board after being terminated by Bottoms.³⁰⁴

Any negotiated changes must focus on getting management and the union to come together to seek win-win reforms that focus on public trust. Specifically, labor law professors Martin Malin and Joseph Slater have argued the best way to approach these reforms is through joint partnerships between police management and police unions even if it may not be a natural orientation for either party:

The idea of partnering with unions is probably anathema to most police chiefs. And it is easier politically for union officials to play to [member] feelings that they are under siege than to engage in meaningful cooperation with management. But with calls to defund police departments and to eliminate police collective bargaining, both labor and management may feel they are facing existential moments and have some incentive to come together to address that.³⁰⁵

While looking at changes to improve the arbitration process in police discipline matters, the parties should also include provisions allowing for the selection of experienced arbitrators from a “critical mass or cadre of diverse neutrals.”³⁰⁶ The BLM movement and the experience of George Floyd should now inspire police unions and police departments to engage in “negotiating the terms of a [labor arbitration] dispute resolution process that embraces racial justice concerns.”³⁰⁷ This process will not be based upon political oscillations and will focus on fairness in the disciplinary treatment of police officers while embracing their role as guardians instead of warriors when engaging the Black communities and citizens that they serve and protect.

VI. CONCLUSION: SEEKING INTEREST-CONVERGENCE AS DIVIDED WE ALL FALL

In recognizing the potential of working together in addressing matters of race and unions,³⁰⁸ the parties should look for common ground where they can agree to accountability measures regarding police discipline and improving arbitration. Any sustaining approaches must involve ongoing vigilance in

³⁰⁴ See discussion *supra* accompanying notes 141–48 (capturing competing responses from Bottoms and Kemp).

³⁰⁵ Malin & Slater, *supra* note 241.

³⁰⁶ Green, *supra* note 189, at 389.

³⁰⁷ *Id.* at 391.

³⁰⁸ See Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 368–69 (2012).

getting police management and politicians working with police unions and their representatives as well as with BLM and other members of the Black community. All these stakeholders must set a goal of adopting measures that bring trust back to the community by reassuring all involved that police misconduct related to the killing of Black people will be addressed in a thorough and responsive manner. Those measures must also recognize the tremendous responsibilities and deadly challenges that the majority of excellent police officers face on a daily basis.

An important objective in that process should be attaining the goal of developing fair and transparent procedures that will protect outstanding officers while providing a prompt, responsive, final, and satisfying disciplinary penalty that will become generally accepted for police misconduct in the community. But unions and politicians, not arbitrators, will have to agree on these transparent procedures as labor arbitrators may not act without the consent of the parties. Once they do agree on these fair procedures, the use of experienced labor arbitrators, who make tough disciplinary calls all the time without being concerned about future work with these parties, would offer a just and neutral resolution.

Only after what critical race founder, Derrick Bell, referred to as “interest-convergence” starts to occur will we see the path forward to sustained change.³⁰⁹ As mentioned earlier, several commentators see the number of protesters of all races who were on the front line after George Floyd’s death as indicative that a form of interest-convergence can be obtained with seeking a racial reckoning with respect to police reforms.³¹⁰ This Article concludes that all the stakeholders, including political and municipal leaders and administrators, police chiefs and their leadership teams, municipal lawyers, police union leaders and their members, police union lawyers, civil service commissions, arbitrators, civil rights leaders, civil rights lawyers, civil rights activists, and the Black communities involved must all come together to develop mutual solutions.

If there is any group in our society that has the highest motivation and balance of converging interests, it is those Black police officers who can talk freely through the collective force of their identity caucuses and use their voices to help take the lead in racial reform issues concerning policing.³¹¹ These Black

³⁰⁹ See Bell, *supra* note 7, at 523.

³¹⁰ See McLaughlin, *supra* note 7. But see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 151, 156–57 (2011) (describing one aspect of Bell’s interest-convergence thesis as “blacks receive favorable judicial decisions to the extent that their interests coincide with the interests of whites” and identifying several critiques and concerns about the impact of Bell’s thesis).

³¹¹ As this Article approached the final stages of editing, Memphis faced the showing of videos regarding what its police chief, Cerelyn Davis, referred to as the “heinous, reckless and inhumane” beating by five Memphis police officers of a Black male motorist, Tyre Nichols, after a traffic stop on January 7, 2023, that led to Nichols’ subsequent death. See Snejana Farberov & Tina Moore, *Police Chief Warns Memphis Not to React Violently After*

officers' words, deeds and pursuits about practices and discipline can help lead us all out of a regenerating path of gains resulting from hideous situations and subsequent acts of retrenchment that represent a vicious and divisive cycle in our society with no systemic changes being obtained. As the rhythm of these discussions repeats at a level of blues where all too many Black people understand its frequency, the remaining question will be: can lasting reform ever come? In dealing with the frequency of this question, this Article concludes that with the help of Black caucus police officers and with transparent arbitration processes that consider public values, the interests that have converged in response to George Floyd's death may provide a yes as an answer to that question. Then finally we can all win, potentially through a fair arbitration process, without having to keep thinking again and again about racial reforms to address police disciplinary actions.

Release of Tyre Nichols 'Inhumane' Beating Video, N.Y. POST, <https://nypost.com/2023/01/26/police-chief-warns-memphis-not-to-react-violently-after-release-of-tyre-nichols-video/> [<https://perma.cc/4GDD-W858>] (Jan. 26, 2023). When a police investigation found the five police officers were "directly responsible" for the physical abuse of Nichols by employing "excessive force" and not intervening and rendering aid, the fact that all the officers were Black males further highlights that Black police officers are neither infallible nor always innocent when shocking police brutality occurs. *Id.*; see Jaweed Kaleem, *What Tyre Nichols' Death at the Hands of Black Officers Says About Race in Policing*, YAHOO! NEWS (Jan. 27, 2023), <https://www.yahoo.com/now/tyre-nichols-death-hands-black-043721880.html> [<https://perma.cc/AQL4-23NB>] (describing unique racial components when Black police officers commit brutality and arguing that hiring more Black police officers does not represent a "panacea" in trying to "reduce police violence against racial minorities" because these officers can still "be pressured to conform, to be more blue than Black" (quoting first and then third Christy Lopez, who "led the Justice Department team that investigated police in Ferguson, Mo.")); see also Carbado & Richardson, *supra* note 193, at 1991 (reviewing racial dilemmas Black police officers face in becoming a member of the blue community). After this very recent example of horrible police brutality against Nichols, it is important to reiterate points made earlier that this Article does not advocate for relying on individual Black police officers as a source for disciplinary reform. See *supra* notes 192–95 and accompanying text. Instead, this Article seeks reform by enhancing the collective voices from Black police officer affinity groups and caucuses whose leaders have committed to becoming a bridge between the police and the Black community. *Id.*; see also Brandon Drenon, *'Shameful and Inhumane'—Black Officers Reckon With Death of Tyre Nichols*, YAHOO! NEWS (Feb. 1, 2023), <https://news.yahoo.com/shameful-inhumane-black-officers-reckon-224619128.html> [<https://perma.cc/73UL-4NXT>] (describing police affinity union caucus responses to the Nichols brutality in comments from the president of the Black Police Association of Greater Dallas, Terrance Hopkins, who said the video of the officers' treatment of Nichols "left him grief-stricken and embarrassed" and their actions "triggered shame and disappointment among black officers," and comments from De Lacy Davis, who "founded Black Cops Against Brutality" in East Orange, New Jersey, stating how it was necessary to "take a position nationally so that we send a clear message about what we don't stand with").