Seeking Structural Solutions to Structural Problems: Reforming Police Disciplinary Arbitration

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In law reviews over the last decade, scholars have offered a range of diagnoses of the problems underlying police misconduct and a broad array of proposals to address it.[1] Many connect police violence to the legal standard allowing police to use lethal force and propose curtailing qualified immunity from liability for serious injuries or misconduct.[2] Some scholars criticize collectively bargained job protections for police officers who engage in misconduct,[3] or the lack of transparency in police contract negotiations and disciplinary procedures, including arbitration.[4] Still others have criticized, or at least raised doubts about the wisdom of, the political power[5] or governance[6] of police unions, consultants that thwart the adoption and implementation of

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[1] *See infra* notes 2–11 and accompanying text.

[2] Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 410 (2022); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1483–84 (2016); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008); Eliana Machefsky, *The California Act to Save* [Black] *Lives? Race, Policing, and the Interest Convergence Dilemma in the State of California*, 109 CAL. L. REV. 1959, 1962 (2021).

[3] 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, 172–73 (2019).

[4] Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1029 (2021); Stephen A. Plass, *Police Arbitration and the Public Interest*, 37 HARV. BLACKLETTER L.J. 31, 31–32 (2021); Catherine Fisk *et al.*, *Reforming Law Enforcement Labor Relations*, CAL. L.R. (Aug. 2020), https://www.californialawreview.org/online/reforming-law-enforcement-labor-relations [https://perma.cc/E6LG-M76W]; 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 (2017).

[5] Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1978 (2022).

[6] Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 738–39 (2017).

reforms,[7] or even the very existence of police collective bargaining rights[8] or police unions.[9] At the most profound level, scholars have linked police misconduct to the estrangement of police from poor communities of color, the carceral state, segregation and subordination of impoverished communities of color, anti-blackness, and propose rethinking the very existence of police.[10] The problems seem so pervasive and intractable that only radical diagnoses and proposals seem proportional, but they are politically elusive and politically controversial.[11]

A significant strand of critique has focused on the rules and institutions that enable police officers who kill to avoid losing their jobs.[12] It is particularly alarming when management of a police department decides an officer's misconduct is so egregious as to warrant termination and an arbitrator overturns that decision and reinstates the officer. Little wonder, then, that proposals for police reform have included removing from arbitrators the power to overturn discipline so that it can be placed "in the hands of individuals who prioritize the

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[7] Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 IND. L.J. 1, 34–35 (2022); *see* Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 893 (2018).

[8] Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 38 J.L. ECON. & ORG. 1, 3 (2020).

[9] Falco Anthony Muscante II, *Defund the Police (Unions): Collective Bargaining is the Problem, Not Law Enforcement* 3–4 (Sep. 2022), https://ssrn.com/abstract=4197316 [https://perma.cc/G4K6-NHXT]; Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1336, 1395 (2020) (exploring the possibility that the problem is police unions, but concluding perhaps the problem is police *per se*).

[10] Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 655 (2020); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066 (2016) [hereinafter *Legal Estrangement*]; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811–12 (2021); Carly Margolis, *Targeting Police Unions, Rethinking Reform*, 46 N.Y.U. REV. L. & SOC. CHANGE 224, 262–63 (2022); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1805 (2020); Ayesha Bell Hardaway, *Rise of Police Unions on the Back of the Black Liberation Movement*, 55 CONN. L. REV. 179, 185 (2022).

[11] Among the many radical proposals, abolition of police and prisons, or defunding the police, loomed large. Akbar, *supra* note 10, at 1783–85; Paige E. Vaughn, Kyle Peyton & Gregory A. Huber, *Mass Support for Proposals to Reshape Policing Depends on the Implications for Crime and Safety*, 21 CRIMINOLOGY & PUB. POL'Y 125, 136, 138 (2022) (survey experiment finding that efforts to defund the police were politically unpopular). In the 2022 midterm elections, Republican candidates embraced the defund the police slogan as a wedge issue, prompting some moderate and suburban Democrats to disclaim any desire to reduce police funding. *See, e.g.*, Glenn Kessler, *GOP Ad Falsely Tags Democratic Candidate with 'Defund Police' Label*, WASH. POST (Oct. 28, 2022) https://www.washingtonpost.com/politics/2022/10/28/gop-ad-falsely-tags-democratic-candidate-with-defund-police-label/ [https://perma.cc/MJ93-BJBJ]. However, "defunding" the police can mean many things and the discursive uses of the term are significant. *See* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 123 (2021).

[12] *See* Muscante II, *supra* note 9, at 3–4.

public interest."[13] To suggest, however, that arbitrators who handle police discipline cases somehow fail to consider the public interest is hardly likely to persuade even some, like Professor Michael Z. Green, who see serious problems with American policing.[14] After all, municipalities agree to the contracts that provide job protections and legislatures have adopted statutes granting police procedural and substantive protections against job discipline.[15] It therefore surprises me not at all that Green's article, *Black and Blue: Police Arbitration Reforms*, responds so strongly to the suggestion that arbitrators are the culprits behind enabling police misconduct.[16]

Among legal scholars, the foremost proponent of the view that the problem is union contracts and the arbitration that enforces them is Stephen Rushin.[17] Professor Rushin has quite a bit of evidence to support his indictment of police disciplinary arbitration. He compiled a data set of 624 police disciplinary arbitration awards and found that arbitrators reduced or overturned punishment in about half of cases.[18] About half of the arbitrations in his data he styled technical violations, but about a quarter were for use of force, and just under a quarter were for dishonesty.[19] 46% of officers whom management fired were reinstated by the arbitrator, and 61% of the suspensions were reduced or overturned.[20] About 30% of arbitrators who reduced or reversed discipline cited procedural problems in the investigation, including lack of notice to the officer about the policy that was violated.[21] In about 38% of the cases, the arbitrator found the evidence insufficient.[22] But in 64% of cases, the arbitrator found the punishment disproportionate to the infraction.[23]

The data on which Rushin based his critique of police arbitration is certainly cause for concern. As the American Civil Liberties Union pointed out in litigation against the City of Pomona (California) Police Department challenging its failure to implement a California law restricting police use of

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[13] Plass, *supra* note 4, at 63.

[14] *See* Michael Green, *Black and Blue Police Arbitration Reforms*, 84 OHIO ST. L.J. 243, 300 (2022).

[15] *See* Margolis, *supra* note 10, at 234.

[16] Green is not alone in this; he cites other leading scholars and practitioners of labor arbitration who have sprung to the defense of conscientious arbitrators in the wake of widespread attacks on arbitration in police discipline cases. Green, *supra* note 14, at 249 n.23 (citing, *inter alia*, Stephen F. Befort, *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]).

[17] *See generally* Stephen Rushin, *Police Arbitration*, 74 VAND. L. REV. 1023 (2021) [hereinafter *Arbitration*]; Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017).

[18] *Arbitration*, *supra* note 17, at 1029–30.

[19] *Id.* at 1054.

[20] *Id.* at 1030, 1059.

[21] *Id.* at 1061–62.

[22] *Id.*

[23] *Id.* at 1061.

lethal force, less than a year after Pomona Police Department Officer Chad Jensen was returned to work after defending against charges of excessive force in the beating of a 16 year-old, Jensen shot and killed another Pomona resident, Anthony Pacheco.[24] A study of data from Florida made possible by a change in law that extended bargaining rights to sheriffs officers who previously lacked such rights compared measures of violent police misconduct before and after police gained bargaining rights to police officers who had such rights throughout.[25] The authors found that incidents of violent misconduct increased after sheriffs gained bargaining rights.[26] Thus, this study suggests, contractual protections against discipline causes more police violent misconduct.

Responding to legal scholars, including Rushin, the popular press, and activists who lay the blame on labor arbitrators who overturn discipline, Green asserts that the problem is not that arbitrators are consistently failing to do their job, or that they overturn discipline because they are biased in favor of police.[27] The problem, Green contends, is that they're doing what labor contracts require them to do because management failed to follow the contract or policy in imposing discipline.[28] He asserts, with some basis, that "[u]nderstanding why labor arbitrators review and affirm or reverse disciplinary actions taken against police officers has been missing from the key arbitration decisions" discussed in the media and by scholars.[29] We do need much more transparency about police arbitration claims and decisions, as indeed I have previously proposed.

If the problem is, as Green and I both argue, that arbitrators are enforcing contracts to which cities have agreed,[30] then the solution is structural change that will make police union contracts and policies more responsive to the needs and desires of Black communities. To put Green's argument in Monica Bell's terms, it is essential to reduce the legal estrangement of police from the impoverished communities of color that are both overpoliced and underprotected by law and to enhance the power of Black police officers to reform departments from within.[31] He proposes that can be done by incorporating Black police voices in arbitration.[32] I return to that below.

Whatever else one might say about police reforms that focus on reducing impunity for violent misconduct, recent political experience suggests that even modest reforms, much less ambitious ones such as Green proposes, are unlikely

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[24] Compl. for Declaratory and Injunctive Relief at 5–8, Organizada v. Pomona Police Dep't, No. 20STCV28895 (Cal. App. Dep't Super. Ct. L.A. Cnty. July 31, 2022).

[25] Dharmapala, McAdams & Rappaport, *supra* note 8, at 3.

[26] *Id.* at 37.

[27] Green, *supra* note 14, at 265–67.

[28] *Id.* at 273–74.

[29] *Id.* at 265.

[30] *Id.* at 273–274.

[31] *Legal Estrangement*, *supra* note 10, at 2066; *see* Green, *supra* note 14, at 300–01. For a book-length treatment of the over-policing and under-protection of Black communities, *see generally* JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015).

[32] Green, *supra* note 14, at 277.

to be enacted in the near term. My own experience is that modest reforms have died for lack of legislative support, even in California. In the spring of 2020, I joined a study group of experienced labor arbitrators, retired judges, civil rights lawyers, and even a lawyer with long experience representing police and firefighter unions, to develop police reform proposals.[33] We came up with a package of what we considered modest reforms: requiring public access to contract negotiations on use of force policy; requiring public entities to conduct public hearings on its bargaining proposals both before negotiation and before contract ratification, with sufficient notice and opportunity for public comment at each stage; requiring that all arbitrations and civil service hearings on police discipline by open to the public, just as trials are, and that disciplinary records and arbitration and civil service decisions involving law enforcement officers be maintained in a publicly accessible database subject to disclosure under the California Public Records Act.[34] We even proposed some very modest, technical, but significant changes to the procedure for disciplinary arbitration and civil service appeals, including: permitting into evidence past complaints and disciplinary action involving the officer, regardless of any contractual or administrative time bars; deeming irrelevant evidence of past disciplinary cases exonerating other officers charged with similar misconduct if the department has given notice of management's intent to depart from past practice; prohibiting consideration of the absence of a written rule when a charge concerns serious misconduct; applying an inference adverse to an officer for failing to use a body or vehicle camera or who declines to be interviewed until they have had an opportunity to examine the evidence against them; and prohibiting a violation of the law enforcement officers "Bill of Rights" statute from being a basis for overturning discipline.[35]

We also proposed to require arbitrators and hearing officers to consider the public interest in safety and equal administration of the law in evaluating just cause for discipline, to find that any officer who will be reinstated to show that they have made efforts to rectify the problematic behavior that led to discipline, and to consider as an aggravating factor any evidence of the officer's discrimination or bias on the basis of race, gender, or other protected trait.[36] We proposed that any arbitrator or hearing officer that will handle cases involving the use of force must be adequately trained and be on a list approved by a government agency such as the state mediation and conciliation service.[37] And, finally, we proposed that law should clearly state that no term of a law enforcement contract, including a "zipper" clause, may be interpreted to prevent modification of a use of force policy during the term of the agreement because a common complaint is that discipline is overturned because the new policy

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[33] *See* Fisk, *supra* note 4.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

restricting certain uses of force cannot go into effect until a new contract is signed.[38]

We turned our proposals into statutory language and tried for two years to get a legislator to carry a bill embodying some or all of them. One legislator agreed to sponsor a bill involving one.[39] The bill did not pass, even though the bill was carried by a Democrat with expertise in criminal justice and a relevant committee assignment and Democrats have a supermajority in both houses of the California Legislature.[40] That experience is sobering: if even modest and technical reforms cannot pass, what is the hope for something really major?

Green attempts to tread a careful line between realism and ambition to promote significant reform. I am not an arbitrator who handles police cases, so I cannot comment on whether my experience studying and proposing reforms to police disciplinary arbitration and civil service proceedings are necessary in cases generally. But the fact that my coauthors are experienced arbitrators and thought our proposals were necessary suggests Green is too optimistic in thinking that it will suffice to have "a committed, well-practiced and neutral labor arbitrator listen to both sides of the dispute."[41] I don't think the problem is just that arbitrators lack the ethical backbone to rule against police unions. And I do have serious doubts about the weight that arbitrators should give to a "long and successful work history" (especially when complaints may be expunged) and I do not share the view that there is a "due process concern" with imposing discipline even where an investigation was "faulty" or with imposing "disciplinary penalties inconsistent with previous cases that were similar."[42]

Green's principal proposed structural reform is to empower Black police officers and Black communities to have greater influence, as collectives, in the negotiation of union contracts, the formulation of policy, and the administration of discipline.[43] He cites data indicating that Black and white police officers

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[38] *Id.*

[39] California Senator Stephen Bradford sponsored Senate Bill 1088 in the spring of 2022. It was introduced as a proposed amendment to the California Public Safety Officers Procedural Bill of Rights Act, Gov't Code § 3309.6 on March 16. *SB-1088 Public employment: law enforcement labor relations*, CAL. LEGIS. INFO. (Mar. 31, 2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1088 [https://perma.cc/X4VW-9N2T].

[40] *Id.*; *see SB1088*, FASTDEMOCRACY (May 27, 2022) https://fastdemocracy.com/bill-search/ca/20212022/bills/CAB00024565/ [https://perma.cc/HJ66-TFRE]. The Democrat sponsor in question being Steven Bradford, who has worked extensively on criminal justice reform bills and the California Senate's Committee on Public Safety. *About Steven,* CAL. STATE SENATE https://sd35.senate.ca.gov/biography [https://perma.cc/QNA8-6E98] (last visited Aug. 5, 2023). Scott Graves & Marcela Salvador, *California's Supermajority and What the Legislature Can Do*, Cal. BUDGET AND POLICY CENTER (Sept. 2021), https://calbudgetcenter.org/resources/californias-supermajority-what-the-legislature-can-do/ [https://perma.cc/S79B-EKGT].

[41] Green, *supra* note 14, at 259.

[42] *Id.* at 265.

[43] *See id.* at 277–82.

understand the role of racism in law enforcement differently.[44] In 2017, 92% of white officers surveyed, but only 29% of Black officers, believe that Blacks have equal rights in the U.S., and only 27% of white officers as compared to 70% of Black officers believe that protests against police violence are motivated by a genuine desire for police accountability.[45] I agree that Black communities and Black officers have a perspective on the problems with policing that should be incorporated into the development and implementation of policy. Indeed, in an article with L. Song Richardson, I proposed exactly that.[46] In particular, we suggested that public sector labor law be modified to require police departments to meet and confer (on subjects not covered by the contract) with labor representatives other than the certified union to enable a minority group of officers or community representatives to present concerns about police practices.[47] I am delighted to see Green endorsing a similar structural reform and drawing on his wisdom and experience to explore how it might work and why it might address the problem.

Careful thought is required to implement a system of officer and community involvement in contract negotiation, policy development, and disciplinary arbitration. I note several differences between what Green proposes and what Richardson and I did. He proposes to incorporate identity caucuses not only in negotiation (as we did) but also apparently in individual discipline cases.[48] More should be said about how involvement in individual arbitrations would work — would it take the form of amicus briefs? And Green may have in mind mandating that departments confer with identity caucuses on subjects covered by the contract, which invites questions about the extent to which Green contemplates modifying the principle of exclusive representation on mandatory subjects of bargaining. Finally, Green refers only to Black officer groups' involvement.[49] For reasons of both constitutional equal protection and inclusivity, a government agency cannot limit the right of involvement to Blacks.

Although involving groups other than police union leaders will increase transparency and the diversity of views presented to police and municipal leadership, there is no guarantee that it will be progressive groups rather than reactionary groups that take advantage of the opportunity.[50] Indeed, given the

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[44] *Id.* at 279.

[45] *Id.* (quoting Eli Hager & Weihau li, *White US Police Union Bosses Protect Officers Accused of Racism*, THE GUARDIAN (June 10, 2020), https://www.theguardian.com/us-news/2020/jun/10/police-unions-black-officers-white-leaders [https://perma.cc/Q9DW-J2KH]).

[46] Fisk & Richardson, *supra* note 6, at 777–97.

[47] *Id.* at 779–82.

[48] Green, *supra* note 14, at 281.

[49] *Id.* at 279–81.

[50] The considerable literature on the varieties and civilian review boards and their effect on reported incidents of violent police misconduct suggests that civilian oversight, although by now very widespread, by itself does not reduce police violence and that design of the

well-documented power and effectiveness of police unions and pro-police consultants in municipal and state-level electoral lobbying and policymaking,[51] it would not be surprising to see opportunities for involvement to be dominated by the very perspectives that Green and I believe need to be countered. As Richardson and I observed, it is quite possible that officers hostile to reform would be the most motivated to prevent minority unions or caucuses from persuading management (or an arbitrator in an individual case) to adopt a position contrary to that preferred by the majority.[52] I am not as optimistic as Green may be that Black police officers have "the highest motivation and balance of converging interests" to lead reforms that will reduce racism in American policing.[53]

Whatever the challenges of designing structural reforms to address the structures of economic and racial subordination that enable police violence, Michael Green wisely points our attention away from reforms that are politically impossible and probably ineffective.[54] Democratizing municipal governance, including the forming and enforcement of law, is harder, but promises benefits that begin with saving lives, but do not end there.

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oversight, and also the racial composition of the police force, matters. On the growth of civilian review since 2020, see Sharon R. Fairley, *Survey Says: The Development of Citizen Oversight of Law Enforcement Skyrockets in the Wake of George Floyd's Killing*, 31 S. CALIF. REV. L. & SOC. JUST. 283, 283–86 (2022). For recent evidence of the effect of civilian review, see Andrea M. Headley, *Accountability and Police Use of Force: Interactive Effects between Minority Representation and Civilian Review Boards*, 24 PUB. MGT. REV. 1682, 1683 (2022). For a recent effort to theorize the determinants of institutional design that create effective community control see K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 685 (2020).

[51] See sources cited *supra* note 6–7.

[52] Fisk & Richardson, *supra* note 6, at 791.

[53] Green, *supra* note 14, at 300.

[54] *See id.* at 258–59.