

The City of Buffalo's Untapped Power to Discipline Police Officers

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Summary

Drawing on decisions from the New York State Court of Appeals, this brief argues that the City of Buffalo has an untapped power to discipline police officers, outside of the provisions in its contract with the police union. Both court decisions and Buffalo's legislative history grant it this authority. However, elected officials have not pursued reforms through collective bargaining agreements, or created new disciplinary systems outside of the police contract—such as civilian oversight with disciplinary power. Taking full advantage of the legal powers that municipalities already have can help remedy some of the fundamental flaws in our criminal justice practices.

Introduction

In 2020, people in cities across the United States came out in large numbers to demand systemic changes to policing in response to the brutal murders of George Floyd and Breonna Taylor. In some cities, like Buffalo, there was a magnified response due to repeated instances of local police brutality, such as the police killings of Wardell “Meech” Davis and Jose Hernandez-Rossy, and the recorded brutalization of Quentin Suttles and Martin Gugino. Demands for reduced police budgets, bans on specific police activities and procedures, and civilian oversight of police departments were common on the lists of activists' demands in many cities, including Buffalo. However, police unions' extraordinary legal and political power has proven to be a barrier to meaningful reform throughout the country and in New York State.¹

One of the biggest obstacles to police reform across the country is that it is abnormally difficult to discipline and fire bad officers. Local governments, in charge of most police departments, often claim that state law is the reason they are unable to implement substantive reforms, especially those regarding discipline.²

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The brief explores NYS Court of Appeals decisions that uphold the right of municipalities to discipline police outside of collective bargaining agreements.

It examines the history of police discipline provisions in Buffalo city charters, which granted disciplinary power first to Common Council and later to the police commissioner.

The brief looks at collective bargaining rights for public employees, and explores why police unions—and the work of policing—is different from other organized labor.

The author calls on the City of Buffalo to use the power granted to it by state courts to discipline and fire bad officers.



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Court of Appeals Upholds Municipal Power to Discipline Police

There is an assumption the policing system in place is working as intended, excusing incidents involving bad officers as outliers and not the norm. However, the lived experiences of persons harmed by law enforcement challenges the idea that respectability, submissiveness, and even class can protect from police abuse — or the rise of a police state in historically marginalized communities. No matter how grievous their misconduct, police officers can evade discipline and keep their jobs in a disturbing number of cases. As a result, many communities, including Black and brown people disproportionately profiled and brutalized by police, feel the government is unlikely to prevent officers from inflicting harm. However, there may be a solution through a line of case decisions from the New York State Court of Appeals, suggesting some local governments have been misapplying police discipline rules for decades.

While almost every municipality in New York has provisions in its collective bargaining contracts with police regarding discipline, all cities and towns are not bound by those rules. The Court of Appeals (“the Court”), the state's highest court, has maintained that police discipline is not always a proper subject for collective bargaining.

In 2006, the Court held that “police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.”³ The Court reasoned that since New York City’s Charter and Administrative Code vested the authority to discipline police in its police commissioner, the City was not required to bargain with its police union in changing disciplinary measures, even though those disciplinary subjects had previously been addressed in its expired contract with the union.⁴ In explaining its conclusion, the Court of Appeals held that Civil Service Law Section 76(4) states that Sections 75 and 76 shall not “be construed to repeal or modify” preexisting laws, and among the laws thus grandfathered are several that...provide expressly for the control of police discipline by local officials in certain communities.”⁵ The Court also clearly notes, “While the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials over the police.”⁶

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FOR AN OVERVIEW OF THE NYS CIVIL SERVICE LAW SECTIONS AND THE TAYLOR LAW, SEE PAGE 5.

In other words, where the State Legislature granted a municipality authority over police discipline before enacting Civil Service Law Sections 75 and 76 (in 1958), those sections do not alter that authority, and police discipline is not subject to collective bargaining.

The Court of Appeals upheld its reasoning in additional cases:

- In 2012, the Court of Appeals maintained its position, when upholding the authority of the Town of Wallkill to pass a local law that allows its town board to discipline officers over police union objections.⁷
- In 2017, the Court upheld the City of Schenectady's right to unilaterally enact police disciplinary measures different from those in its contract with the police union.⁸

Buffalo has the Power to Discipline Its Police

An examination of the legislative history of Buffalo's charters reveals that the City has the right to discipline police officers outside the confines of its contract with the police union.

In 1914, the New York State Legislature enacted a charter for the City of Buffalo expressly granting the Common Council the right to discipline police. Title VII, Article I, Section 250 of that Charter states that "there shall be a department of police, which shall be a subordinate department of the department of public safety, and which shall have charge of all police matters of the city. ... The government and *discipline* of the department shall be prescribed by the council in form of orders, rules, and regulations for such department"⁹ (*emphasis added*). The section goes on to state "[t]he orders, rules and regulations of the council relating to this department shall have the same force and effect as if herein enacted, provided they are not in conflict with the laws of the state."¹⁰ By the explicit language regarding discipline in this Act, the "Legislature has expressly committed disciplinary authority over a police department to local officials" in Buffalo.

In later versions of the City Charter – after the Home Rule Amendment to the New York State Constitution of 1924, but before 1958, when Civil Service Law Sections 75 and 76 were enacted –

The NYS Court of Appeals has upheld the right of New York City to change police disciplinary measures outside of collective bargaining, the right of the Town Board of Wallkill to discipline police officers, and the right of the City of Schenectady to adopt police disciplinary measures different from its police union contract.

Common Council amended the Charter to vest disciplinary authority of police in the police commissioner. Section 224 of the 1949 City Charter clearly states that “[t]he commissioner of police shall be charged with the power and duty of governing and disciplining the department and the members of the police force and all subordinates and employees of the department.”¹¹

As with New York's City Charter, the State Legislature granted Buffalo Common Council the power to discipline police, along with authority over subsequent measures. After the advent of home rule, the Council exercised the authority by vesting police disciplinary power in the commissioner of police. Therefore, as with New York City, the power of the Buffalo police commissioner to discipline police is grandfathered in by Section 76(4) of the Civil Service Law, following the Court of Appeals' reasoning.

Just as Common Council vested its authority to discipline police in the police commissioner, it can also transfer that authority through a City Charter amendment. In April 2021, State Attorney General Letitia James issued a letter in support of the Buffalo Police Advisory Board's recommendation to amend the City Charter to allow the Board to subpoena and discipline officers, demonstrating her opinion that Buffalo has the power to grant this authority to its civilian board.¹²

The Buffalo police commissioner appears to have the authority to discipline officers outside of the provisions of the collective bargaining agreement — by application of the Court of Appeals rulings and the office's vested powers before 1958. This power may be challenged at arbitration, but, as shown above, the Court of Appeals has consistently sided with local governments with charter authority over arbitrators and police unions in disciplinary matters.

Moreover, the City of Buffalo seems to have the right to treat police discipline as an impermissible subject of bargaining, directing the police commissioner to fire bad cops. However, the power to discipline police is irrelevant if the City lacks the will to exercise it, which may require contesting any appeals of these firings all the way up to the state's highest court.

The legal authority of cities like Buffalo to discipline police outside

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of the collective bargaining process is well established. So why do cities like Buffalo choose not to exercise that authority — and why does that authority matter now? The answers lie in the history of public employee bargaining rights and applying those rights in situations where police have used unjustified or unnecessary force against civilians.

Collective Bargaining Rights of Public Employees in New York State

NEW YORK STATE CIVIL SERVICE LAW SECTIONS 75 AND 76

Public sector unions won a variety of collective bargaining rights for workers throughout the 1940s and 1950s. The passage of Sections 75 and 76 of the New York Civil Service Law in 1958 granted the right to representation at disciplinary hearings for all public employees. These sections provide several classes of public employees — police officers included — with protections during disciplinary actions, including the right to representation and arbitration during disciplinary proceedings. However, Section 76(4) provides an exception, stating that “nothing contained in section 75 or 76 of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.”¹³

In the past 15 years, this exception enabled several cities and towns to implement police disciplinary measures outside of collective bargaining agreements. However, the City of Buffalo has yet to take advantage of this exception.

THE TAYLOR LAW

In 1967, the New York State Legislature passed the Taylor Law, which, among other provisions, gave public employees the right to organize for collective bargaining purposes, allowed local governments to enter into collective bargaining agreements with the bargaining representatives of its public employees, and created the Public Employment Relations Board (PERB) to resolve disputes between local governments and public employee unions. While PERB decisions are subject to review by the courts, many local governments choose not to appeal them. One explanation could be

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because of the time and expense of doing so — lawyers could spend months or even years to get a single case to the State's highest court.

THE TRIBOROUGH AMENDMENT

In 1982, an amendment to the Taylor Law required local governments to abide by expired contract provisions during an impasse in negotiations with unionized employees, so long as those employees do not strike.¹⁴ The changes, known as the Triborough Amendment, essentially allow police unions to wait out unfavorable terms a local government proposes because it must honor the terms of the expired contract — wages, hours, pension contributions, pay increases, and other terms — until the involved parties reach a new contract.¹⁵

Collective Bargaining Rules as Obstacles to Police Reform

The application of collective bargaining rules to police discipline has been one of the most significant obstacles to reform, because those rules make firing bad officers extremely difficult. These rules also contribute to a culture that overlooks officer misconduct or incompetence, shielding officers who need punishment or retraining from facing discipline. This leads to more incidents of abuse, as outlined below. The consequences of these disciplinary procedures create an environment that drastically lowers the bar on effective discipline and subjects communities to a reduced quality of life, with no expectation of protection or justice from the legal authority to provide it.

Those unaffected by police violence routinely state that the remedy for unjustified shootings, beatings, and acts of physical and psychological violence is better training instead of officer termination and criminal charges. These conditions — that afford a small minority of the worst police officers more protection than the people they abuse — have led to the alienation of entire communities and public doubt in the legitimacy of our law enforcement system. This brief argues that taking full advantage of the legal powers that municipalities already have can help remedy some of the fundamental flaws in our society's criminal justice practices.

The collective bargaining rules spelled out above mean that cities

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and towns often have difficulty placing new rules or disciplinary procedures into police contracts without the police union's agreement. Thanks to the Triborough Amendment, in New York State, officers can effectively refuse specific changes to the job rules they oppose and continue to operate under the expired contract.

Most rules governing police conduct are subject to collective bargaining—a process in which the police union and the local government negotiate employment conditions for officers. Police unions often successfully challenge new rules in arbitration or court when its implementation is outside of the traditional process, or there is an attempt to insert it into the contract during the bargaining procedures.¹⁶

When a local government offers terms that a police union considers unfavorable, it can force the city to provide different terms by simply declaring an impasse. This forces the city to continue abiding by the pay increases and other provisions of the expired contract. Because the expired provisions favor the status quo over reform, the city often must make concessions to move forward. This means that the most substantive changes — especially those regarding police oversight and the ability to fire bad cops — have proven difficult to implement.

Elected officials are often reluctant to pass legislation or collective bargaining agreements with substantial reforms. The unwillingness to fully use their powers to discipline officers is often due to police unions' political power, which is often well-funded and can sway elections by painting opponents as “soft on crime.” In Western New York, police unions are skilled at blocking changes to disciplinary procedures and keeping officers who commit misconduct on the force. Examples include:

- The Rochester Police Union successfully challenged the ability of the City's Police Accountability Board to discipline officers. The case is being appealed.¹⁷
- The City of Buffalo fired former police officer Jorge Melendez in 2012 for his role in an illegal marijuana growing operation. The Buffalo Police Benevolent Association challenged his termination, with PERB requiring the City to pay Melendez

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over \$200,000 in back pay due to the procedure followed to fire him — even after jail sentencing for his crime.¹⁸

- The Cheektowaga Police Union successfully challenged the 2020 termination of officer Sean Trapper after he punched his supervisor during a holiday party, resulting in his reinstatement.¹⁹
- The reinstatement of Salvatore Vaccaro, a deputy in Erie County, after his union challenged his termination after numerous instances of misconduct, including falsifying records and sleeping during his shift.²⁰

In other instances, police unions have played a role in police officers keeping their jobs after incidents of unjustified use of force, resulting in the injury or death of civilians.

- In 2014, two off-duty police officers provided security at Molly's Pub in Buffalo when the bar manager shoved William Saeger Jr. down a flight of stairs; he was knocked unconscious and later died from his injuries. One of the off-duty officers, Robert Eloff, handcuffed the unconscious Saeger and his friend, Donald Hall, who tried to help him. In order to justify the arrest, Eloff falsely stated that Hall trespassed, resulting in jail time for the false misdemeanor arrest.²¹ The other officer, Adam O'Shei, who went along with Eloff's story — and did not intervene — received a suspension from the police force. However, the Erie County District Attorney's Office granted him immunity in exchange for his testimony in the bar manager's manslaughter trial, absolving him of charges for any crime.²² Buffalo Police later reinstated O'Shei to field duty.²³
- In 2012, Buffalo Police Officer Karl Schultz shot and paralyzed 17-year-old Wilson Morales after a car chase. A filed use of force complaint couldn't hold due to a process outlined in the collective bargaining agreement.²⁴ Despite this finding, the City of Buffalo paid a \$4.5 million settlement to Mr. Morales for the shooting.²⁵
- In 2020, Officer Schultz, who Internal Affairs investigated 17 times often for the use of force complaints, went on to shoot Willie Henley, a 60-year-old homeless man with mental illness,

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after police responded to a wellness call. Schultz is still on Buffalo's police force.²⁶

Police Contract Provisions that Block Discipline

The above examples of departments protecting bad officers demonstrate how police contracts can shield cops from discipline. According to the Buffalo Police's collective bargaining agreement with the City, "a permanent employee shall not be removed or otherwise subjected to any disciplinary penalty provided in this Article except for incompetency or misconduct or for committing a felony or any crime involving moral turpitude, and only then after a [internal] hearing upon stated charges."²⁷ The effect of this provision carries significant consequences. If an officer goes along with another cop's false arrest — even if the evidence is so strong it requires immunity to testify — the lack of conviction would have the same effect under the contract if the incident never happened. Due to the same provision and PERB's strict adherence to it, former Officer Melendez received nearly \$200,000 of taxpayer money after imprisonment and conviction for marijuana growing, due to his termination without a hearing and before his sentencing occurred.²⁸

Additionally, the article on discipline in the Buffalo Police contract maintains officer suspension can only occur for 30 days without pay.²⁹ This provision placed officers Robert McCabe and Aaron Torgalski — who were on video pushing Martin Gugino to the ground during a peaceful protest, cracking his skull — back on police payroll a month after their suspension, with felony assault charges still pending at the time.³⁰ With a grand jury dismissing those charges, the officers' reinstatement is likely if it hasn't occurred, though video evidence of the incident makes a strong case for poor police conduct and the need for corrective action.

The police contract also requires that the first step in disciplinary investigations is a Department of Internal Affairs investigation. Officers in the same bargaining unit as the accused administer this process, clearing officers of wrongdoing 94% of the time.³¹ Internal Affairs often finds no officer misconduct in cases with direct harm, even if there is a reasonable assumption that a jury would determine otherwise. An example is Officer Schultz shooting and paralyzing a child, resulting in a multimillion taxpayer-funded settlement.

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What Distinguishes Police Contracts from Other Collective Bargaining Agreements?

Those familiar with the collective bargaining process may note that grievance procedures, which prevent management from terminating workers at will, are common throughout organized labor. However, it is important to note that throughout the history of labor rights in the United States, police have often been in a separate category due to law enforcement's peculiar role as laborers engaged in state violence. Police often acted as the arm of management in breaking strikes during the first half of the 20th century, and the Buffalo police union is still not a part of the Western New York Area Labor Federation, which covers most other unionized labor in the area.³²

Special protections given to officers are a distinguishing factor of police contracts, which most laborers are unable to utilize. Those advantages are dangerous because of the unique relationship that the power to discipline police has to the safety of our democratic system. For example, the first step of the Buffalo Police disciplinary process is an internal affairs investigation, conducted by fellow officers who often find in favor of the accused officer. Other organized laborers typically do not get to police themselves in disciplinary matters. Article XI of the Buffalo Police contract also gives an officer accused of wrongdoing the right to contest the "final" disciplinary decision of the police commissioner through arbitration.³³

These sorts of provisions are common in police contracts. A University of Pennsylvania Law Review survey of 656 police contracts across the country — including the City of Buffalo — found that these contracts create conditions in which third-party arbitration determines an overwhelming number of police disciplinary decisions instead of police commissioners or elected officials responsible to the public.³⁴ While one may make an argument that an arbitrator is not as susceptible as an elected official to the political pressure that powerful police unions bring, it does not pass muster when one considers that most police contracts, including Buffalo's, require that the union and local government mutually agree upon an arbitrator.³⁵ In Western New York, the list of police arbitrators is small, and arbitrators remain on that list if

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agreeable to the police union. More importantly, while elected officials may face political pressure from a police union, they can also face pressure from their constituents. In contrast, an arbitrator has no accountability to the public whatsoever. The result is that “the average American police officer faces even less democratic accountability than many scholars have previously assumed.”³⁶

This lack of accountability has a chilling effect on public confidence in law enforcement, one of the factors which led to the 2020 uprisings. In the infancy of policing in New York State, the Court of Appeals pointed out how important it is for police to be subject to public officials.³⁷ The Court reasoned that because the police possess a power similar to that of the military — in that it has, in certain situations, the ability to use deadly force to subjugate citizens — they must be subordinate to civilian authority, as our nation’s military is to its commander in chief. The current state of police discipline is comparable to our military being solely responsible to itself and presents a comparable threat to the health of our democracy.

Arguing that police should have the same right to due process in disciplinary matters as other organized laborers because police play a different role than any other workers does not excuse this threat. Too often in our nation’s history, police have been the instruments of organized violence against oppressed groups, such as striking workers, queer people, immigrants, and people of color. Copying and pasting concepts of industrial justice onto a system of police discipline is not only inappropriate, but has a much different effect on our democracy.

For example, an industrial worker at a factory who recklessly breaks a widget, faces discipline, and narrowly keeps their job because of a favorable contract provision only poses a further threat to the factory’s widgets. Police officers who recklessly kill and get to keep their jobs because of a contract technicality pose a threat to other citizens and our faith in public fairness. There should be no treatment of officers as other organized laborers, because people are not widgets.

The privileges that police have won over other laborers too often include the right to commit violence against citizens without being

According to the Court of Appeals, police possess a power similar to that of the military; in certain situations, they have the ability to use deadly force. Just like the military, then, they should be subordinate to civilian authority.

accountable to public officials, creating the imbalance that the Court of Appeals has warned against for over 100 years. These privileges are not essential to the job of policing, and cities should use their existing authority to reign in these privileges in the interest of the public trust to ensure officers are accountable to the people.

What About Rochester?

Rochester, one of the largest cities in New York State, is currently in a legal fight to exercise disciplinary authority over its police force. During the preparation of this brief, the State Supreme Court ruled against Rochester's Police Accountability Board — the city's authority to discipline police outside of the terms of its collective bargaining agreement — in favor of the police union. The decision, currently in the Appellate Division of the Supreme Court — strips the board of its discipline power that the Rochester City Council bestowed in 1985, altering its charter to conform its police disciplinary power to the provisions of the Civil Service Law.

In 1985, the Rochester City Council repealed the “Charges and trials of policemen” portion of its city charter, which notes, “for the reason that this subject matter is covered in the Civil Service Law.”³⁹ While the Court of Appeals has yet to decide on the authority of Rochester’s City Council to cede its disciplinary authority back to the state, the ruling could set a precedent that impacts Buffalo, though the city has yet to take such action.

Unlike Rochester, Buffalo’s Common Council has never ceded its police disciplinary authority, as the current City Charter contains the same discipline provision that it did in 1949.⁴⁰ There is no argument that Buffalo ever ceded its police disciplinary authority to the state, and it should have the authority to use that power regardless of the provisions of its police contract. This point also illustrates why the Buffalo Police Advisory Board’s call to alter the police disciplinary structure in Buffalo should have fewer legal obstacles to success than its Rochester counterpart.

Unlike Rochester, Buffalo’s Common Council has never ceded its disciplinary authority, as the current City Charter contains the same discipline provision that it did in 1949.

Conclusion

Decisions from the NYS Court of Appeals have prescribed a remedy to the problem of officer discipline that Buffalo has yet to apply. In Buffalo, when city officials are in dispute with the police union, they have submitted disciplinary decisions to the Public Employment Relations Board (PERB) – when not required to do so. When municipalities submit to the disciplinary procedures in their police contracts — as seen in Buffalo, Cheektowaga, and the Erie County Sheriff's Office — they often lose, forced to reinstate officers in need of termination. In other cases, they take little or no disciplinary action out of fear of costly and unfavorable arbitration.

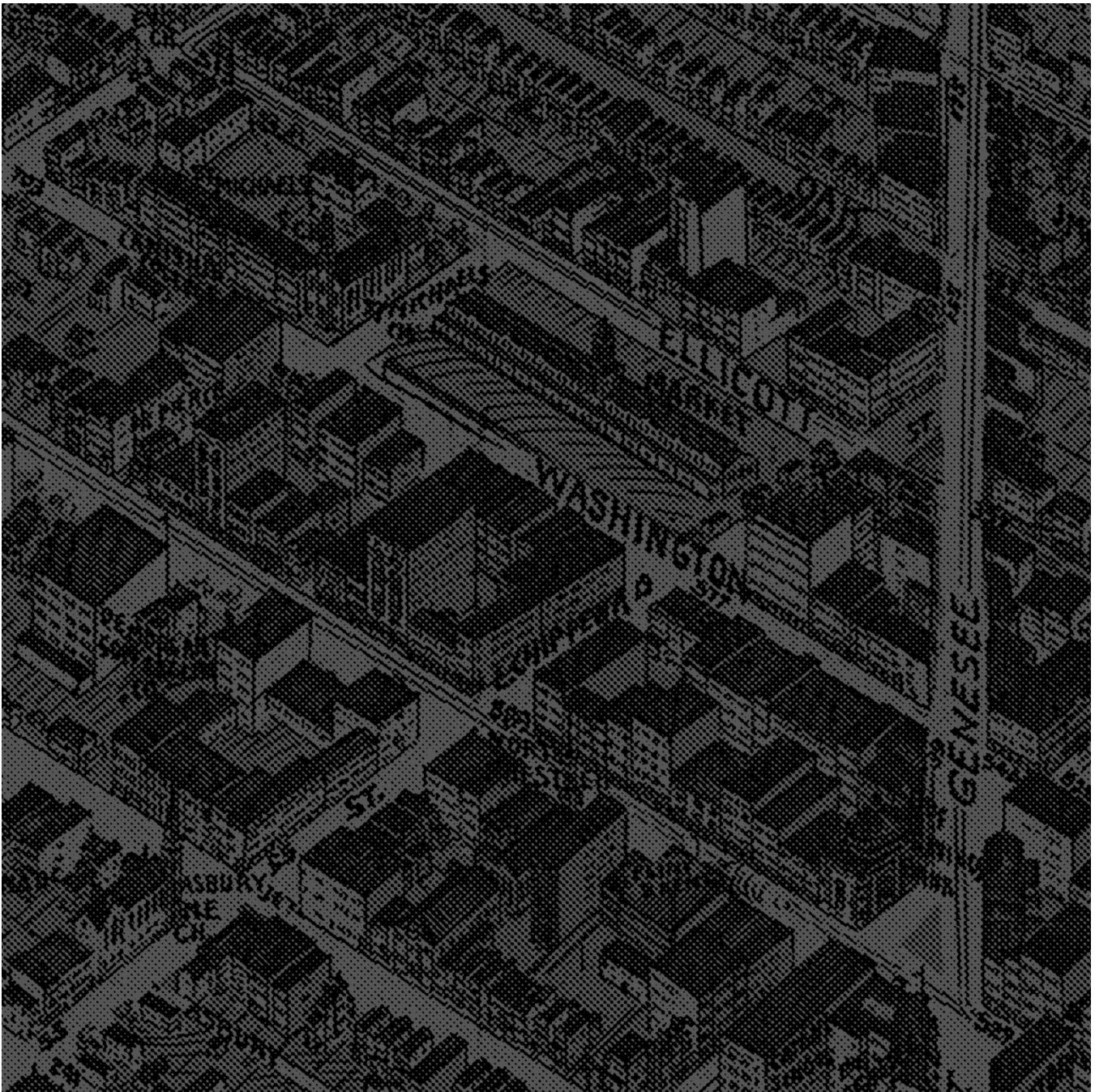
The question that remains is this: If state courts have given local governments the power to fire officers outside of their police union contracts, why do those governments keep abiding by unfavorable contract provisions and arbitration decisions, making it more difficult to fire bad cops? City officials raise obstacles to firing officers, such as lengthy legal appeals that may result. But in the current climate, where Black and brown bodies are increasingly subject to police violence without consequence — both in the City of Buffalo and across the country — answers to these questions are long overdue.

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- ³⁶ *Ibid.*, 552.
- ³⁷ *Ibid.*
- ³⁹ *Matter of Rochester Police Locust Club Inc. v City of Rochester*, 2020 NY Slip Op 20357.
- ⁴⁰ “Duties and Powers,” *City of Buffalo Charter Chapter 13 Section 4*. Available from: <https://ecode360.com/13552020>.



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