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## Police Unions

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# Police Unions

Catherine L. Fisk & L. Song Richardson\*

## ABSTRACT

*No issue has been more controversial in the discussion of police union responses to allegations of excessive force than statutory and contractual protections for officers accused of misconduct, as critics assail such protections and police unions defend them. For all the public controversy over police unions, there is relatively little legal scholarship on them. Neither the legal nor the social science literature on policing and police reform has explored the opportunities and constraints that labor law offers in thinking about organizational change. The scholarly deficit has substantial public policy consequences, as groups ranging from Black Lives Matter to the U.S. Department of Justice are proposing legal changes that will require the cooperation of police labor organizations to implement. This Article fills that gap.*

*Part I explores the structure and functioning of police departments and the evolution of police unions as a response to a hierarchical and autocratic command structure. Part II examines how and why police unions have been obstacles to reform, focusing particularly on union defense of protections for officers accused of misconduct. Part III describes and analyzes instances in which cities have implemented reforms to reduce police violence and improve police-community relations over fifty years. All of them involved the cooperation of the rank-and-file, and many involved active cooperation with the union. Part IV proposes mild changes in the law governing police labor relations to facilitate rank-and-file support of the kinds of transparency, accountability, and constitutional policing practices that police reformers have been advocating for at least a generation. We propose a limited form of minority union bargaining—a reform that has been advocated in other contexts by both the political left and the political right at various points in recent history—to create an institutional structure enabling diverse representatives of police rank-and-file to meet and confer with police management over policing practices.*

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INTRODUCTION

A major law and policy debate shaping the contemporary landscape of racial inequality today concerns police, whom critics assail as a major source of racial inequity and whose unions are said to be the major obstacle to reform. Critics often cite a recent instance in which a police officer who engaged in appalling misconduct escapes firing or discipline through the intervention of a union or by invoking a statutory or contractual job protection. The many recent instances of police killing civilians—when Darren Wilson shot Michael Brown in Fergu-

son, Missouri,<sup>1</sup> or when Daniel Pantaleo choked Eric Garner to death on a Staten Island street,<sup>2</sup> or when Baltimore police officers killed Freddie Gray while driving him to jail,<sup>3</sup> or when Peter Liang shot Akai Gurley in the stairwell of a New York apartment building,<sup>4</sup> or when Jeronimo Yanez shot Philando Castile during a traffic stop in suburban St. Paul,<sup>5</sup> or when Jeffrey Cook and Omar Thyme shot Alexia Christian in the back of an Atlanta police car,<sup>6</sup> or when five police officers shot and killed Kisha Michael in her car while she was unconscious<sup>7</sup>—have sparked calls to fire and prosecute the officers involved, and outrage at the difficulty and delays in doing so and at the union’s resistance to summary discipline. People rightly wonder why the union conceives of its obligation as protecting cops who appear to have engaged in clear misconduct rather than protecting the interests of “good” ones by allowing “bad” ones to be disciplined, fired, or prosecuted. Under this analysis, public employee unions are a major impediment to the kinds of reforms that would eliminate pervasive racism toward people of color and the urban poor.<sup>8</sup>

For their part, many rank-and-file police officers see the union as an important protection against endemic arbitrariness in discipline. As

<sup>1</sup> Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES: Q&A (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

<sup>2</sup> Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html?smid=pl-share>.

<sup>3</sup> Joshua Barajas, *Freddie Gray’s Death Ruled a Homicide*, PBS NEWSHOUR: THE RUN-DOWN (May 1, 2015, 1:50 PM), <http://www.pbs.org/newshour/rundown/freddie-grays-death-ruled-homicide/>.

<sup>4</sup> Pervaiz Shallwani & Thomas MacMillan, *NYPD Officer Pleads Not Guilty in Shooting Death of Unarmed Man*, WALL ST. J. (Feb. 11, 2015, 9:10 PM), <http://www.wsj.com/articles/nypd-officer-surrenders-after-indictment-in-death-of-unarmed-man-1423668909>.

<sup>5</sup> Camila Domonoske & Bill Chappell, *Minnesota Governor Calls Traffic Stop Shooting ‘Absolutely Appalling at All Levels,’* NPR: THE TWO-WAY (July 7, 2016, 7:19 AM), <http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video>.

<sup>6</sup> Christian Boone, *No Charges for Officers Who Shot Woman in Back of Patrol Car*, ATLANTA J.-CONST. (July 15, 2016, 9:07 PM), <http://www.myajc.com/news/crime—law/charges-for-officers-who-shot-woman-back-patrol-car/V519PgmXsxe48f9cmhhuqL/>.

<sup>7</sup> Angel Jennings, *A Mother Was Fatally Shot 13 Times in Inglewood. But the Police Watchdog Group Has Barely Even Met*, L.A. TIMES (Oct. 17, 2016, 4:05 AM), <http://www.latimes.com/local/lanow/la-me-inglewood-police-oversight-20160906-snap-story.html>.

<sup>8</sup> Similar criticisms have been leveled at teachers’ unions, and for similar reasons. See generally Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 OR. L. REV. 673 (2013) (describing criticisms of teachers’ unions). We focus on police unions in this Article, leaving to others to consider the extent to which our analysis and our proposal might be appropriate for other public sector employees.

we discuss in Part II, police union leaders believe they are legally and morally obliged to advocate for their members, including those accused of misconduct, and to resist efforts to strengthen the power of management to discipline officers. In part because union leaders are elected by the membership, many are reluctant to publicly question the legality of their members' behavior, and some dismiss criticisms as reflecting anti-police attitudes. If police union officials have any private reservations, they feel constrained by their role to remain publicly silent, at the very least, and often describe criminal punishment of officers who kill as being politically motivated efforts to scapegoat individual officers for systemic problems.<sup>9</sup> In their view, what appears to outsiders to be egregious police violence is in fact a justifiable reaction to dangerous suspects, bad management, and difficult working conditions, and the union's role is to protect hard-working officers from a witch hunt so that officers can protect the public.

In-depth investigations of police departments in the wake of highly publicized incidents of police violence since 2012 provide support for the views of both police union critics and police union leaders. For instance, in January 2017, the Department of Justice ("DOJ") issued a scathing report ("DOJ Chicago Report") finding, among other things, that the Chicago Police Department ("CPD") engaged in a pattern and practice of unreasonable uses of force, and that "there is no meaningful, systemic accountability for officers who use force in violation of the law or CPD policy."<sup>10</sup> In part, these accountability failures are due to collective bargaining agreements between the city and the unions that contain provisions impeding the investigation of alleged police misconduct.<sup>11</sup> However, the DOJ concluded that the CPD bears some responsibility for these accountability failures. Among other things, the DOJ Chicago Report states that the contracts allow CPD to override some of the problematic contract provisions, but management rarely does so.<sup>12</sup>

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<sup>9</sup> See Henrick Karolyszyn, *Solidarity in Blue*, CRIME REP. (Feb. 22, 2016), <http://thecrimereport.org/2016/02/22/solidarity-in-blue/>; see also Jacob Fischler, *Police Union Expresses Frustration Over Labor's Response to Ferguson, Eric Garner*, BUZZFEED NEWS (Dec. 10, 2014, 10:50 AM), [https://www.buzzfeed.com/jacobfischler/police-union-expresses-frustration-over-labor-response-to-f?utm\\_term=.np51r4WXq#.ilQlq3d0x](https://www.buzzfeed.com/jacobfischler/police-union-expresses-frustration-over-labor-response-to-f?utm_term=.np51r4WXq#.ilQlq3d0x).

<sup>10</sup> CIVIL RIGHTS DIV. & U.S. ATTORNEY'S OFFICE N. DIST. OF ILL., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 7 (2017), <https://www.justice.gov/opa/file/925846/download> [hereinafter DOJ CHI. REP.].

<sup>11</sup> *Id.* at 47.

<sup>12</sup> *Id.*

The August 2016 report of the DOJ, *Investigation of the Baltimore City Police Department* (“DOJ Baltimore Report”), faults both the rank-and-file and supervisors for the pattern of unconstitutional stops, searches, arrests, and excessive force, the “severe and unjustified” racial disparities harming African Americans, and retaliation against civilians and police officers who speak out about abuses.<sup>13</sup> The DOJ Baltimore Report criticizes certain statutory and contractual job protections, which police unions fought hard to attain and vigorously defend, but it also describes shocking incidents of managerial neglect and retaliation of the sort that prompt employees to join and defend unions in the first place.<sup>14</sup> Although the DOJ Baltimore Report takes no position on that city’s police union, as we explain below in Section II.B.1, past DOJ civil rights interventions and consent decrees have encountered unions as obstacles to implementation of reform. Many proposed reforms entail creating mechanisms of institutionalized cooperation between rank-and-file and management that unions may be uniquely capable of delivering. As we argue below in Section III.B, such reforms will not succeed if they fail to consider why unions have not previously advocated such mechanisms or why they might resist them.

The debates over police unions are part of a larger legal and policy debate over whether public employee unions are agents of or obstacles to government reform, particularly because local government employees (including police) are among the most densely unionized in the country.<sup>15</sup> A standard criticism of government employee unions is that they exercise disproportionate influence in setting government policy.<sup>16</sup> Until the passing of Justice Scalia, the Supreme Court appeared to be on the path to reduce union power,<sup>17</sup> and the Court with

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<sup>13</sup> CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), [http://civilrights.baltimorecity.gov/sites/default/files/20160810\\_DOJ%20BPD%20Report-FINAL.pdf](http://civilrights.baltimorecity.gov/sites/default/files/20160810_DOJ%20BPD%20Report-FINAL.pdf) [hereinafter DOJ BALT. REP.].

<sup>14</sup> See *id.* at 146, 152–53. Similarly, the DOJ Chicago Report notes that some of the actions of CPD management, such as failing to provide information about the criteria for promotions and failing to provide officers with safe and functional equipment, lower officer morale and foster officer skepticism. See DOJ CHI. REP., *supra* note 10, at 123, 129.

<sup>15</sup> In 2015, forty-five percent of local government employees were represented by a union, as compared to less than eight percent of private sector employees. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USDL-16-0158, UNION MEMBERS—2015 tbl.3 (2016), [https://www.bls.gov/news.release/archives/union2\\_01282016.pdf](https://www.bls.gov/news.release/archives/union2_01282016.pdf).

<sup>16</sup> See DANIEL DISALVO, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES 4–5 (2015).

<sup>17</sup> Five Justices expressed concern during a January 2016 oral argument about the constitutionality of a union security provision in a teachers’ union contract, in part because of the influence that teachers’ unions exert in setting education policy. See Transcript of Oral Argument at

Justice Gorsuch is expected to continue down that path.<sup>18</sup> Moreover, legislatures in many states have eliminated the ability of some government employees to bargain collectively and narrowed the permissible subjects of bargaining for those employees who retain union rights at all, and these reductions in the power of public employee unions are often described as being necessary to reduce the cost and improve the quality of government service.<sup>19</sup> Concern about the influence of public employee unions is not confined to the political right, as activists and scholars have focused criticism on union contractual provisions protecting officers investigated for excessive use of force.<sup>20</sup>

Perhaps no issue has been more controversial in the discussion of police union responses to allegations of excessive force than statutory and contractual protections for officers accused of misconduct, as crit-

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4, 15, 41–42, 45–47, 76, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915). After Justice Scalia died, an equally divided Court affirmed the lower court's dismissal of the suit and, therefore, the law remains unchanged. *See Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 227–32 (1977) (affirming that public unions may participate in policymaking).

<sup>18</sup> Josh Gerstein, *What Trump's Supreme Court Pick Means for the Court*, POLITICO (Feb. 1, 2017, 5:05 AM), <http://www.politico.com/story/2017/02/trump-supreme-court-gorsuch-234471> (“Perhaps the most certain result of putting Gorsuch on the court is an eventual setback for public employee unions.”).

<sup>19</sup> *See* MARTIN H. MALIN ET AL., *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 7–20 (3d ed. 2016) (summarizing changes to public sector labor law and gathering sources evaluating need for changes).

<sup>20</sup> *See, e.g.*, Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1239 (2017) (arguing that state labor law poses a significant barrier to police reform and proposing that the public be given a right to participate in collective bargaining over police disciplinary procedures); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 799–801 (2012) (arguing that “[c]ollective bargaining rights deter department-wide changes intended to prevent constitutional violations” and proposing that scholars attend not only to constitutional law and civil rights laws regulating policing but also to labor and employment law); Samuel Walker, *The Baltimore Police Union Contract and the Law Enforcement Officers's Bill of Rights: Impediments to Accountability* (May 2015) (unpublished report), [http://www.aclu-md.org/uploaded\\_files/0000/0681/walker\\_-\\_baltimore\\_police\\_union\\_contract\\_report.pdf](http://www.aclu-md.org/uploaded_files/0000/0681/walker_-_baltimore_police_union_contract_report.pdf) (arguing that collective bargaining agreements and law enforcement officers' bills of rights (“LEOBORS”) are impediments to police accountability); *Black Lives Matter Publishes 'Campaign Zero' Plan to Reduce Police Violence*, NPR: ALL THINGS CONSIDERED (Aug. 26, 2015, 5:42 PM), <http://www.npr.org/2015/08/26/434975505/black-lives-matter-publishes-campaign-zero-plan-to-reduce-police-violence>; *see also Developments in the Law—Policing*, 128 HARV. L. REV. 1706 (2015) (discussing the law regulating policing, but not delving into labor law); 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 (2005). *But see* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1234–35 (2016) (urging that critics are mistaken to advocate eliminating procedural protections for officers suspected of wrongdoing and instead that the investigative protections available to officers should be extended to all criminal suspects). Part III of this Article discusses the points of agreement and disagreement with these scholars.

ics have assailed such protections and police unions defend them.<sup>21</sup> Police in most states enjoy significantly more procedural and substantive protections against discipline for on-the-job and off-the-job misconduct than do private sector employees. As government employees, police have constitutional due process rights if, as a matter of state or local law or practice, they have an expectation of continued employment sufficient to create a property interest in the job.<sup>22</sup> They have constitutional immunity from use, in a criminal prosecution, of a statement made during an internal administrative investigation when the officer was compelled to speak, under penalty of job discipline.<sup>23</sup> They also have a limited First Amendment right to be free from retaliation for political activity off the job, unless the municipality has adopted a valid, nondiscriminatory law prohibiting partisan political activity.<sup>24</sup> In at least sixteen states, police additionally have statutory rights to certain procedures in the investigation of misconduct under Law Enforcement Officers Bills of Rights (“LEOBORs”) as well as civil service protections in many other states.<sup>25</sup> Supplementing these constitutional and statutory protections are police union contracts, which

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21 See Keenan & Walker, *supra* note 20, at 243 (advocating reduction of LEOBOR protections); Levine, *supra* note 20, at 1235 (advocating extending LEOBOR protections to all suspects); Jonah Newman, *Can Chicago Take on Police Union Contracts This Year?*, CHI. REP. (Jan. 9, 2017), <http://chicagoreporter.com/can-chicago-take-on-police-union-contracts-this-year/>.

22 See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540–41 (1985) (public employee with property interest in employment who faces disciplinary discharge is entitled to pre-termination and post-termination procedural protections); *Bishop v. Wood*, 426 U.S. 341, 343–44 (1976) (observing, in case involving discipline of police officer, that “[a] property interest in employment can, of course, be created by ordinance, or by an implied contract”); *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) (junior college professor had a right to claim a property interest in continued employment even in absence of a tenure system because the faculty guide created an expectation of tenure).

23 See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); see also Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1312 (2001) (noting that many courts find such statements to be “the equivalent of formally immunized testimony” under *Garrity*).

24 See *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417–19 (2016); cf. *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 556 (1973) (reaffirming the constitutionality of laws limiting certain political activities of federal employees).

25 See, e.g., ARIZ. REV. STAT. ANN. §§ 38-1101 to 38-1104 (2015); CAL. GOV’T CODE §§ 3301–3311 (West 2010); DEL. CODE ANN. tit. 11, §§ 9200–9209 (2015); FLA. STAT. § 112.532 (2016); 50 ILL. COMP. STAT. ANN. 725/3 (West 2014); KY. REV. STAT. ANN. § 15.520 (West 2010); MD. CODE ANN., PUB. SAFETY § 3-104 (LexisNexis 2011); MINN. STAT. § 626.89 (2014); NEV. REV. STAT. ANN. § 289.060 (LexisNexis 2013); N.M. STAT. ANN. § 29-14-4 (2013); 42 R.I. GEN. LAWS § 42-28.6-2 (2007); TEX. LOC. GOV’T CODE ANN. §§ 143.051, 143.123 (West 2008); VA. CODE ANN. § 9.1-501 (2012); W. VA. CODE ANN. § 8-14A-2 (LexisNexis 2012).



contain additional procedural and substantive protections against discipline.<sup>26</sup>

The public controversy gives new urgency to consideration of the role of police unions in promoting or thwarting police reform.<sup>27</sup> Scholars of policing have debated police professionalization and community policing, and have discussed the relationship between policing and democracy, but have, as police scholar Samuel Walker put it, “seriously neglected” police unions.<sup>28</sup> The substantial social science literature on policing and police unions has rarely engaged with public sector labor law, other than to note that collective bargaining rights are positively correlated with increased compensation and job protections.<sup>29</sup> Although labor law provides important opportunities for and constraints on organizational change in police departments,<sup>30</sup> police unions and police union contractual protections have been neglected in labor law scholarship.<sup>31</sup> A particular concern of labor law has been whether and how unionization can improve the quality of work for the benefit of

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<sup>26</sup> See *infra* Section I.C.2.

<sup>27</sup> See Rushin, *supra* note 20, at 1198; Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2205–17 (2014). Law professor David Sklansky and criminologist Samuel Walker have published their works on police unions in policing journals, but few other scholars’ works on police unions have appeared in law reviews. See, e.g., Monique Marks & David Sklansky, *Introduction: The Role of the Ranks and File and Police Unions in Police Reform*, 18 POLICING AND SOC’Y 1 (2008), reprinted in *POLICE REFORM FROM THE BOTTOM UP 1* (Monique Marks & David Sklansky eds., 2012) (a reproduction of special issues of two journals: *POLICE PRAC. & RES.*, May 2008, and 18 *POLICING AND SOC’Y*, no. 1, 2008); Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, *POLICE PRAC. & RES.*, May 2008, at 95, reprinted in *POLICE REFORM FROM THE BOTTOM UP*, *supra*, at 88; cf. Harmon, *supra* note 20 (published in the *Michigan Law Review*).

<sup>28</sup> Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, *POLICE PRAC. & RES.*, May 2008, at 95, 95 (noting that although police chiefs and civil rights activists “frequently allege that the police union prevents the fair and thorough investigation of officer misconduct and the proper discipline of officers who have in fact engaged in improper activity[.] [s]ocial scientists should not take these allegations at face value, since they are made by persons with a direct interest in the issues involved”). As noted above, see *supra* note 20, very recently legal scholars have begun to examine certain aspects of police labor and employment relations, but this Article is the only law review piece that systematically studies the role of police unions as institutions.

<sup>29</sup> See, e.g., Brigham R. Frandsen, *The Effects of Collective Bargaining Rights on Public Employee Compensation: Evidence from Teachers, Firefighters, and Police*, 69 ILR REV. 84, 85 (2016).

<sup>30</sup> As Stephen Rushin says in his analysis of police union contracts, legal scholars have only recently discussed the impact of labor and employment law on police behavior. Rushin, *supra* note 20, at 1198.

<sup>31</sup> Until Rushin, *supra* note 20, the only content analysis of police union contracts was a 1992 content analysis of 328 contracts. David L. Carter & Allen D. Sapp, *A Comparative Analysis of Clauses in Police Collective Bargaining Agreements as Indicators of Change in Labor Relations*, 12 AM. J. POLICE, no. 2, 1993, at 17, 19.

consumers of goods and services while simultaneously protecting the dignity and standard of living of workers.<sup>32</sup> But more work remains to be done in thinking about police unions and public sector labor law as offering leverage or resistance to change. In short, although there is a general scholarly consensus that police unions play an important role in policing and politics, there is no agreement concerning their proper role, and there has been almost no sustained analysis of the role they might play in police reform.<sup>33</sup> The scholarly deficit has substantial public policy consequences, as groups ranging from Black Lives Matter to the U.S. DOJ are proposing legal changes that will require the cooperation of police labor organizations to implement notwithstanding a long history of police rank-and-file resistance to imposition of reforms without their input.<sup>34</sup>

In public policy debates and in the nascent legal scholarship on policing in the wake of the recent spate of police violence that spawned the Black Lives Matter movement, many have advocated restricting the job protections for police officers in order to facilitate the detection and punishment of criminal police violence. Reform is essential. But reform will not be accomplished simply by eliminating job protections, even if that were politically feasible. Without support from unions and some police rank-and-file, the kinds of reforms that are now being proposed—e.g., public involvement in union-management negotiation of disciplinary procedures<sup>35</sup>—are unlikely to be enacted or implemented. Rather, police need to be involved in improving police practices, and that involvement requires the cooperation of some kind of police labor representative.

This Article explains how public sector labor law might be changed to enable activists outside of police departments to find allies within police departments to support reforms. It does not propose specific policy reforms about policing. Rather, it proposes structural reform to police union representation and the duty to meet and confer in order to enable policy reforms to be adopted and, importantly, implemented. In particular, this Article proposes that state public sector

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<sup>32</sup> Frandsen, *supra* note 29, at 84–85.

<sup>33</sup> George L. Kelling & Robert B. Kliesmet, *Police Unions, Police Culture, and Police Abuse of Force*, in *POLICE VIOLENCE* 191, 192 (William A. Geller & Hans Toch eds., 1996).

<sup>34</sup> See, e.g., *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/wp-content/uploads/2016/07/CommControlofLawEnforcement-OnePager.pdf> (last visited Mar. 19, 2017); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

<sup>35</sup> See, e.g., Rushin, *supra* note 20, at 1199.

labor law be amended to require police departments to meet and confer with labor representatives other than the certified police union. This modified form of minority union bargaining would, ideally, enable the minority of officers in a department who favor reform to discuss police practices even if the majority union prefers not to, or is legally prohibited from, negotiating over those practices. The minority union could be any organization the officers choose to represent them. It might be an existing police officers' affinity group (e.g., the local or national Black, Latino, women's or other officers' association), or a Black Lives Matter chapter, or any other group whom a significant number of officers in a department select. The scope of the duty to confer would encompass topics that are not mandatory subjects of bargaining under most state's labor law, including use of force, policing techniques, and community relations. The minority union would have no authority to modify the terms of the collective bargaining agreement negotiated by the majority union. The point of minority union bargaining would be to give the rank-and-file a voice in policing policy without undermining the economic and other terms that management negotiated with the majority union.<sup>36</sup> A limited form of minority union bargaining—a reform that has been advocated in other contexts by both the political left and the political right at various points in recent history—would create an institutional structure enabling diverse representatives of police rank-and-file to meet and confer with police management over policing practices. Although it might weaken the power of the majority union, as any form of minority- or dual-unionism necessarily does, it would facilitate rank-and-file support of the kinds of transparency, accountability, and constitutional policing practices that police reformers have been advocating for at least a generation.

Part I explores the structure and functioning of police departments and the evolution of police unions as a response to a hierarchical and autocratic command structure. Part II examines how and why police unions have been obstacles to reform, focusing on union defense of protections for officers accused of misconduct. Part III describes and analyzes fifty years' worth of instances in which cities have implemented reforms to reduce police violence and improve police-community relations. All of the proposed reforms involved the cooperation of the rank-and-file, and many involved active cooperation with the union. Part IV proposes relatively straightforward changes in

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<sup>36</sup> The specifics of the proposal are laid out in Part IV.

the law governing police labor relations to implement the proposed form of minority-unionism.

## I. POLICE DEPARTMENTS AND POLICE UNIONS

### A. *The Structure of Police Departments and Police Labor Relations*

Across the nation, there are approximately 18,000 police agencies which together employ more than 1.1 million people, 750,000 of whom are sworn officers.<sup>37</sup> Although many small or rural departments do not have unions, most large urban police departments are unionized.<sup>38</sup> The total number of unionized officers is unknown and unions differ in their structure, priorities, and degree of activity.<sup>39</sup>

Police departments are hierarchical, with a chain of command as in the military<sup>40</sup> and a sharp division between the leadership and the rank-and-file.<sup>41</sup> The top command, consisting of the police commissioner and the various chiefs,<sup>42</sup> is responsible for official policymaking within the organization.<sup>43</sup> Typically, they have very little personal contact with the rank-and-file,<sup>44</sup> perhaps in part due to the long-dominant belief among police management scholars that police departments are

<sup>37</sup> Karoliszyn, *supra* note 9.

<sup>38</sup> *See id.* For a description of the wide variety of policing organizations that exist, see PETER K. MANNING, *POLICING CONTINGENCIES* 43–45 (2003).

<sup>39</sup> Karoliszyn, *supra* note 9; *see also* Colleen Kadleck, *Police Employee Organizations*, 26 *POLICING* 341, 345 (2003) (using a national sample of police employee organizations, explores the variety in their structure, membership and perspectives on labor relations).

<sup>40</sup> David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 *J. CRIM. L. & CRIMINOLOGY* 1209, 1209 (2006); *see also* EGON BITTNER, *ASPECTS OF POLICE WORK* 25 (1990); Marks & Sklansky, *supra* note 27, at 1, 3. This structure is a historical accident having to do with the origins of the modern police in England. *See* JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 116–17 (1993).

<sup>41</sup> *See* SKOLNICK & FYFE, *supra* note 40, at 117–18; Peter K. Manning, *A Dialectic of Organisational and Occupational Culture*, in *POLICE OCCUPATIONAL CULTURE* 47, 47 (Megan O'Neill et al. eds., 2007). This command structure is the result of one of the three different eras of police reform. *See* George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, in *COMMUNITY POLICING* 96, 97–114 (Willard M. Olivier ed., 2000). In Seattle, for example, the chain of command is as follows: Chief of Police, Deputy Chief, Assistant Chief, Captain, Lieutenant, Sergeant, then officers and detectives. *Department Fact Sheet*, SEATTLE POLICE DEP'T, <http://www.seattle.gov/police/about-us/about-the-department/department-fact-sheet> (last visited Apr. 1, 2017).

<sup>42</sup> *See* Manning, *supra* note 41, at 70 (“[The top command] is composed of officers above the rank of superintendent (or commander) including chief, and deputy chief or assistant chief.”). Detectives are typically considered a separate group from patrol officers and have a higher status. *See id.* at 64; *see also* Wesley Skogan, *Why Reforms Fail*, in *POLICE REFORM FROM THE BOTTOM UP*, *supra* note 27, at 144, 148.

<sup>43</sup> *See* Manning, *supra* note 41, at 70.

<sup>44</sup> *See id.* at 64.

best organized with “strong, top-down management.”<sup>45</sup> Middle management consists of captains, lieutenants, sergeants, and other equivalent positions.<sup>46</sup> Sergeants make up the lowest level of management and serve as the direct supervisors of the rank-and-file.<sup>47</sup> Given their placement in the management structure, sergeants often are aligned more closely with the rank-and-file than with top command.<sup>48</sup> The bulk of the department consists of the rank-and-file, who sit at the bottom of the organizational pyramid.<sup>49</sup> At any given time, over sixty percent of officers within a department are in the patrol division.<sup>50</sup> Most will remain at this rank for their entire careers.<sup>51</sup> This hierarchy has important implications for unions, we argue, because officers turn to unions to protect their interests since they otherwise have little voice in the operation of the department.

Under the prevailing quasi-military style of police department organization, management seeks to maintain a high level of internal discipline and strict rank-and-file obedience to rules and policies.<sup>52</sup> The prevailing belief is that the rank-and-file must be strictly controlled and monitored in order to ensure compliance.<sup>53</sup> Police managers “worry about laziness, corruption, racial profiling, and excessive force, and they do not trust rank-and-file officers on any of those dimensions.”<sup>54</sup> “In the face of continued scandals and charges of inequity,

<sup>45</sup> Marks & Sklansky, *supra* note 27, at 1.

<sup>46</sup> See Manning, *supra* note 41, at 69 (observing that middle management consists of the “sergeant, lieutenant, inspector, chief inspector and superintendent or their equivalents” who are “[s]ymbolically located between command and other officers”).

<sup>47</sup> See Skogan, *supra* note 42, at 146.

<sup>48</sup> See Manning, *supra* note 41, at 63, 67. In fact, sometimes sergeants are considered part of the rank-and-file. See David H. Bayley, *Police Reform: Who Done It?*, in *POLICE REFORM FROM THE BOTTOM UP*, *supra* note 27, at 16, 23.

<sup>49</sup> See Manning, *supra* note 41, at 63. Unless otherwise noted, the discussion of the rank-and-file excludes detectives.

<sup>50</sup> *Id.* at 63.

<sup>51</sup> *Id.* at 54.

<sup>52</sup> See BITTNER, *supra* note 40, at 137; MANNING, *supra* note 38, at 49; Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. CRIM. JUST. 199, 203 (2003) (“Uniformity in appearance, attitude, and behavior, as well as strict adherence to rules and procedures, is expected of all recruits.”); David N. Allen, *Police Supervision on the Street: An Analysis of Supervisor/Officer Interaction During the Shift*, 10 J. CRIM. JUST. 91, 92 (1982) (noting the strict and unquestioning obedience required of the rank-and-file).

<sup>53</sup> Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 565 (2001); Wesley G. Skogan & Tracey L. Mearns, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 67 (2004) (“The organization under which officers work struggles to keep control of its field force.”).

<sup>54</sup> Skogan, *supra* note 42, at 145; see also George L. Kelling et al., *Police Accountability and Community Policing*, in *COMMUNITY POLICING*, *supra* note 41, at 269, 269–70 (“Police chiefs

police administrators tend to maintain an almost phobic preoccupation with accountability and conformity.”<sup>55</sup>

Although management focuses intensely on control and conformity with policy, police work inevitably requires the exercise of discretion.<sup>56</sup> The judgment and discretion that most police officers and management would agree is essential to good policing means that precise rules cannot always be followed, general rules do not provide meaningful guidance,<sup>57</sup> and policies are therefore not consistently enforced. Flexibility opens the door to arbitrariness and discrimination. This is one reason why the relationship between line officers and management has been described as one “dominated by a feeling of uncertainty.”<sup>58</sup> Rank-and-file officers fear punitive enforcement of policy and often perceive management as being “not on the level,”<sup>59</sup> using rules primarily to blame them when things go wrong.<sup>60</sup>

Rank-and-file officers in many departments do not trust management to mete out discipline fairly. In Los Angeles, for example, in 2001, the Police Protective League, the Los Angeles Police Department (“LAPD”) officers’ union, requested that law professor Erwin Chemerinsky and a group of civil rights lawyers investigate a major scandal in the Rampart Division.<sup>61</sup> The League did not trust the LAPD to conduct a fair and thorough investigation and feared the union and some officers might be scapegoated for a corruption scandal that they thought was a symptom of a larger problem. Professor

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continually worry about abuse of authority . . . . As a consequence, it is not surprising that police leaders have developed organizational mechanisms of control that seek to ensure police accountability to both the law and the policies and procedures of police departments.”); Hans Toch, *Police Officers as Change Agents in Police Reform*, 18 POLICING & SOC’Y 60, 63 (2008) (noting that management wonders: “Can we really trust those bums to be honest and law-abiding . . . and dedicated?”).

55 Todd Wuestewald & Brigitte Steinheider, *Shared Leadership: Can Empowerment Work in Police Organizations?*, POLICE CHIEF, Jan. 2006, at 48, 49, [http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=print\\_display&article\\_id=789&issue\\_id=12006](http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=789&issue_id=12006). Of course, there are important exceptions. See, e.g., DOJ CHI. REP., *supra* note 10, at 105 (noting deficiencies in supervisors providing accountability).

56 Wuestewald & Steinheider, *supra* note 55, at 51.

57 SKOLNICK & FYFE, *supra* note 40, at 120–21.

58 Paoline, *supra* note 52, at 201.

59 SKOLNICK & FYFE, *supra* note 40, at 121.

60 *Id.* at 120–21. Sociologist Egon Bittner terms this the “legality” problem. See BITTNER, *supra* note 40, at 350–52; see also MICHAEL K. BROWN, *WORKING THE STREET* 9 (1981) (noting that patrol officers “must cope not only with the terror of an often hostile and unpredictable citizenry, but also with a hostile—even tyrannical—and unpredictable bureaucracy”); Malcolm K. Sparrow, *Implementing Community Policing*, in COMMUNITY POLICING, *supra* note 41, at 172, 177.

61 Chemerinsky, *supra* note 53, at 547–49.

Chemerinsky's analysis of the LAPD's report on the Rampart Division found that "virtually everyone, except the Chief of Police and the Board of Inquiry, is dissatisfied with the current disciplinary system."<sup>62</sup> Concerns included perceptions that the chief controlled the system and used it to protect command staff and persecute whistleblowers and minority officers.<sup>63</sup> Nearly fifteen years later, similar perceptions persist. In 2014, an overwhelming number of LAPD rank-and-file officers still believed that management's disciplinary decisions "revolved around an officer's rank and whether he or she was well liked by their superiors in the department. [Officers believed that c]ommand-level officers routinely received slaps on the wrist or no punishment, while lower-ranking officers were suspended for similar misconduct . . . ."<sup>64</sup> Similarly, in 2016, the DOJ found that the Baltimore Police Department failed to apply discipline consistently: "Throughout our interviews and ride-alongs with officers, we heard officers express that discipline is only imposed if an incident makes it into the press or if you were on the wrong side of a supervisor, not because of the magnitude of the misconduct."<sup>65</sup>

Empirical studies of police stress find that the indignities of poor employment practices—"arbitrary decision making, poor working conditions," feeling lack of support from supervisors—cause more stress to officers than "witnessing injuries, deaths or other potentially traumatic events" involving police work.<sup>66</sup> Recent commentary on police legitimacy noted this and, giving the example of New York police officers who were disciplined and publicly reprimanded for playing football with youngsters at a Fourth of July celebration at a low-income housing project, observed that police officers "react to arbitrary power in the same way that citizens do when they are policed: with

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<sup>62</sup> *Id.* at 598.

<sup>63</sup> *Id.*

<sup>64</sup> Joel Rubin & Jack Leonard, *LAPD Survey in Wake of Dorner Rampage Finds Bias Complaints*, L.A. TIMES (Nov. 13, 2014, 11:16 PM), <http://www.latimes.com/local/california/la-me-lapd-dorner-20141114-story.html>; see also Robin Abcarian, *She's the Mom of Four Black Men, a Former L.A. Cop and a Major Skeptic of 'Justifiable' Police Shootings*, L.A. TIMES (July 18, 2016, 3:00 AM), <http://www.latimes.com/local/abcarian/la-me-abcarian-cheryl-dorsey-2016-0718-snap-story.html> ("The Dorner tragedy, by the way, also occasioned a spasm of self-reflection in the LAPD. Chief Charlie Beck surveyed his troops and discovered a widespread perception that the LAPD dispensed discipline unfairly, based on skin color, rank and nepotism.").

<sup>65</sup> DOJ BALT. REP., *supra* note 13, at 147.

<sup>66</sup> Jeffrey Fagan et al, *Street Stops and Police Legitimacy in New York*, in *COMPARING THE DEMOCRATIC GOVERNANCE OF POLICE INTELLIGENCE* 203, 219 (Thierry Delpuech & Jacqueline E. Ross eds., 2016) (citing Akiva M. Liberman et al., *Routine Occupational Stress and Psychological Distress in Police*, 25 *POLICING* 421, 423, 432 (2002)).

ambivalence about the institution, and resistance or hostility toward the rules of that institution.”<sup>67</sup> As one policing scholar observed,

Officers come to find out that when they are recognized it is usually for something that they have done wrong (procedurally), rather than for something they have done well (substantively). . . . [O]fficers are constrained, working within an organization that demands that all problems be handled on the street with efficiency and certainty, yet held to excessive scrutiny by “watchful administrators” at a later date.<sup>68</sup>

In sum, police scholars note that rank-and-file officers often perceive their departments “as a mock bureaucracy, capricious, unpredictable and punitive, rather than democratic and fair.”<sup>69</sup> Although the reality is that both management and the rank-and-file understand that rules cannot guide their behavior in all instances, any violation, no matter how small, can still result in punishment.<sup>70</sup> Thus, the rank-and-file views management’s fixation on rule-following in the face of these contradictions as illegitimate.<sup>71</sup> The result is that management officers “are perceived as mere disciplinarians” and “are often viewed by the line personnel with distrust and even contempt.”<sup>72</sup> In light of this focus on control and discipline of rank-and-file officers for conduct like playing football with kids that seems desirable or at least benign, police unions often focus their bargaining and contract enforcement efforts toward protecting officers from discipline and arbi-

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<sup>67</sup> *Id.*; see also Christopher Robbins, *NYPD: Dry-Humping Is OK, but Throwing Football Is Misconduct*, *GOTHAMIST* (Sept. 19, 2011, 1:37 PM), [http://gothamist.com/2011/09/19/nypd-dry-humping\\_ok\\_throwing\\_footba.php](http://gothamist.com/2011/09/19/nypd-dry-humping_ok_throwing_footba.php).

<sup>68</sup> Paoline, *supra* note 52, at 201 (quoting BROWN, *supra* note 60, at 80); see also Skogan & Mearns, *supra* note 53, at 79 (“Traditionally, police management consists of overseeing subordinates until they break a rule in the book and then punishing them. It is essentially negative, with little in their management kitbag but sanctions for noncompliance; hence, the emphasis on internal inspections to ensure compliance with rules.”).

<sup>69</sup> Manning, *supra* note 41, at 73; see Paoline, *supra* note 52, at 204 (“[O]fficers must also provide protection to one another against supervisors, in the organizational environment, who are often viewed as ‘out to make their jobs difficult.’”); Kelling et al., *supra* note 54, at 277 (noting that officers see discipline as “arbitrary and unjust”).

<sup>70</sup> See Chemerinsky, *supra* note 53, at 565–66; see also DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 64 (1994) (“Because police officers are almost always at risk of violating some stricture, management is perceived by police officers as oppressive and quixotic.”); Sparrow, *supra* note 60, at 177.

<sup>71</sup> SKOLNICK & FYFE, *supra* note 40, at 122 (“*Esprit* among police is desirable and necessary, but when coupled with the necessity of routine violations of the rules in order to get the job done, it delegitimizes everything the brass does.”).

<sup>72</sup> BITTNER, *supra* note 40, at 143–44; see also Chemerinsky, *supra* note 53, at 565 (relating being “stunned by the extent of hostility to the Chief of Police and the command staff” within the LAPD).



trary work assignments, fighting for compensation, and ensuring compliance with seniority rules, among other labor interests.<sup>73</sup>

Although these negative perceptions of management's motives could be tempered by contact, rank-and-file officers have few opportunities to interact with top command outside of the context of punishment.<sup>74</sup> They have little direct communication with top-level management because the information flow is "almost exclusively downwards through the chain of command," and not the opposite.<sup>75</sup> This isolation from top command increases the risk of miscommunication, misunderstandings, and resentment, and it also leads police unions to adopt a highly defensive approach to union-management relations.<sup>76</sup>

The rank-and-file's shared perception that management's exercises of power are illegitimate, coupled with their isolation from top command, facilitates the creation of a subculture amongst the rank-and-file with its own political life that remains largely hidden from management.<sup>77</sup> Amongst the rank-and-file, there is a "rare degree of camaraderie and group loyalty"<sup>78</sup> that is partly the result of having to confront "unpredictable and punitive supervisory oversight."<sup>79</sup> In short, scholars agree that management and the rank-and-file have

<sup>73</sup> See *infra* Section I.C.

<sup>74</sup> See Manning, *supra* note 41, at 68. "Very little direct exchange unites [top command] and officers and this relationship shows the greatest social distance, ambivalence, and animosity." *Id.* And, when things go wrong, such as a fatal shooting, top management "in general acts first and asks questions later." *Id.*

<sup>75</sup> See BITTNER, *supra* note 40, at 152; SKOLNICK & FYFE, *supra* note 40, at 121 ("This sense of isolation is exacerbated by the difficulty of communicating up and down the rigid *chains of command* that characterize the military-style hierarchy.").

<sup>76</sup> See MANNING, *supra* note 38, at 246 ("The segments of the culture, a response to hierarchy, isolation, and information based at the bottom, communicate more within than across, creating constant misunderstandings and a sense of arbitrary discipline."); Chemerinsky, *supra* note 53, at 565 (noting the alienation between the rank-and-file and top command within the LAPD).

<sup>77</sup> See BROWN, *supra* note 60, at 94 ("[H]ierarchical controls . . . increase group solidarity and loyalty among patrolmen and the dependence of a patrolman upon his immediate peer group, while exacerbating the ongoing conflict between patrolmen and administrators."); see also Paoline, *supra* note 52, at 200 ("Viewing police culture as an occupational phenomena suggests that officers collectively confront situations that arise in the environments of policing, and subsequent attitudes, values, and norms that result are in response to those environments."); cf. JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* 199 (1990) (discussing creation of forest poaching subculture in face of property rights of others viewed as illegitimate).

<sup>78</sup> SKOLNICK & FYFE, *supra* note 40, at 122; see also Toch, *supra* note 54, at 61 ("A code of conduct can evolve in the locker room that appears to tolerate transgressions and discourages 'snitching' on peers.").

<sup>79</sup> Paoline, *supra* note 52, at 201 (emphasis removed).

their own distinct cultures<sup>80</sup> and that the relationship between them is often characterized by “mutual suspicion and mistrust.”<sup>81</sup>

As will be explored below in Section I.C, police officers responded to this kind of hierarchical and punitive supervisory structure by forming unions. And many police officers are quite dedicated unionists precisely because they see the union as necessary to protect their interests in fair process and in having a voice in the workplace.

### B. *From Professionalism to Community Policing*

The contemporary emphasis on hierarchy and adherence to rules was the product of mid-twentieth-century reforms that attempted to combat police corruption by professionalizing police work. In the late nineteenth century, police were closely tied to their communities, were under the control of local political machines, engaged in foot patrols, and often lived in the communities they policed.<sup>82</sup> The close connection to the community and its political machinery was believed to lead to police corruption.<sup>83</sup> To sever police hiring, promotion, and control from the local political machine, early twentieth-century local government reformers sought to “professionalize” the police.<sup>84</sup> Professionalism did not refer to giving individual rank-and-file officers more autonomy and discretion.<sup>85</sup> Rather, it referred to reducing political influence over police and improving police efficiency.<sup>86</sup>

A crucial aspect of the professionalism project was to define the core mission of the police as crime control, thereby insulating officers from political influence and corruption by distancing them from the community.<sup>87</sup> Once the official function of the police was crime con-

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<sup>80</sup> See David Alan Sklansky, *Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-In*, in POLICE OCCUPATIONAL CULTURE, *supra* note 41, at 19, 38 (“An influential study in the early 1980s argued that ‘management cops’ have their own culture, separate and distinct from ‘street cop culture.’”); Toch, *supra* note 54, at 63. See generally BAYLEY, *supra* note 70, at 66; ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS (1983).

<sup>81</sup> Toch, *supra* note 54, at 63; see also Sklansky, *supra* note 80, at 25; Chemerinsky, *supra* note 53, at 565.

<sup>82</sup> Kelling & Moore, *supra* note 41, at 98–99.

<sup>83</sup> See *id.* at 100–01.

<sup>84</sup> *Id.* at 102, 108.

<sup>85</sup> *Id.* at 108.

<sup>86</sup> *Id.* at 103.

<sup>87</sup> Kelling & Kliesmet, *supra* note 33, at 193; Samuel Walker, “Broken Windows” and Fractured History: The Use and Misuse of History in Recent Police Patrol Analysis, in COMMUNITY POLICING, *supra* note 41, at 326, 328 (“The most professionalized departments, in fact, took extra measures to de-personalize policing. Frequent rotation of beat assignments was adopted as a strategy to combat corruption.”).

trol, departments “move[d] away from crime prevention (except as an outcome of arrest), peacekeeping, order maintenance, and the provision of social and emergency services.”<sup>88</sup> This, along with the isolation of officers from citizens that was thought necessary to combat corruption, contributed to what various scholars characterize as “officer alienation from the citizens they serve,” officers’ self-conception as “crime fighters and the ‘thin blue line,’” and “a warrior mentality.”<sup>89</sup>

An important goal of the professionalism era was to control rank-and-file officers, leading to extensive and strict rules to govern their conduct, increased surveillance and oversight of officers, and reduced rank-and-file officer discretion.<sup>90</sup> The control of the rank-and-file did not end with their work related duties. Police management also attempted to control the personal lives of officers in order to reduce the opportunities for corruption.<sup>91</sup> Officers were prohibited “from living in the areas they policed, from incurring debts, or from being involved in businesses in their areas, as well as requir[ed] . . . to declare the business interests of their families.”<sup>92</sup> Some departments went even further to “de-personalize policing” by frequently reassigning patrol officers to new neighborhoods far removed from the neighborhoods where officers lived.<sup>93</sup> These, and a host of other controls, helped spur the creation of police unions.<sup>94</sup>

A new model of policing, known as community policing, emerged in the late 1970s and early 1980s<sup>95</sup> to put officers back into relation-

<sup>88</sup> Kelling & Kliesmet, *supra* note 33, at 193; *see also* Sklansky, *supra* note 80, at 20, 23.

<sup>89</sup> Kelling & Kliesmet, *supra* note 33, at 203–04.

<sup>90</sup> *See id.* at 193; *see also* SAMUEL WALKER, *THE POLICE IN AMERICA* 14 (2d ed. 1992). Police reformers viewed officers “as a tightly controlled and inherently limited functionary whose primary, if not sole, role was nondiscretionary law enforcement.” Kelling & Kliesmet, *supra* note 33, at 194 (citing George L. Kelling & James K. “Chips” Stewart, *The Evolution of Contemporary Policing*, in *LOCAL GOVERNMENT POLICE MANAGEMENT* 3 (William A. Geller ed., 3d ed. 1991)). In part, this model of strict control of the rank-and-file was in line with the Frederick Taylor model for routinizing factory work. Sklansky, *supra* note 80, at 31. The Taylorism model focuses on top-down control of workers through rigid rules. Wuestewald & Steinheider, *supra* note 55, at 49 (“The scientific and bureaucratic management principles of Frederick Taylor and Max Weber were in vogue and found welcome application in the drive to professionalize law enforcement.”).

<sup>91</sup> *See* Kelling & Kliesmet, *supra* note 33, at 195 (citing MALCOLM K. SPARROW ET AL., *BEYOND 911: A NEW ERA FOR POLICING* 36–37 (1990)); *see also* Kelling & Moore, *supra* note 41, at 102 (noting concerns with “separat[ing] police from politics”).

<sup>92</sup> Kelling & Kliesmet, *supra* note 33, at 195 (citing SPARROW ET AL., *supra* note 91, at 36–37).

<sup>93</sup> Walker, *supra* note 87, at 328.

<sup>94</sup> Kelling & Kliesmet, *supra* note 33, at 195–96.

<sup>95</sup> *See* Scott Lewis et al., *Acceptance of Community Policing Among Police Officers and Police Administrators*, 22 *POLICING* 567, 567–68 (1999); Kelling & Moore, *supra* note 41, at 109;

ships with the community and to transform rank-and-file officers into problem solvers.<sup>96</sup> Community policing is a broad concept used to describe a wide variety of policing approaches.<sup>97</sup> Two common themes among them are that power is pushed to officers at the lower levels of the organization and that there is increased involvement with the community.<sup>98</sup> Some versions of community policing embrace the idea that the social work aspects of policing are important,<sup>99</sup> and encourage officers to attempt to determine the root causes of crime and to look beyond the criminal justice system to solve them.<sup>100</sup> Today, most departments claim that they are engaged in community policing.<sup>101</sup> Yet, police continue to follow professionalism-era practices for a variety of

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see also Steve Herbert, 'Hard Charger' or 'Station Queen'? Policing and the Masculinist State, 8 GENDER, PLACE & CULTURE 55, 62 (2001).

<sup>96</sup> See Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 228 (2015). See generally MICHAEL J. PALMIOTTO, COMMUNITY POLICING: A POLICING STRATEGY FOR THE 21ST CENTURY (2000).

<sup>97</sup> See generally PALMIOTTO, *supra* note 96.

<sup>98</sup> Kelling & Moore, *supra* note 41, at 109–13; see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING 9 (1994), <https://www.ncjrs.gov/pdffiles/commpp.pdf> ("In 1979, Herman Goldstein developed and advanced the concept of 'problem-oriented policing' (POP), which encouraged police to begin thinking differently about their purpose. Goldstein suggested that problem resolution constituted the true, substantive work of policing and advocated that police identify and address root causes of problems that lead to repeat calls for service. POP required a move from a reactive, incident-oriented stance to one that actively addressed the problems that continually drained police resources.") (citing Herman Goldstein, *Improving Policing: A Problem Oriented Approach*, 25 CRIME & DELINQ. 236, 241–43 (1979)); Kelling & Kliesmet, *supra* note 33, at 202–03.

<sup>99</sup> See generally PALMIOTTO, *supra* note 96; SARA SATINSKY ET AL., HUMAN IMPACT PARTNERS, STRESS ON THE STREETS (SOS) 17 (2015), [http://www.trustnottrauma.org/wp-content/uploads/2015/12/HIP\\_Stress-on-the-Streets\\_FullReport.pdf](http://www.trustnottrauma.org/wp-content/uploads/2015/12/HIP_Stress-on-the-Streets_FullReport.pdf) ("By the 1990s the concepts of community-oriented policing and problem-solving policing were merged into a form used widely today that encourages officers to understand and analyze the roots of problems, then to solve and evaluate them in ways that may include looking beyond the criminal justice system for solutions.").

<sup>100</sup> L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 143–44 (2014) (citing Herbert, *supra* note 95, at 63; and Kelling et al., *supra* note 54, at 270).

<sup>101</sup> Wesley G. Skogan, *The Promise of Community Policing*, in POLICE INNOVATION 27, 27 (David Weisburd & Anthony A. Braga eds., 2006) ("By 2000, a federal survey . . . found that more than 90 percent of departments in cities over 250,000 in population reported having full-time, trained community policing officers in the field." (citation omitted)). However, community policing involves a number of different practices, including patrolling on foot, or with bikes, horses, or segways. *Id.* Some communities "train civilians in citizen police academies, open small neighborhood storefront offices, conduct surveys to measure community satisfaction, canvass door-to-door to identify local problems, publish newsletters, conduct drug education projects, and work with municipal agencies to enforce health and safety regulations." *Id.*

reasons, including the growth in quantitative measures of job performance and the so-called “War on Drugs.”<sup>102</sup>

The set of legal and policy changes known as the War on Drugs sought to eliminate drug sales and use through massive drug arrests and other proactive policing strategies. As many scholars observed, the War on Drugs fueled racial disparities in arrest rates and exacerbated negative relationships between the police and communities of color.<sup>103</sup> Both community policing and the proactive policing strategies associated with drug enforcement policy required departments to gather information in order to analyze problems, and technological change enabled police departments to collect data and use data analysis in personnel management on an unprecedented scale.<sup>104</sup> This had significant consequences for how police departments managed line officers and how officers responded.<sup>105</sup>

Quantitative measures rapidly became one of the most significant elements of contemporary evaluation of police officer job performance. The reliance on counting stops, arrests, and other measures of law enforcement vigor originated in New York under the leadership of William Bratton, a proponent of the “broken windows” theory of policing.<sup>106</sup> The broken windows idea was “that the police could cut down on serious crimes by making it clear that even the trivial ones wouldn’t go unpunished.”<sup>107</sup> To ensure that the rank-and-file implemented this philosophy, especially in neighborhoods inhabited by indigent people of color, the New York Police Department (“NYPD”)

102 See generally STEVE HERBERT, *CITIZENS, COPS, AND POWER* 94–109 (2006); Kelling & Moore, *supra* note 41, at 97, 101–02.

103 See generally Graham Boyd, *Collateral Damage in the War on Drugs*, 47 *VILL. L. REV.* 839 (2002); Dan Gardner, *Civil Liberties Cast Aside in Overzealous Drug War*, *CHI. SUN-TIMES*, Feb. 4, 2001, at 30A (recognizing police methods used to prevent drug crimes); *Punishment and Prejudice: Racial Disparities in the War on Drugs*, *HUM. RTS. WATCH* (May 2000), <http://www.hrw.org/reports/2000/usa>.

104 See U.S. DEP’T OF JUSTICE & POLICE EXEC. RESEARCH FORUM, *COMPSTAT: ITS ORIGINS, EVOLUTION, AND FUTURE IN LAW ENFORCEMENT AGENCIES* 2–6 (2013), <https://www.bja.gov/publications/perf-compstat.pdf> [hereinafter DOJ COMPSTAT REP.].

105 See PALMIOTTO, *supra* note 96, at 174–95. See generally DOJ COMPSTAT REP., *supra* note 104, at 3–8. More recently, predictive policing and other algorithms, Chicago heat lists, and big data are the new policing technologies. “Yet, an increased reliance today on technology to analyze and predict problems, in addition to outfitting police with weaponry that creates urban ‘warriors,’ can distance police from the communities they serve.” SATINSKY ET AL., *supra* note 99, at 17.

106 Saki Knafo, *A Black Police Officer’s Fight Against the N.Y.P.D.*, *N.Y. TIMES MAG.* (Feb. 18, 2016), <https://www.nytimes.com/2016/02/21/magazine/a-black-police-officers-fight-against-the-nypd.html>; see also DOJ COMPSTAT REP., *supra* note 104, at 3–6.

107 Knafo, *supra* note 106.

developed a management system that kept careful track of arrest and crime statistics throughout the City. The system was called CompStat, short for “compare statistics.”<sup>108</sup> The sharp decline in the number of murders in New York in the late 1990s coincided with the adoption of CompStat, and so cities across the United States embraced it and hired chiefs and consultants committed to implementing it, with the result that “most large American cities [now] use some form of CompStat.”<sup>109</sup>

Although some credited CompStat for falling murder and violent crime rates, by the early 2000s, doubters began to question whether broken windows policing and the CompStat measure of police work was the cause and some voiced doubts about the effects it had on police behavior.<sup>110</sup> Eli Silverman, a police-studies professor at John Jay College of Criminal Justice, who had been an early supporter of CompStat, had received a number of letters from NYPD officers saying that CompStat was not all that it seemed.<sup>111</sup> Silverman and a fellow criminologist and retired NYPD captain, John Eterno, set out to study how the system worked.<sup>112</sup>

They surveyed more than 2,000 retired NYPD officers in 2008 and 2012 and found that CompStat had a substantial effect on police work, but it was not uniformly positive.<sup>113</sup> They learned that during the CompStat era, officers “were twice as likely as their predecessors to say that they had been under . . . pressure to increase arrests, and three times as likely to say” they experienced pressure to issue more summonses.<sup>114</sup> “Most of this activity took place in minority neighborhoods. In predominantly black Bedford-Stuyvesant, Brooklyn, for example, officers issued more than 2,000 summonses a year between 2008 and 2011 to people riding their bicycles on the sidewalk,” but “an average of eight bike tickets a year in predominantly white and notably bike-friendly Park Slope.”<sup>115</sup> The New York Civil Liberties Union calculated that “between 2001 and 2013, black and Hispanic people

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (“In districtwide CompStat meetings, executives interrogated commanders about their violent-crime statistics. Some commanders tried to protect themselves by underreporting or reclassifying major crimes. Others tried to show they were being ‘proactive’; invariably this meant more stops, more summonses, more arrests.”).

<sup>115</sup> *Id.*

were more than four times as likely as whites to receive summonses for minor violations.”<sup>116</sup>

The emphasis on evaluating officers according to arrests, summonses, and stops and frisks had the perhaps unintended consequence of dissuading officers from using innovative approaches to crime reduction, even when the innovations appeared to work. For example, “instead of praising the officer who developed [a program that appeared to reduce shoplifting], . . . the chief told him to ‘get more numbers.’”<sup>117</sup> As one officer complained, “You don’t get recognized and rewarded for helping a homeless person get permanent housing, but you get recognized for arresting them again and again and again.”<sup>118</sup>

The confluence of CompStat, broken windows policing, and the War on Drugs not only created increasingly negative relationships between the police and communities of color, but it also negatively influenced the relationship between the rank-and-file and police management. CompStat, with the pressure it put on management to reduce the crime rate, led to management pressure on rank-and-file officers to perform in ways that could be measured. Management exercised more control and scrutiny over the daily work behaviors of rank-and-file officers. And, as discussed below, rank-and-file officers who expressed dissatisfaction with these practices were threatened with poor performance evaluations, given unpleasant work assignments, and subjected to involuntary transfers and other negative consequences to their daily work life. For all these reasons, rank-and-file officers turned to their unions for protection.

### *C. Police Unions as a Response to Police Management and Police Department Structure*

Police officers today belong to a wide array of organizations to represent their interests. Although in labor law a union is a membership organization that exists to represent employees for purposes of collective bargaining over conditions of employment, this Article uses the term “union” somewhat more loosely to capture the full range of police labor organizations. Some police unions today are affiliated with either the Teamsters or the AFL-CIO’s International Union of Police Associations, and these typically have been certified or recognized as representing all police employees within a bargaining unit.<sup>119</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 181, 183 (2008).

Other independent police unions developed from local benevolent associations, protective leagues, federations, lodges, or international police associations, and these are typically not affiliated with the rest of organized labor in the United States and may or may not be certified as the exclusive representative of the officers on whose behalf they negotiate.<sup>120</sup> Some officers also belong to identity-based police organizations, which sometimes have close relationships to their civilian counterparts, and these identity or affinity groups do not have the legal right to bargain collectively on behalf of their members, as a labor union does, but they may nevertheless play an informal role in speaking for their members both within the department and publicly.<sup>121</sup> Police unions and identity-based groups within police departments may jointly take positions on matters of department policy, but sometimes they compete with each other for rank-and-file support and solidarity.<sup>122</sup>

This section of the Article discusses the history of police unionization, the web of contractual and statutory terms governing police working conditions, and the involvement of police unions in the political and policymaking process.

### 1. *History of Police Unions*

Police officers in many cities began joining unions in the late nineteenth and early twentieth centuries when workers in every industry unionized, and for the same reasons—to improve pay and working conditions and to gain some measure of control over their work lives.<sup>123</sup> Police in Boston in 1919, for example, worked regular shifts of between seventy-three and ninety-eight hours a week, “were sometimes required to remain on duty seventeen hours” a day, had to buy their own uniforms, and did not receive a raise between 1898 and 1913, even though the cost of living had doubled.<sup>124</sup> Station houses were unsanitary.<sup>125</sup> Supervisors restricted where officers could go on their scarce free time.<sup>126</sup> Equally as important to police officers and government reformers was the idea that unions might reduce endemic

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<sup>120</sup> *Id.* at 183.

<sup>121</sup> *Id.* at 181.

<sup>122</sup> *Id.*

<sup>123</sup> See ROBERT M. FOGELSON, *BIG-CITY POLICE* 193–94, 198–99, 201 (1977); HERVEY A. JURIS & PETER FEUILLE, *POLICE UNIONISM* 15 (1973); MARGARET LEVI, *BUREAUCRATIC INSURGENCY* 27–56 (1977); JOSEPH E. SLATER, *PUBLIC WORKERS* 17 (2004).

<sup>124</sup> SLATER, *supra* note 123, at 24–25.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



corruption in local government.<sup>127</sup> John Commons, the leading labor economist of the early twentieth century, found that labor organizing among municipal employees was the leading antidote to political machines and corruption because they aided reformers in local government to set wages, hours, and working conditions without regard to the personal, economic, and political self-interest of city leaders.<sup>128</sup>

But business and anti-labor groups feared that unionized police would strike and, more important, would not stop other employees from striking and picketing. When Boston police formed a union and affiliated with the American Federation of Labor (“AFL”) in August 1919,<sup>129</sup> the chief of police suspended seventeen union leaders (and two policemen the chief mistakenly believed were union leaders). In protest nearly three-quarters of the Boston police walked out the next day.<sup>130</sup> Violence and looting ensued.<sup>131</sup> Governor Calvin Coolidge called out troopers who, after firing into the crowd killing nine and wounding twenty-three more, stopped the looting and prevented support for the striking police from turning into a citywide general strike.<sup>132</sup> The violence caused a panic about strikes by police or any other government employees, which resulted in the collapse of all AFL-affiliated police union locals and a huge backlash against government employee unions generally and police unions in particular.<sup>133</sup> As a result, the unionization of government employees that had begun in the Progressive Era ground to a halt, only to really pick up steam in the post-World War II period as government employees’ earnings were outstripped by factory and skilled labor earnings and the growth of private sector unionization eventually made it seem that government employee unions were both desirable and inevitable.<sup>134</sup>

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<sup>127</sup> *See id.* at 17.

<sup>128</sup> *Id.* (quoting JOHN R. COMMONS, LABOR AND ADMINISTRATION 111–12 (Augustus M. Kelley 1964) (1913)).

<sup>129</sup> *Id.* at 25.

<sup>130</sup> *Id.* at 26.

<sup>131</sup> *See id.* at 13, 27.

<sup>132</sup> *Id.* at 13–14.

<sup>133</sup> *See id.* at 35–37; JURIS & FEUILLE, *supra* note 123, at 16–17. In September 1919, the Boston Police Commissioner banned the police union, and a strike resulted. Joanne Klein, *History of Police Unions*, in 5 ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2207, 2211 (Gerben Bruinsma & David Weisburd eds., 2014). President Wilson called the strike a “crime against civilization,” one that rang of a Bolshevik threat and Communist undertones. *See id.* After rioting and looting, all 1,147 strikers were dismissed. SLATER, *supra* note 123, at 14. This event stalled the momentum that had been building in other cities to establish police unions. *See id.*

<sup>134</sup> *See* JURIS & FEUILLE, *supra* note 123, at 17–18; *see also* Kelling & Kliesmet, *supra* note 33, at 196.

Police officers formed local unions in various cities in the 1940s, and some police unions affiliated with national labor federations, including the American Federation of State, County and Municipal Employees (“AFSCME”), founded in 1932, and some with the national federations of police officers, including the Fraternal Order of Police (“FOP”), founded in 1915.<sup>135</sup> States began to enact laws permitting government employee collective bargaining in the late 1950s. Wisconsin was the first in 1959.<sup>136</sup> However, well into the 1960s, police departments routinely fired officers who attempted to unionize<sup>137</sup> and courts upheld the power of cities to ban officers from joining unions.<sup>138</sup> In the absence of any legal right to unionize or bargain collectively, government employee unions became adept at securing their members’ interests through political activity and negotiating informal agreements with public officials.<sup>139</sup>

Unions finally succeeded in gaining a lasting foothold in American police departments in the late 1960s, as rank-and-file officers felt attacked by the civil rights movement’s focus on police brutality and racism and by federal court decisions limiting police officers’ investigatory and arrest powers.<sup>140</sup> Officers also did not have protection within the department when they were investigated or accused of misconduct and felt they had no way to present grievances to management.<sup>141</sup> Furthermore, they feared that civilian review boards would scapegoat individual rank-and-file officers for practices that management encouraged or even required.<sup>142</sup> Then, as now, officers believed

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<sup>135</sup> See *A History of the Fraternal Order of Police*, FRATERNAL ORD. POLICE, <https://www.fop.net/CmsPage.aspx?id=13> [<https://perma.cc/74DV-NT8L>] (last visited Mar. 25, 2017); *AFSCME: 75 Years of History*, AFSCME, <http://www.afscme.org/union/history/afscme-75-years-of-history> [<https://perma.cc/9C2R-RTME>] (last visited Mar. 25, 2017); see also JURIS & FEUILLE, *supra* note 123, at 17–18.

<sup>136</sup> SLATER, *supra* note 123, at 9. See *id.* at 158–92, for a more complete discussion.

<sup>137</sup> See FOGELSON, *supra* note 123, at 193–96; LEVI, *supra* note 123, at 122–23, 144; see also Kelling & Kliesmet, *supra* note 33, at 196. One of the authors, Kliesmet, “was harassed, arrested, and eventually fired for his union activities while a member of the Milwaukee Police Department. (Both the arrest and firing were later overturned.)” *Id.*

<sup>138</sup> *E.g.*, *Local 201, AFSCME v. City of Muskegon*, 120 N.W.2d 197, 199 (Mich. 1963) (reasoning that a police officer cannot join a union because he is “required by law and invariably becomes a neutralizer in controversies involving the right of public assemblage, neighborhood disputes, domestic difficulties and strikes, between labor and management” and “his actions in these instances must be governed by his oath of office”).

<sup>139</sup> SLATER, *supra* note 123, at 96.

<sup>140</sup> Keenan & Walker, *supra* note 20, at 196.

<sup>141</sup> *Id.* at 196–97.

<sup>142</sup> See *id.* at 196 (quoting JURIS & FEUILLE, *supra* note 123, at 20–21).

that discipline was meted out only to those who criticized management.<sup>143</sup>

Not surprisingly, unions representing rank-and-file officers negotiated for contractual protections against discipline and lobbied legislators to incorporate these protections in legislation, including LEOBORs.<sup>144</sup> They sought to protect officer autonomy, effectiveness, and safety by opposing constitutional criminal procedure restrictions on police conduct and by blocking civilian oversight of police discipline.<sup>145</sup> The legacy of the 1960s is collective bargaining agreements and LEOBORs, which make it difficult to investigate and punish officers, and limited civilian oversight, all of which can impede reform efforts.<sup>146</sup>

## 2. *Elements of Police Union Contracts*

Police union contracts contain provisions regarding wages, benefits, and discipline.<sup>147</sup> Police officers, like all government employees, have statutory and constitutional rights to fair treatment in personnel decisions.<sup>148</sup> However, police protection exceeds that provided to workers in other industries. In addition to the rights enjoyed by all government employees, police officers in at least sixteen states have special statutory protections from LEOBORs.<sup>149</sup> And even in states or cities that have not enacted a LEOBOR, similar provisions are often included in union contracts.<sup>150</sup>

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<sup>143</sup> *Id.* at 196–97 (citing JURIS & FEUILLE, *supra* note 123, at 138). These punishments included punitive transfers. JURIS & FEUILLE, *supra* note 123, at 138.

<sup>144</sup> See Keenan & Walker, *supra* note 20, at 206–10 (describing protections of bills of rights). See generally Levine, *supra* note 20 (describing LEOBOR protections against interrogation and other investigative techniques commonly used for other people suspected of wrongdoing and arguing that the protections should be extended to all criminal suspects rather than eliminated for police).

<sup>145</sup> See Keenan & Walker, *supra* note 20, at 186, 189, 190–91.

<sup>146</sup> See *infra* Part II.

<sup>147</sup> Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), <http://inthesetimes.com/features/police-killings-union-contracts.html>.

<sup>148</sup> Nonprobationary government employees enjoy a constitutional due process right to notice and some form of hearing before being fired from a job. *Cf.* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573–74 (1972) (holding that professor on probation was not denied due process when university did not hold hearing and failed to rehire); Perry v. Sindermann, 408 U.S. 593, 599 (1972) (explaining *Roth*). However, if an employee does not have an expectation of continued employment, he is not entitled to due process before termination of the job. Bishop v. Wood, 426 U.S. 341, 345, 347 (1976) (holding that city police officer held his position at will and was therefore not entitled to due process before termination).

<sup>149</sup> See *supra* notes 25, 144 and accompanying text.

<sup>150</sup> See Levine, *supra* note 20, at 1224–25, 1224 n.140.

As a matter of labor law in most states, unions are selected and govern on a majority rule principle. Under that principle, the union chosen by the majority of employees in a job classification or department, what is generally known as a “bargaining unit,” is the exclusive representative of all the employees in that unit.<sup>151</sup> The purpose of majority rule and exclusive representation is to strengthen and legitimize the employee representative by enabling it to speak with one voice and to enable the employees, within their union, to agree on priorities and resolve differences.<sup>152</sup> Law limits the ability of the majority representative to sacrifice the interests of the minority by imposing a duty of fair representation, which requires the union to represent all employees in the unit fairly and competently and prohibits the union and its officers from engaging in arbitrary action or invidious discrimination against individuals or the minority.<sup>153</sup>

When police officers gained the right to unionize and bargain collectively in the 1960s, union leadership embraced the language of professionalism that police management and an earlier generation of police reformers had used, insisting that the purpose of the police was to control crime.<sup>154</sup> However, police unions responded to the extensive rules and regulations controlling rank-and-file behavior by negotiating their own set of rules and regulations to protect rank-and-file officers from arbitrary exercises of management power.<sup>155</sup> Unions challenged exercises of managerial prerogative through grievance arbitration, and protected members’ economic interests and working conditions by advocating for favorable “wages and benefits; job security; hiring, retention, promotion, and disciplinary processes; [and] access to ‘good’ jobs, shifts, assignments, [and] overtime.”<sup>156</sup> As one labor lawyer opined, “It is nearly impossible to have a situation in which a creative police organizer cannot find a rule, regulation, guideline, budget provision, benefit program rule, or personnel procedure which cannot be exploited to significantly increase the rights and benefits of working officers.”<sup>157</sup> Professionalism era reforms, with its host of controls, not

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<sup>151</sup> See generally Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 269–71 (1987) (explaining the principle of exclusive representation and questioning certain aspects of its viability).

<sup>152</sup> See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

<sup>153</sup> See Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 874 (2014).

<sup>154</sup> See Kelling & Kliesmet, *supra* note 33, at 198–99.

<sup>155</sup> *Id.* at 197.

<sup>156</sup> *Id.* at 198.

<sup>157</sup> *Id.* at 197. Unions began to use various rules to exercise “countercontrol,” including “the Constitution; federal statutes; state statutes and regulations; city ordinances; internal budget

only helped spur the creation of police unions but also “were directly responsible for the shape and functions of police unions as well.”<sup>158</sup>

Police collective bargaining agreements look in part like the labor agreements negotiated by a wide range of public and private sector unions. They contain provisions governing economic terms of employment, including wages, hours, sickness and vacation leave, pensions, health insurance, death benefits, and so forth.<sup>159</sup> There are typically detailed provisions governing overtime compensation, payment when called to testify, compensation for purchasing uniforms, and the right to have protective equipment like bullet-proof vests.<sup>160</sup> They prohibit discrimination on the basis of union membership, race, religion, gender, and so on, and generally require just cause for discipline and discharge.<sup>161</sup> They create a grievance process usually culminating in arbitration.<sup>162</sup> Given the history of rank-and-file concern about arbi-

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and personnel regulations and directives; Equal Employment Opportunity rules and affirmative action plans and court decrees; public disclosure, privacy, and administrative law rules; general orders; squad or division rules, directives, and guidelines; and personnel records.” *Id.*

<sup>158</sup> *Id.* at 193–97.

<sup>159</sup> *Cf.*, e.g., *Salary and Benefits*, METROPOLITAN POLICE DEP’T, <http://mpdc.dc.gov/page/salary-and-benefits> (last visited Mar. 22, 2017). Contracts for dozens of police departments were obtained by public records act requests and made available online. *See Police Contracts Database*, CHECKTHEPOLICE.ORG <http://www.checkthepolice.org/database/> (last visited Mar. 22, 2017). We downloaded from that site contracts from: Albuquerque, Anaheim, Anchorage, Aurora, Austin, Bakersfield, Baltimore, Baton Rouge, Berkeley, Beverly Hills, Boston, Buffalo, Burbank, Carlsbad, Chandler, Chicago, Chico, Chula Vista, Cincinnati, Cleveland, Columbus, Corpus Christi, Costa Mesa, Cypress, Dallas, Daly City, Denver, Detroit, District of Columbia Metro, Duluth, Durham, East Palo Alto, El Paso, Eureka, Fort Wayne, Fremont, Fresno, Glendale, Hayward, Henderson, Hialeah, Honolulu, Houston, Indianapolis, Irvine, Jacksonville, Jersey City, Kansas City, Laredo, Las Vegas, Lexington, Long Beach, Los Angeles, Los Angeles County, Louisville, Madison, Memphis, Mesa, Miami, Milwaukee, Minneapolis, Nashville, New York City, Newark, North Las Vegas, Oakland, Oklahoma City, Omaha, Orlando, Pasadena, Philadelphia, Phoenix, Pittsburgh, Portland, Redwood City, Reno, Rialto, Richmond (CA), Riverside, Rochester, Sacramento, San Antonio, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Ana, Santa Barbara, Santa Cruz, Seattle, Spokane, St. Louis, St. Paul, St. Petersburg, Stockton, Tampa, Toledo, Tucson, Tulsa, and Wichita.

<sup>160</sup> *See*, e.g., Memorandum of Understanding Between the Baltimore City Police Department and the Baltimore City Lodge No. 3, Fraternal Order of Police, Inc. Unit I: Fiscal Years 2014–2016 [hereinafter *Balt. Police Union Memorandum*]; Memorandum of Understanding No. 24 Between the City of Los Angeles and the Los Angeles Police Protective League (2011) [hereinafter *L.A. Police Union Memorandum*].

<sup>161</sup> *See*, e.g., Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7 Effective 2012–2017 arts. 8, 10 (describing employee security and nondiscrimination provisions).

<sup>162</sup> *See*, e.g., Labor Agreement Between the Government of the District of Columbia Metropolitan Police Department and the Fraternal Order of Police MPD Labor Committee: Effective FY 2004–FY 2008 art. 19; L.A. Police Union Memorandum, *supra* note 160, arts. 8–10; Memorandum of Understanding Between the Anaheim Police Association and the City of Anaheim January 8, 2010–July 7, 2011 art. 55.

trary management discipline for violations of detailed rules, it is unsurprising that many union contracts include quite specific provisions protecting police officers in discipline cases.<sup>163</sup> But union contracts have little to say about how police officers actually do their job. This is in part because police unions, like other public and private sector unions in the 1960s, focused on gaining the power to bargain over economic issues, promotions, and discipline.<sup>164</sup> But it is also because state legislatures, courts, and public employee relations boards insisted that it is the province of management to decide the mission and methods of public work, and the only things on which labor has a right to negotiate are pay, promotion, and protection against discipline.<sup>165</sup> That police unions adopted a narrow conception of the union's role in collaborating with management about policing policy and tactics is not surprising, given the dominant conception of policing and the business unionism of the mid-twentieth century. The top-down hierarchy in police departments allowed for little input by the rank-and-file, and labor law and labor policy excluded employees from meaningful voice in the goals of the organization.<sup>166</sup>

An example of this hierarchy in practice is the Meyers-Milias-Brown Act (“MMBA”),<sup>167</sup> the California statute governing police labor relations that is relatively typical of state labor relations statutes.<sup>168</sup> The scope of the union's right to negotiate and represent public employees includes

all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, ex-

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<sup>163</sup> See, e.g., Balt. Police Union Memorandum, *supra* note 160, arts. 6, 16; see also Kelling & Kliesmet, *supra* note 33, at 199–201.

<sup>164</sup> Kelling & Kliesmet, *supra* note 33, at 197; see also Karoliszyn, *supra* note 9.

<sup>165</sup> See Kelling & Kliesmet, *supra* note 33, at 198.

<sup>166</sup> See *id.* at 199.

<sup>167</sup> Meyers-Milias-Brown Act, 1968 Cal. Stat. 2725 (codified at CAL. GOV'T CODE §§ 3500–3511).

<sup>168</sup> More accurately, the MMBA is typical of the subset of state public sector labor statutes that grant full collective bargaining rights to government employees. Some states (e.g., Virginia and North Carolina) prohibit public employee bargaining entirely, some (e.g., Wisconsin and Tennessee) sharply limit it, and some (e.g., Missouri) have a patchwork of rules that leave the status and functions of public employee unions to the development of local practice. See MALIN ET AL., *supra* note 19, at 367–69 (noting that “[a]t the turn of the twenty-first century, there were more than 110 separate public-sector labor laws”; “[t]wenty-nine states . . . allowed collective bargaining for all . . . public employees”; thirteen allowed bargaining only for some types of employees; and eight did not allow any public worker bargaining); *Indep.-Nat'l Educ. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131, 135–40 (Mo. 2007) (en banc) (detailing Missouri bargaining rules).

cept, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.<sup>169</sup>

The two clauses conflict—read alone, they could respectively “encompass practically any conceivable bargaining proposal” or “swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city’s discretion.”<sup>170</sup> Even if an employer’s action or policy has a significant and adverse effect on the employees’ wages, hours, and working conditions, the employer may be exempt from the duty to meet and confer with the union if the subject is the “merits, necessity, or organization” of government action.<sup>171</sup> Added in 1968, the limitation on the union’s right to confer over these matters “was intended to ‘forestall any expansion of the language of “wages, hours and working conditions” to include more general managerial policy decisions.’”<sup>172</sup>

Police officers in California, therefore, are able to bargain for the right to consult with a union representative or attorney prior to making a report concerning any shooting incident involving an officer. In *Long Beach Police Officer Ass’n v. City of Long Beach*,<sup>173</sup> the City Police Chief “issued a directive prohibiting the City’s police officers who became involved in a shooting from consulting with a representative of the [association] or an attorney prior to the filing of a written or oral report concerning such incident” because previous instances had resulted in interference with the Department’s investigation.<sup>174</sup> The court found the right to consult was a “working condition” under the collective bargaining agreement rather than a matter reserved for management which would permit the Department to change practices without prior written agreement or compliance with statutory meet and confer procedures.<sup>175</sup>

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<sup>169</sup> CAL. GOV’T CODE § 3504 (West, Westlaw through Chapter 791 of 2016 Reg. Sess., Ch. 8 of 2015–2016 2nd Ex. Sess., and all propositions on 2016 ballot).

<sup>170</sup> Int’l Ass’n of Fire Fighters, Local 188 v. Pub. Emp’t Relations Bd., 245 P.3d 845, 852 (Cal. 2011) (quoting *Fire Fighters Union, Local 1186 v. City of Vallejo*, 526 P.2d 971, 976 (Cal. 1974)).

<sup>171</sup> GOV’T § 3504; *Claremont Police Officer’s Ass’n v. City of Claremont*, 139 P.3d 532, 536 (Cal. 2006).

<sup>172</sup> *Claremont Police Officer’s Ass’n*, 139 P.3d at 537 (quoting *Fire Fighters Union, Local 1186*, 526 P.2d at 976).

<sup>173</sup> 203 Cal. Rptr. 494 (Ct. App. 1984).

<sup>174</sup> *Id.* at 496.

<sup>175</sup> *Id.* at 504–05.

However, although a police officer is allowed to have a representative *after* a shooting has occurred, policies governing the use of force *before* a shooting are not subject to bargaining under the MMBA. In *San Jose Peace Officer's Ass'n v. City of San Jose*,<sup>176</sup> a California appellate court found that the police chief's issuance of a new policy governing the use of force without meeting and conferring with the association did not violate the MMBA. Although a change on the policy governing a police officer's ability to "fire at a suspected criminal" has "some effect" on safety, it is "equally true" that the "use of force policy is as closely akin to a managerial decision as any decision can be in running a police department, surpassed only by the decision as to whether force will be used at all."<sup>177</sup> According to the court, there are "few decisions more 'managerial' in nature than the one which involves the conditions under which an entity of the state will permit a human life to be taken."<sup>178</sup>

Police unions have been excluded under this law from involvement in certain proceedings of civilian review commissions. In *Berkeley Police Ass'n v. City of Berkeley*,<sup>179</sup> Berkeley established, through an initiative, a civilian police review commission.<sup>180</sup> The function of the commission was to "provide for community participation in setting and reviewing police department policies, practices, and procedures and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department."<sup>181</sup> The chief of police announced that a member of the commission would attend Department Board of Review hearings during which bureau reports were discussed, and send a representative of the Department to each police review commission trial board meeting who would "take with him a copy of any bureau reports that had been prepared concerning individuals who were being investigated by the police review commission and answer questions of commission members concerning the department's position on the complaints."<sup>182</sup> The court noted that the police association was fundamentally challenging the "announced policies" of their chief officer "concerning . . . police-community relations," and "[t]hese policies clearly constitute manage-

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176 144 Cal. Rptr. 638, 646-47 (Ct. App. 1978).

177 *Id.* at 645.

178 *Id.*

179 143 Cal. Rptr. 255 (Ct. App. 1977).

180 *Id.* at 258.

181 *Id.*

182 *Id.*



ment level decisions which are not properly within the scope of union representation and collective bargaining.”<sup>183</sup>

Although a police association is able to bargain for the right of an officer to consult with a union representative or attorney prior to making a report concerning any shooting incident involving the officer,<sup>184</sup> a police department can prevent officers from “huddling” together before making reports. In *Ass’n for Los Angeles Deputy Sheriffs v. County of Los Angeles*,<sup>185</sup> the Department instituted an anti-huddling policy, where officers would gather in groups of two or more with a union representation, “i.e., two or more deputies consulting at the same time with the same legal counsel/labor representative.”<sup>186</sup> The City created a policy where individuals involved, including witnesses, could not discuss the shooting amongst themselves, but still had the right to meet with counsel individually.<sup>187</sup> The court found that the revision “had no effect on wages and hours.”<sup>188</sup> In contrast, the court found that “the Department’s express objective in implementing its policy revision was to collect accurate information regarding deputy-involved shootings. Plainly, the purpose of the policy revision was to foster greater public trust in the investigatory process,” and was a fundamental managerial decision.<sup>189</sup> Finally, in a recent case, a county’s adoption of a policy to limit a deputy sheriff’s access the internal investigative file before being interviewed by an internal affairs investigator was found not to be a working condition subject to bargaining under the MMBA.<sup>190</sup>

While it is understandable that California, like other states, would want to free police departments from the leverage a union might have to block reforms through prolonged bargaining and through inclusion of contract terms that could thwart new policies, the consequence of

<sup>183</sup> *Id.* at 260.

<sup>184</sup> *Long Beach Police Officer Ass’n v. City of Long Beach*, 203 Cal. Rptr. 494, 504–05 (Ct. App. 1984).

<sup>185</sup> 83 Cal. Rptr. 3d 494 (Ct. App. 2008).

<sup>186</sup> *Id.* at 498.

<sup>187</sup> *Id.* at 499–500.

<sup>188</sup> *Id.* at 510.

<sup>189</sup> *Id.*

<sup>190</sup> *See Ass’n of Orange Cty. Deputy Sheriffs v. County of Orange*, 158 Cal. Rptr. 3d 135, 146–47 (Ct. App. 2013) (“The change in practice implemented by the Sheriff’s order, therefore, . . . constitutes a fundamental managerial decision, falling within the Department’s ‘freedom to manage its affairs unrelated to employment.’ The Association does not identify any results from, or effects of, the Sheriff’s order, which are subject to bargaining.”) (citation omitted) (quoting *Int’l Ass’n of Fire Fighters, Local 188 v. Pub. Emp’t Relations Bd.*, 245 P.3d 845, 852 (Cal. 2011)).

the limited duty to bargain has been perverse. If employees and their union are excluded from participation in policy-setting, they often feel compelled to oppose new policies for fear that the policy will be implemented punitively or unfairly as a way to discipline rank-and-file who are unpopular with management.<sup>191</sup> In the case of police, as scholars have shown, unions become reflexively opposed to policies when they cannot participate in policy design, and focus instead simply on protecting their members from discipline for violating the policy.<sup>192</sup> Thus, both the law and the dominant theory of policing compel union leadership to focus their attention on rectifying the abuses of management: arbitrary dismissals, scheduling, and work assignments; informal discipline; citation and arrest quotas; cronyism in promotions; and incursions into officers' personal lives.

### 3. *Police Unions and the Political Process*

While police unions adopted a narrow view of labor's role in setting criminal justice policy in the workplace, apart from officer pay and discipline, they embraced a broad view of how they could advocate for police officers' interests as labor. They do not just bargain and enforce labor agreements; they are involved in electoral politics, in litigation, and in the media, attacking the restrictions imposed on them by the Supreme Court, criticizing groups ranging from the Black Lives Matter movement to the Communist Party to the American Civil Liberties Union ("ACLU"), and opposing civilian oversight.<sup>193</sup> And in advocating for police interests as labor to be protected from civilian intervention and unfair discipline, of course, they did have a substantial impact on criminal justice policy. That is, although unions did not contest management efforts to adopt the militarized style of urban policing instead of a more social service or community-oriented style, they did demand that officers be protected from discipline when that harsh style of policing resulted in civilian injuries or deaths. Police

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<sup>191</sup> See *infra* Part IV.

<sup>192</sup> See *infra* Part IV.

<sup>193</sup> See generally Timothy D. Chandler & Rafael Gely, *Protective Service Unions, Political Activities, and Bargaining Outcomes*, 5 J. PUB. ADMIN. RES. & THEORY 295, 312–13 (1995) (finding that electoral political activity by police and firefighter unions is a more important determinant of wages and employment levels than unionization); Casey Ichniowski et al., *Collective Bargaining Laws, Threat Effects, and the Determination of Police Compensation*, 7 J. LAB. ECON. 191, 191, 205–06 (1989) (finding that “[s]tate laws that provide stronger bargaining rights and ensure closure to the bargaining process increase the direct effect of police unions on compensation”); see also *Police Union Pressures Amazon.com to Halt “Black Lives Matter” Sales*, DEMOCRACY NOW! (Dec. 27, 2016), [https://www.democracynow.org/2016/12/27/headlines/police\\_union\\_pressures\\_amazoncom\\_to\\_halt\\_black\\_lives\\_matter\\_sales](https://www.democracynow.org/2016/12/27/headlines/police_union_pressures_amazoncom_to_halt_black_lives_matter_sales).

unions negotiated for contractual protections in the disciplinary process and also lobbied for state or municipal laws giving officers procedural protections during discipline.<sup>194</sup>

Police unions also actively opposed reform-oriented chiefs and civilian review boards, both for reasons of conservative and sometimes racist ideology and to protect police officers' bread-and-butter interests, like pay, benefits, and job security.<sup>195</sup> In several cities, police unions have challenged police chiefs brought in to enact reforms that they consider threatening to officer safety or economic interests, or that they believe weaken public safety. Unions challenged city officials over issues like staffing and job protection. Many have taken openly partisan stands—such as recent police protests in New York—

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<sup>194</sup> See generally Levine, *supra* note 20, at 1220–27. As noted in the DOJ Chicago Report, some barriers to accountability for misconduct are also created by management without apparent legislative or union-negotiated pressure. The DOJ stated:

Our investigation revealed that the City fails to conduct any investigation of nearly half of police misconduct complaints and that a number of institutional barriers contribute to this fact. There are provisions in the City's agreements with the unions that impede the investigative process, such as the general requirement that a complainant sign a sworn affidavit and limitations on investigating anonymous complaints and older incidents of misconduct. That said, the union agreements contain override provisions for some of these provisions that the City rarely utilizes. Other barriers have been created solely by the City, such as internal policies allowing investigative agencies to truncate investigations of serious misconduct through mediation, administratively close complaints deemed less serious, and ignore mandatory investigations into uses of force that could identify misconduct or faulty training issues.

DOJ CHI. REP., *supra* note 10, at 47. The DOJ also found procedures used in the circumstances where investigations are conducted hampered the search for truth and its description of those procedures makes clear that blame for them is widespread:

Witnesses and accused officers are frequently not interviewed at all, or not interviewed until long after the incident when memories have faded. When interviews do occur, questioning is often biased in favor of officers, and witness coaching by union attorneys is prevalent and unimpeded—a dynamic neither we nor our law enforcement experts had seen to nearly such an extent in other agencies. Investigators routinely fail to collect probative evidence. The procedures surrounding investigations allow for ample opportunity for collusion among officers and are devoid of any rules prohibiting such coordination. We found that a lack of resources and investigative training contribute to these investigative problems. We also found that investigations foundered because of the pervasive cover-up culture among CPD officers, which the accountability entities accept as an immutable fact rather than something to root out.

*Id.*

<sup>195</sup> See CHRISTOPHER LASCH, *THE AGONY OF THE AMERICAN LEFT 206–07* (1969); JEROME H. SKOLNICK, *THE POLITICS OF PROTEST 274–78* (1969); John Thomas Delaney & Peter Feuille, *Police*, in *COLLECTIVE BARGAINING IN AMERICAN INDUSTRY* 265, 301 (David B. Lipsky & Clifford B. Donn eds., 1987); see also STEPHEN C. HALPERN, *POLICE-ASSOCIATION AND DEPARTMENT LEADERS 93–99* (1974).

against politicians who they claim adopt policies that weaken public safety.<sup>196</sup> Because police officers have long felt at risk of arbitrary or unfair discipline, they have fought hard to retain union involvement in internal investigations into employee misconduct, and therefore have stymied efforts to reform police culture.<sup>197</sup> The January 2017 DOJ Chicago Report, for example, noted that a 1994 effort to use data to identify patterns of problematic officer behavior was opposed by the union because officers felt discipline was imposed arbitrarily and unfairly; the system was abandoned after just two years, and all the data and reports it produced “went missing.”<sup>198</sup> A 2016 effort to analyze data and create an early intervention system is in the works, but the DOJ Chicago Report stated:

[T]he project managers are taking guidance from the City on how and when to do so—and union involvement has not yet occurred. There is no evidence that the City or CPD engaged with the unions early on, before beginning this new effort, to determine whether CPD’s unions will support the new effort.<sup>199</sup>

As these examples suggest, unions have been blocked, by labor law, by the hierarchical management structure, and by short-sighted union leaders’ own narrow conception of role, from adopting a more proactive and collaborative approach to management-labor cooperation over police goals and tactics.

In sum, police unions see their mission as protecting the interests of police officers, including protecting officers from discipline, ensuring good working conditions, and protecting seniority. When police union leaders defend officers involved in what appear to be egregious instances of violence toward suspects, critics assert that the solidarity that enables a union to function, and that is encouraged by the quasi-militaristic culture in many police forces, has become pathological.<sup>200</sup> Whereas unions are thought by their defenders to be an institutional mechanism to create and sustain workplace democracy in other work

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<sup>196</sup> See Alex Altman, *Why New York Cops Turned Their Backs on Mayor de Blasio*, TIME (Dec. 22, 2014), <http://time.com/3644168/new-york-police-de-blasio-wenjian-liu-rafael-ramos/>; see also Josh Dawsey, *New York City Police Vent Frustrations at Mayor de Blasio*, WALL ST. J. (Aug. 1, 2016, 9:09 PM), <https://www.wsj.com/articles/new-york-city-police-vent-frustrations-at-mayor-de-blasio-1470100169>.

<sup>197</sup> Karoliszyn, *supra* note 9.

<sup>198</sup> DOJ CHI. REP., *supra* note 10, at 117.

<sup>199</sup> *Id.* at 118.

<sup>200</sup> See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455–56 (2004).

settings, law enforcement unions are perceived as irredeemably oligarchic and implacably opposed to even modest reform and to anything that might weaken the influence of union leaders.<sup>201</sup>

## II. POLICE UNIONS AS OBSTACLES TO REFORM

Police unions in New York City, Ferguson, Baltimore, Cleveland, Chicago, and other cities have, at least initially, publicly come to the defense of officers accused of shooting and killing civilians, insisting that it is important to avoid a “rush to judgment.”<sup>202</sup> Responses have gone beyond offering a public defense to include fundraising for accused officers in Ferguson, Baltimore, and Cleveland,<sup>203</sup> and, in New York City, proclaiming “[i]t is time to stop the amateur video activists who interfere with police operations” by recording arrests and police violence.<sup>204</sup> Though New York Patrolmen’s Benevolent Association (“PBA”) President Patrick Lynch uses extreme rhetoric in his defense of officers,<sup>205</sup> refusing to publicly concede that an officer was wrong,

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<sup>201</sup> *Id.*

<sup>202</sup> See, e.g., Justin George, *New Online Fundraising Campaign Starts Up for Officers Charged in Gray’s Death*, BALT. SUN (May 6, 2015, 12:34 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-freddie-gray-officers-fund-20150506-story.html>. After the Baltimore police union’s GoFundMe site was shut down by the company because GoFundMe pages cannot benefit people charged with “serious violations of the law,” the union backed fundraising on a site devoted specifically to raising money for law enforcement officers. *Id.* Union president Gene Ryan said the charges against the officers were “an apparent rush to judgment.” *Id.*

<sup>203</sup> See *id.*; Sarah Parvini, *GoFundMe Shuts Down Fund-Raising Page for Baltimore Police*, L.A. TIMES (May 2, 2015, 1:59 PM), <http://www.latimes.com/nation/la-na-gofundme-baltimore-cops-20150502-story.html>; Lorrie Taylor, *Cleveland Police Union to Raffle Gun in Fundraiser for Officer Accused of Shooting Teen*, FOX 8 CLEVELAND (July 28, 2015, 5:44 PM), <http://fox8.com/2015/07/28/cleveland-police-union-to-affle-gun-in-fundraiser-for-officer-accused-of-shooting-teen/> (reporting that “[t]he Cleveland Police Patrolman’s Union has come under fire for raffling off a Glock pistol to raise money for an officer accused of shooting an unarmed teenager” and that the union president said no offense was ever intended and explained, “Raffling off a Glock in a police community is like raffling off M&Ms at a kid’s birthday party”); Christopher Zara, *Officer Darren Wilson GoFundMe: Donations Halted as Organizers Sort Out Legal Questions*, INT’L BUS. TIMES (Sept. 2, 2014, 8:00 PM), <http://www.ibtimes.com/officer-darren-wilson-go-fundme-donations-halted-organizers-sort-out-legal-questions-1676430> (reporting that a GoFundMe page started by an anonymous donor raised almost a half-million dollars for Officer Wilson and his defense fund).

<sup>204</sup> Press Release, N.Y.C. Patrolmen’s Benevolent Association, Pat Lynch Says 35-Second Video Doesn’t Tell Whole Story and that Resisting or Interfering with Arrest is Illegal (Oct. 7, 2014), <https://www.nycpba.org/archive/releases/14/pr141007-video.html> [<https://perma.cc/8RPY-3KC6>].

<sup>205</sup> See David Firestone, *The NYC Police Union Has a Long History of Bullying City Hall*, QUARTZ (Dec. 23, 2014), <http://qz.com/317338/the-nyc-police-union-has-a-long-history-of-bullying-city-hall/>. A full collection of press releases can be found on the PBA’s website: <https://www.nycpba.org/releases/index.html>.

even when the officer in question went to jail,<sup>206</sup> his milder statements about the role of the police union are not unusual among police union leaders. He says what most do: “Our job, as an advocate for police officers, is to speak out for them, whether it’s getting them a contract or defending them when they’re wrongfully accused, or explaining exactly how and why we do our job. That’s our role, and we proudly do it.”<sup>207</sup>

Although it is understandable that elected union leaders come to the defense of employees accused of misconduct, the zeal and leverage that police unions bring to the defense is considerable. As a result of contractual and statutory substantive and procedural protections, the expense and hassle necessary to discipline an officer is greater than if the officer could be fired at will.<sup>208</sup> This, combined with the fact that labor arbitrators sometimes reduce punishment, “makes supervisors less likely to impose disciplinary sanctions because while a supervisor faces a possible headache for not disciplining a misbehaving subordinate, they face a *certain* headache if they do.”<sup>209</sup>

One study of discipline imposed in the CPD in the early 1990s found that arbitrators “routinely cut in half” the severity of discipline.<sup>210</sup> Experience with the personnel system prompted Tom Nolan, a veteran of the Boston Police Department and professor of criminology, to say: “The number one impediment to reforming policing in the United States are police unions.”<sup>211</sup> Similarly, in 2016, the Chicago Police Accountability Task Force issued a report concluding that “[t]he collective bargaining agreements between the police unions and the City have essentially turned the code of silence into official policy.”<sup>212</sup> As explained in this Part, statutory and contractual protections for po-

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<sup>206</sup> Karoliszyn, *supra* note 9.

<sup>207</sup> *PBA President Talks Re-Election, Contracts & More*, NY1: INSIDE CITY HALL (June 1, 2015, 9:40 PM), <http://www.ny1.com/nyc/all-boroughs/inside-city-hall/2015/06/1/ny1-online--pba-president-talks-re-election--contracts--more.html> (statement at 2:20); see Edgar Sandoval & Reuven Blau, *Rev. Al Sharpton Rips Police Union President for Criticizing Man Who Taped Cops Arresting Eric Garner*, N.Y. DAILY NEWS (Aug. 4, 2014, 12:05 PM), <http://www.nydailynews.com/new-york/nyc-crime/killed-eric-garner-distraught-article-1.1890415> (quoting PBA President Patrick Lynch as saying that Ramsey Orta, the man who caught the fatal Garner arrest on video, was “demonizing” officers and was a “criminal” because he was arrested for allegedly trying to hand off a stolen gun).

<sup>208</sup> See *infra* Sections II.A, II.B.

<sup>209</sup> Stoughton, *supra* note 27, at 2211–12.

<sup>210</sup> Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 216 (1998).

<sup>211</sup> Karoliszyn, *supra* note 9.

<sup>212</sup> POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM 14 (2016), [https://chicagopatf.org/wp-content/uploads/2016/04/PATF\\_Final\\_Report\\_4\\_13\\_16-1.pdf](https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf).

lice officers do have an effect on police accountability and the transparency of police disciplinary systems.<sup>213</sup> For instance, collective bargaining agreements often contain provisions that protect officers accused of misconduct, shield them from civilian oversight, and limit the ability to change officers' conditions of employment, which also makes it difficult to enact reforms such as setting up early warning systems.<sup>214</sup>

### A. *Statutory and Contractual Limits on Discipline and Transparency*

In the wake of extensive news coverage of and social media outrage about police shootings from 2014 through 2017, a group affiliated with Black Lives Matter launched a project known as Campaign Zero in part to draw public attention to job protections for police officers accused of misconduct.<sup>215</sup> Campaign Zero compiled a database of police union contracts for over eighty American cities, including every major city and a significant number of smaller cities, by obtaining the contracts through Freedom of Information Act requests.<sup>216</sup> Another source of recent data about police union contracts comes from a breach of the website of the country's largest police union, the FOP. Hackers obtained and then leaked to *The Guardian* newspaper nearly two decades' worth of police union contracts, apparently wanting to draw attention to contractual protections that made it more difficult to discipline officers accused of misconduct.<sup>217</sup> A third important source of police union contracts was compiled by Professor Stephen Rushin.<sup>218</sup>

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<sup>213</sup> See JOHN DECARLO & MICHAEL J. JENKINS, LABOR UNIONS, MANAGEMENT INNOVATION AND ORGANIZATIONAL CHANGE IN POLICE DEPARTMENTS 2–3 (M.R. Haberfield ed., 2015); WALKER, *supra* note 90, at 379–80; Walker, *supra* note 28, at 101 (collecting sources and noting “it is widely believed—but not investigated or proven—that police unions stifle good management in general, [and] innovation in particular”); Emmanuel, *supra* note 147.

<sup>214</sup> See DECARLO & JENKINS, *supra* note 213, at 2; WALKER, *supra* note 90, at 374; Walker, *supra* note 28, at 102; Emmanuel, *supra* note 147.

<sup>215</sup> Kyle Jaeger, *The Black Lives Matter Activists Have a Plan: Campaign Zero*, ATTN: (Aug. 26, 2015), <http://www.attn.com/stories/2906/what-is-campaign-zero-black-lives-matter>.

<sup>216</sup> See DERAY MCKESSON ET AL., CAMPAIGN ZERO, POLICE UNION CONTRACTS AND POLICE BILL OF RIGHTS ANALYSIS 4 (2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdf28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf>.

<sup>217</sup> See George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will Be Kept Secret*, GUARDIAN (Feb. 7, 2016, 7:00 AM), <http://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret>.

<sup>218</sup> See Rushin, *supra* note 20, apps. A, B.

All three of these sources of police union contracts reveal several contractual or statutory job protections that are potentially problematic for reform efforts. Some slow down misconduct investigations, prevent public access to complaints and disciplinary records, and enable the destruction of complaints and disciplinary records after a negotiated period of time.<sup>219</sup> Procedural protections for officers during interrogation can make it difficult for investigators to recover accurate information about uses of force. Transparency about how misconduct allegations are handled and accountability for officers who engage in misconduct are hampered by limits on civilian oversight, short statutes of limitation for misconduct charges against officers, and restrictions on which complaints will be investigated, including refusing to investigate anonymous complaints.<sup>220</sup> In the approximately twenty states with statutory LEOBORs, many of these protections exist as a matter of state law and thus even elimination of the police union or its contract would not immediately change the law unless the statute were repealed as well.<sup>221</sup> This Article highlights the contractual and statutory protections that pose the most significant obstacles to reforms. The power of police unions to negotiate over terms of employment and disciplinary processes, which is at the core of the collective bargaining process in any unionized workplace, will be essential to consider in any serious approach to police reform.

*Timing and Conduct of Interrogation.* Most collective bargaining agreements and state LEOBORs outline the process for investigating allegations of officer misconduct, although the process varies.<sup>222</sup> Maryland, for example, provides that no officer may be questioned without having been given the opportunity to secure legal counsel and gives officers ten days to do so.<sup>223</sup> This provision has been criticized for giving officers plenty of time to delay interrogations and concoct an account of the incident that exonerates the officer.<sup>224</sup> Other provisions on officer interrogation include regulation of the location, length, and timing of interrogations.<sup>225</sup>

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<sup>219</sup> *Id.* at 1212, 1220 fig.1.

<sup>220</sup> *Id.* at 1196–97.

<sup>221</sup> Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. LEGAL F. 213, 222 & n.42 (counting twenty LEBORs).

<sup>222</sup> See Keenan & Walker, *supra* note 20, at 203.

<sup>223</sup> MD. CODE ANN., PUB. SAFETY § 3-104(j)(1)–(2) (LexisNexis 2011).

<sup>224</sup> See Walker, *supra* note 20, at 3.

<sup>225</sup> See Keenan & Walker, *supra* note 20, at 217–19.



*Handling of Personnel Files.* Officer personnel files contain records of complaints and their outcomes. Issues concerning those files include whether the public should have access to any of them and, if so, what information should be disclosed. Additional issues include whether records should be expunged after a period of time and, if so, which records and for what length of time.<sup>226</sup>

Proposed legislation that failed to pass in California in 2016 would have increased public access to police disciplinary records that have been restricted by state law and limited by court decisions.<sup>227</sup> The bill would have required public access to records of all investigations into uses of force that result in death or serious injury.<sup>228</sup> The records would be open even if the officer involved eventually was found to have complied with a department's policy.<sup>229</sup> Currently, the LAPD only releases summaries, and some departments don't even provide a summary.<sup>230</sup> The bill would also have required that other reports and findings be made public when officers are found to have engaged in misconduct that violates the legal rights of the public.<sup>231</sup> A similar bill failed to pass in 2007 "after dozens of peace officers testified to lawmakers that permitting public access to police disciplinary files would endanger lives."<sup>232</sup> Yet, according to a news report, there has been no reported case where an officer was harmed based on release of this information.<sup>233</sup> Other police departments, including Baltimore, similarly do not release notice of disciplinary actions and their disposition.<sup>234</sup>

In contrast, at least ten states including Texas and Florida already "provide public access to investigative details, findings, and disciplinary actions when officers are found to have acted improperly."<sup>235</sup> Since 2014, Dallas has maintained websites listing every officer-involved shooting and every officer use of force in response to resistance since 2008 along with the location, the name of the subject,

<sup>226</sup> *Id.* at 235.

<sup>227</sup> S. 1286, 2015–16 Leg., Reg. Sess. (Cal. 2016).

<sup>228</sup> *See id.*; *see also* Patrick McGreevy, *Lawmaker Proposes Giving Public Access to Police Shooting and Misconduct Cases*, L.A. TIMES (Feb. 19, 2016, 11:57 AM), <http://www.latimes.com/politics/la-pol-ca-cop-records-story.html>.

<sup>229</sup> *See* Cal. S. 1286; *see also* McGreevy, *supra* note 228.

<sup>230</sup> *See* McGreevy, *supra* note 228.

<sup>231</sup> *See* Cal. S. 1286; *see also* McGreevy, *supra* note 228.

<sup>232</sup> McGreevy, *supra* note 228.

<sup>233</sup> *See id.*

<sup>234</sup> Balt. Police Union Memorandum, *supra* note 160, art. 16(K).

<sup>235</sup> *See* McGreevy, *supra* note 228.

whether the subject was armed, and the name or badge number, race, and gender of the officers involved.<sup>236</sup>

The challenge with public access to disciplinary records is balancing transparency with protection of legitimate privacy and safety interests of police officers. From one point of view, transparency is clearly desirable as the public should be able to monitor how public employees are disciplined, and this is especially important to restoring public trust in police.<sup>237</sup> From another, the value of transparency is a function of the reliability of the records. Police officers who feel that discipline is used unfairly to punish officers or is meted out based on favoritism or for other nonmeritorious reasons would conclude that public accessibility of the records will only compound the harm of the unfair discipline by stigmatizing an officer and might facilitate reprisals if the officer's name and home address are released.<sup>238</sup> Conversely, officers who feel that discipline is fair might still be reluctant to allow their name to be publicized, but at least recognize that public awareness is not unreasonable or grossly unfair.<sup>239</sup>

As for expungement, many cities allow for expungement of complaints.<sup>240</sup> Baltimore's union contract allows officers to request expungement of formal complaints that are found to be unfounded or as to which the officer was exonerated after three years.<sup>241</sup> Some policing scholars assert that expungement of unfounded complaints is undesirable because such records are part of early intervention systems mandated by DOJ consent decrees. These systems create a computerized record of multiple performance indicators, including uses of force and citizen complaints, that allow supervisors and oversight entities to have a full picture of every officer's job performance.<sup>242</sup>

*Civilian Complaints and Oversight.* Some LEOBORs and contracts impose short statutes of limitations on the prosecution of disci-

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<sup>236</sup> See *Dallas Police Officer-Involved Shootings*, DALLAS OPENDATA, <https://www.dallasopendata.com/Police/Dallas-Police-Public-Data-Officer-Involved-Shootin/4gmt-jyx2> (last visited Apr. 6, 2017); *Police: 2015 Response to Resistance*, DALLAS OPENDATA, <https://www.dallasopendata.com/dataset/Police-2015-Response-to-Resistance/594v-2cnd> (last updated Feb. 10, 2017); Leon Neyfakh, *A Police Department That's Embraced Reform*, SLATE (July 8, 2016, 12:10 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2016/07/the\\_dallas\\_police\\_department\\_has\\_been\\_a\\_model\\_for\\_reducing\\_officer\\_involved.html](http://www.slate.com/articles/news_and_politics/crime/2016/07/the_dallas_police_department_has_been_a_model_for_reducing_officer_involved.html).

<sup>237</sup> Walker, *supra* note 20, at 7.

<sup>238</sup> See Joseph, *supra* note 217.

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> Rushin, *supra* note 20, at 1196–97.

<sup>242</sup> See Keenan & Walker, *supra* note 20, at 235.

pline.<sup>243</sup> In Maryland, for example, no complaint alleging brutality will be investigated or be the basis of discipline if filed more than ninety days after the alleged incident.<sup>244</sup> Others treat citizen complaints differently than complaints initiated by other officers.<sup>245</sup> Other provisions limit civilian oversight.<sup>246</sup> For many police unions, limiting civilian oversight is one of their most important issues.<sup>247</sup>

*Misconduct Investigations.* Several types of contractual and statutory provisions governing investigations have been criticized. One provision concerns the timing of such investigations and who should conduct them.<sup>248</sup> Other constellations of concerns focus on control of the hearing boards that determine whether officers have committed misconduct.<sup>249</sup> In Los Angeles in the decades before the Rampart scandal, rank-and-file officers believed that the Board of Rights was controlled by the chief who used it to punish whistleblowers and dissenters.<sup>250</sup> In Baltimore, perhaps for a similar reason, the union negotiated a contractual provision requiring that one member of every hearing board be a peer officer of the accused.<sup>251</sup> A critic, however,

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<sup>243</sup> Police Officer Bill of Rights laws reviewed include: California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. See CAL. GOV'T CODE §§ 3301–3311 (West 2010); DEL. CODE ANN. tit. 11, §§ 9200–9209 (2015); FLA. STAT § 112.532 (2016); 50 ILL. COMP. STAT. ANN. 725/3 (West 2014); KY. REV. STAT. ANN. § 15.520 (West 2010); LA. STAT. ANN. § 40:2531 (Westlaw through the 2017 First Extraordinary session); MD. CODE ANN., PUB. SAFETY §§ 3-101 to 3-113 (LexisNexis 2011); MINN. STAT. § 626.89 (2014); NEV. REV. STAT. ANN. § 289.020–.120 (LexisNexis 2013); N.M. STAT. ANN. § 29-14-4 (2013); 42 R.I. GEN. LAWS § 42-28.6-2 (2007); VA. CODE ANN. § 9.1-501 (2012); W. VA. CODE § 8-14A-2 (LexisNexis 2012); WIS. STAT. § 164.01–.06 (West, Westlaw through 2017 Act 2).

<sup>244</sup> MD. CODE ANN., PUB. SAFETY § 3-104(c)(2) (LexisNexis 2011).

<sup>245</sup> See *supra* note 243. See generally Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against the Police*, 25 FORDHAM URB. L.J. 209, 216–22 (1998) (describing civilian complaint review procedures).

<sup>246</sup> See *supra* note 243. See generally EDUARDO L. CALDERON & MARIA HERNANDEZ-FIGUEROA, *CITIZEN OVERSIGHT COMMITTEES IN LAW ENFORCEMENT* 7–8 (2013), <http://cpp.fullerton.edu/pdf/Citizen%20Oversight.pdf> (discussing impediments to the establishment of civilian oversight committees).

<sup>247</sup> CALDERON & HERNANDEZ-FIGUEROA, *supra* note 246, at 8. Ironically, sometimes civilian oversight results in more leniency towards officers. See, e.g., Kate Mather & David Zahniser, *A Proposal to Give Civilians More Say in LAPD's Disciplinary System Could End Up More Lenient on Officers*, L.A. TIMES (Jan. 10, 2017, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-lapd-discipline-change-20170109-story.html> (noting a study which “showed that civilian members of the boards that weigh major LAPD discipline cases are ‘consistently more lenient’ than their sworn counterparts, frequently voting to acquit officers or dole out lesser punishments”).

<sup>248</sup> Walker, *supra* note 20, at 3.

<sup>249</sup> Chemerinsky, *supra* note 53, at 563.

<sup>250</sup> *Id.* at 607.

<sup>251</sup> Balt. Police Union Memorandum, *supra* note 160, art. 16(C)(3).

insisted that “including a peer officer as a member of the Hearing Board serves to protect misconduct” because “giving the rank and file a direct voice in disciplinary investigation . . . necessarily lowers the standards for police conduct” inasmuch as officers have “a vested interest in shielding all officers from meaningful investigations and discipline.”<sup>252</sup> Other provisions concern whether the public should receive notice of the disposition of investigations.<sup>253</sup>

The provisions highlighted above can be obstacles to reforms in that they make it harder for supervisors, civilian oversight boards, and the public to determine the nature and extent of police misconduct, to develop early intervention systems to help officers who are at risk of committing future abuse, and to remove officers who have committed egregious misconduct. Police unions, however, have defended these provisions. The FOP, for example, said these types of provisions are necessary to protect officers from unfounded citizen complaints.<sup>254</sup> As the former President of the Federal Agents’ Police Benevolent Association and founder of the National Police Defense Foundation, a non-profit that provides legal services to members of law enforcement, put it: “What is happening now is police are second-guessing their instincts and training they have because they’re scared to get indicted, that they may have to go to jail for doing their job.”<sup>255</sup> This alleged reluctance to do the job, which some have called the Ferguson Effect,<sup>256</sup> is the latest iteration of a longstanding argument that unions are necessary to protect police from the anti-police rhetoric.

As explained further in Parts III and IV, police unions have fought hard for many of these procedural and substantive protections because they do not trust the process of adopting and implementing policies. But reform will not be accomplished simply by eliminating job protections, even if that were politically feasible. Nor will reform be accomplished simply by involving the public in negotiating over job protections, at least so long as the rank-and-file retain the collective will to resist reforms, discipline is subject to grievance arbitration, and

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<sup>252</sup> Walker, *supra* note 20, at 5 (emphasis removed). Campaign Zero also calls for eliminating police officer influence from disciplinary boards and setting up an independent process. See *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/investigations> [<https://perma.cc/5AFE-J8T4>] (last visited Mar. 26, 2017).

<sup>253</sup> See Walker, *supra* note 20, at 7.

<sup>254</sup> Karoliszyn, *supra* note 9.

<sup>255</sup> *Id.*

<sup>256</sup> See Neil Gross, Opinion, *Is There a ‘Ferguson Effect’?*, N.Y. TIMES: SUNDAY REV. (Sept. 30, 2016), <https://www.nytimes.com/2016/10/02/opinion/sunday/is-there-a-ferguson-effect.html>.

negotiating disputes are subject to interest arbitration. And it is politically infeasible (and may well be unwise) to eliminate a process to appeal discipline. Rather, rank-and-file need to be involved in improving police practices, and that involvement very likely requires the cooperation of some kind of officer labor representative.

## B. *Other Limits on Reform*

### 1. *Changing Conditions of Employment*

In addition to protection against discipline, accountability, and transparency, many states have laws that require management to collectively bargain over any changes to conditions of employment.<sup>257</sup> This requirement can also stymie reform efforts. For instance, federal law empowers the DOJ to bring structural reform litigation against police departments engaged in a “pattern or practice” of civil rights abuses.<sup>258</sup> Most of the investigations conducted by the DOJ have resulted in consent decrees that are approved and overseen by federal courts.<sup>259</sup> An investigation of seventeen of these consent decrees negotiated between 1997 and 2016 found that in at least seven of them, the union contract with the city hindered the reforms contained in the consent decree.<sup>260</sup>

Unsurprisingly, unions, and sometimes classes of union members, have filed grievances when these reforms change working conditions. In Seattle, for instance, two police unions filed a lawsuit in 2013 arguing that “certain topics that have long been subjected to bargaining—including conditions for employment . . . could be *severely curtailed* by the city’s proposed police reform plan.”<sup>261</sup> The plan included provisions that the Seattle Police Department (“SPD”) would be monitored to determine “whether all use of force is reported[,] . . . tracked, and properly classified, and thoroughly and objectively investigated and reviewed to a reasonable and unbiased conclusion,” and also “whether disciplinary results on founded complaints reflect the seriousness of the underlying event . . . with biased policing, excessive

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<sup>257</sup> Karoliszyn, *supra* note 9.

<sup>258</sup> 42 U.S.C. § 14141 (2012). *See generally* Armacost, *supra* note 200, at 525–31; Harmon, *supra* note 20, at 804–05; Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343 (2015).

<sup>259</sup> *See* Armacost, *supra* note 200, at 527–30 (describing DOJ’s frequent use of consent decrees).

<sup>260</sup> Emmanuel, *supra* note 147.

<sup>261</sup> Cienna Madrid, *Seattle Police Union Files Lawsuit to Block Police Reform Plan*, STRANGER: SLOG (Mar. 11, 2013, 3:08 PM), <http://slog.thestranger.com/slog/archives/2013/03/11/seattle-police-union-file-lawsuit-to-block-police-reform-plan>.

force, failure to report force, or dishonesty meriting appropriate discipline.”<sup>262</sup> The lawsuit asked the court to “permanently block the city and court monitor from making any changes to police officers’ wages, hours, or working conditions.”<sup>263</sup> DOJ consent decrees aimed at reform of police departments often include language providing that any reforms can only occur to the extent that they do not conflict with the union contract.<sup>264</sup> These provisions can delay or permanently hinder reform efforts.<sup>265</sup>

## 2. Union Structure

Unions are run by an elected president and board of directors.<sup>266</sup> In large departments, the individuals holding these full-time paid positions control a multimillion-dollar budget amassed from union dues.<sup>267</sup> This gives them enormous power to influence public policy because they can donate a portion of these funds to politicians viewed as friendly to their interests.<sup>268</sup> A case in point is Seattle.

The Seattle Police Officers’ Guild (“SPOG”), the union of rank-and-file officers, endorsed Ed Murray for Mayor in 2013 and contributed \$15,000 to his campaign.<sup>269</sup> Upon his taking office, one of his first

<sup>262</sup> *Id.* (emphasis removed; ellipses in original). This occurred prior to Smith taking office in 2014. See *infra* note 320 and accompanying text.

<sup>263</sup> Madrid, *supra* note 261 (emphasis removed). In 2014, a class of union members, and not the union itself, filed a lawsuit to block the use of force reforms contained in the DOJ consent decree with the City, contending that the policies put officers’ lives in danger. Steve Miletich et al., *Seattle Cops Sue over DOJ Reforms*, SEATTLE TIMES (May. 29, 2014, 1:56 PM), <http://www.seattletimes.com/seattle-news/seattle-cops-sue-over-doj-reforms>.

<sup>264</sup> Emmanuel, *supra* note 147. For instance, the consent decree between the DOJ and Pittsburgh in 1997 includes the language, “Nothing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police.” *Id.*

<sup>265</sup> See *supra* notes 165–73 and accompanying text.

<sup>266</sup> See, e.g., Agreement by and Between the City of Seattle and Seattle Police Officers’ Guild: Effective Through December 31, 2014 art. 1, <http://www.seattle.gov/personnel/resources/pubs/SPOG.pdf>.

<sup>267</sup> For example, in Houston, with more than five thousand police officers paying approximately \$600 a year in union dues, an annual budget would exceed three million dollars. See *Crime in the United States 2012: Table 78*, FBI: UCR, [https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/78tabledatadecpdf/table-78-state-cuts/table\\_78\\_full\\_time\\_law\\_enforcement\\_employees\\_texas\\_by\\_city\\_2012.xls](https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/78tabledatadecpdf/table-78-state-cuts/table_78_full_time_law_enforcement_employees_texas_by_city_2012.xls) (last visited Mar. 26, 2017) (Houston “Total Law Enforcement Employees”: 6,663); *2015 Union Dues*, HOUSTON POLICE OFFICERS’ UNION, <http://www.hpou.org/2015-union-dues/> [<https://perma.cc/V3A7-P2AG>] (last visited Mar. 26, 2017) (indicating the 2015 total union dues owed is \$641.04).

<sup>268</sup> See *supra* note 193 and accompanying text.

<sup>269</sup> Ansel Herz, *Amid Contract Negotiations, Seattle Police Union Claims It’s “Under Attack” by Black Lives Matter Activists*, STRANGER: SLOG (Dec. 3, 2015, 4:56 PM), <http://www.thestranger.com/blogs/slog/2015/12/03/23230986/amid-contract-negotiations-seattle-police-union-claims-its-under-attack-by-black-lives-matter-activists>.

acts was to demote the interim chief of the department, a man who had enacted numerous reforms that had been praised in a report by the federal court monitor of the DOJ consent decree.<sup>270</sup> Additionally, the report praised an assistant chief who also retired suddenly.<sup>271</sup> The Mayor then appointed the former Vice President of SPOG, Harry Bailey, as interim police chief.<sup>272</sup> Bailey immediately attempted to overturn misconduct findings of numerous officers found guilty of using excessive force.<sup>273</sup>

The perception that SPOG captured the Mayor existed not only amongst reformers, but also amongst some members of the rank-and-file. The Mayor's actions created "an atmosphere of fear."<sup>274</sup> One officer opined that the former Chief and Assistant Chief who the Mayor forced out were

people who have a deep institutional knowledge of the organization, have been there a long time and earned their way to the top, and have been chipping away at deficiencies for three years . . . [.] After a long struggle to make this a better organization, boom, they are all gone. You bring in new people who are less experienced, and you give them the same task, but you have erased that last few years of work.<sup>275</sup>

Another officer, who wanted to remain anonymous to avoid the possibility of retribution, stated:

If the people who have been opposing the federal court monitor and reform are elevated, . . . [t]here is a risk in working hard to achieve reform. It sends a message that is, at best, confusing about whether they want reform to be successful. Why would you put the fox in charge of the henhouse? . . . Any risk they take may piss off the folks who are in charge.

I think a lot of us were quite stunned . . . . The mood was shock—complete shock—because everyone who was involved in reform was gone or buried. People just stopped talking.<sup>276</sup>

These quotes reveal how union leadership can stymie reform by stifling the voices of rank-and-file members who may support reform

<sup>270</sup> Dominic Holden, *Reform in Reverse*, STRANGER (Apr. 16, 2014), <http://www.thestranger.com/seattle/reform-in-reverse/Content?oid=19281433>.

<sup>271</sup> *Id.*

<sup>272</sup> Herz, *supra* note 269.

<sup>273</sup> *Id.* Ultimately, Bailey was unable to do so because his actions caused a scandal. *See id.*

<sup>274</sup> Holden, *supra* note 270.

<sup>275</sup> *Id.* (ellipsis in original).

<sup>276</sup> *Id.*

efforts. The perception that the Mayor was in bed with the union and his actions in demoting and forcing out individuals who were working with the DOJ to institute reforms created fear, silenced more progressive voices amongst the rank-and-file, and made them reluctant to engage in reform-oriented efforts.

Similar suppression of rank-and-file voices occurred in San Francisco, according to a Blue Ribbon Panel appointed by the District Attorney after it was discovered that members of the police department had exchanged racist and homophobic text messages.<sup>277</sup> Among the panel's findings was that the union dissuaded officers from speaking to the panel and many who did speak to the panel did so anonymously because they feared retaliation from the union and had concerns about their physical safety.<sup>278</sup>

The union can also hinder reforms by capturing police management, thereby eliminating any checks and balances with the department. This arguably occurred in Seattle when the former vice president of the union was elevated to the position of police chief.<sup>279</sup> In San Francisco, the Blue Ribbon Panel concluded that there was virtually no distinction between the command staff of the department and the police officer's union.<sup>280</sup> This made it difficult to engage in reforms because the union was essentially running the department and it had historically taken antireformist positions.<sup>281</sup>

Finally, one way for union leadership to maintain their power and influence is to convince rank-and-file officers to join the union and pay union dues. As such, they must justify why the union is important for officers, and one persuasive way to do so is to encourage the rank-and-file to believe that they cannot trust management and that management is out to get them. This narrative is easy to maintain because the hierarchical structure of most police departments limits contact between command staff and the rank-and-file.<sup>282</sup>

In sum, collective bargaining agreements, including seniority systems, union power over conditions of work, and the structure and incentives of police unions can all be barriers to reform.<sup>283</sup> However, this

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277 S.F. BLUE RIBBON PANEL, THE BLUE RIBBON PANEL ON TRANSPARENCY, ACCOUNTABILITY, AND FAIRNESS IN LAW ENFORCEMENT 1 (2016), [http://sfblueribbonpanel.com/sites/default/files/BRP\\_report.pdf](http://sfblueribbonpanel.com/sites/default/files/BRP_report.pdf) [hereinafter PANEL REP.].

278 *Id.* at 143.

279 *See supra* notes 269–73 and accompanying text.

280 PANEL REP., *supra* note 277, at 143.

281 *See id.*

282 *See supra* Section I.A.

283 *See* SKLANSKY, *supra* note 119, at 82 (“[T]he growing power of police unions made it



does not mean that unions and rank-and-file officers always find reform efforts problematic. Next, this Article provides evidence that unions can be important partners in reform efforts.

### III. POLICE UNIONS AS AGENTS OF POLICE REFORM

In theory, police unions could be agents of reform in at least two ways. First, as representatives of the line officers who have daily contact with the community whom the police are supposed to protect and serve, unions could help improve the relationship between police and citizens, and help ensure that force is used wisely and prudently, and that arrests are made and citations issued only when doing so actually improves life for the community. Second, unions could become intermediaries to convey the concerns of line personnel to management in a way that will improve policing. But to do either of those, unions would have to develop genuine and sustained enthusiasm for improving the quality of policing.<sup>284</sup>

Given the prevailing wisdom that police unions are irredeemably opposed to reforms, it is surprising to learn that while unions fight hard to ward off discipline for some members,<sup>285</sup> doing so does not necessarily equate with an antireformist position when it comes to matters unrelated to officer discipline. There is evidence of police unions occasionally working to facilitate reforms that improve the quality of policing. Here we offer a few examples and then draw some generalizations from them.

#### A. *Examples of Police Unions as Agents of Reform*

A number of cities at various points over the last fifty years have implemented reforms to reduce police violence and improve police-community relations. All of them involved the cooperation of the rank-and-file, and many involved active cooperation with the union.

An early example is the “Friday Crab Club” of the Berkeley Police Department, which was organized by Chief August Vollmer in the

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more difficult for departments to explore new strategies of collaborative decision making that circumvented seniority systems or bypassed the union hierarchy.”); JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE* 160 (1986); WALKER, *supra* note 90, at 380 (“[T]he possibilities for changing police organizations are limited by structural features such as civil service and police unions.”).

<sup>284</sup> Kelling & Kliesmet, *supra* note 33, at 211.

<sup>285</sup> Cf. Max Rivlin-Nadler, *Police Union Turns Its Back on Cop Who Killed Innocent Man in Brooklyn Stairwell*, *GOTHAMIST* (Jan. 28, 2016, 11:17 AM), [http://gothamist.com/2016/01/28/akai\\_gurley\\_liang\\_trial.php](http://gothamist.com/2016/01/28/akai_gurley_liang_trial.php) (discussing surprising lack of PBA support at an officer’s trial).

early 1900s.<sup>286</sup> This group consisted of rank-and-file officers who met with the Chief on a weekly basis to review police actions, including uses of force.<sup>287</sup> Officers who had used force were required to explain their behaviors and the group would decide whether the force was justified.<sup>288</sup> The group also invited experts and members of the community, including those accused of criminal conduct, to address them.<sup>289</sup> “Advocates of community policing hold up the Friday Crab Club as a paradigm for collegial peer review that will ‘unleash[ ] [the] human potential that lies at the core of community policing and problem oriented policing.’”<sup>290</sup>

Another example occurred during the 1960s and 1970s when the Oakland police department was struggling with violent encounters with citizens.<sup>291</sup> Chief Charles Gain was a reformist chief who had strong support from the Black community, but not much from the union.<sup>292</sup> He pushed through many reforms despite union opposition.<sup>293</sup> Many officers resigned or retired under his leadership and the newly formed union issued a vote of no confidence.<sup>294</sup> Despite his strong leadership style, Chief Gain created the Violence Prevention Unit with the help of social psychologist Hans Toch, to address the problem of violence-prone officers.<sup>295</sup> The Unit diverged from the otherwise hierarchical organization of the police department and Chief Gain maintained a hands-off approach and allowed the Unit to function independently.<sup>296</sup> The Unit was based on two assumptions: first, that patrol officers could control other officers, and second, that those officers who had been violent in the past would be in the best position to help officers who were having problems in the present.<sup>297</sup> The Unit was successful in two ways—officers participated with great enthusiasm and caring, and the work of the panel reduced violent confronta-

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<sup>286</sup> Armacost, *supra* note 200, at 541.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 542.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* (alteration in original) (quoting William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in POLICE VIOLENCE, *supra* note 33, at 317).

<sup>291</sup> See HANS TOCH & J. DOUGLAS GRANT, POLICE AS PROBLEM SOLVERS 77–85 (1991), for an in-depth discussion.

<sup>292</sup> See Jerome H. Skolnick, *Enduring Issues of Police Culture and Demographics*, in POLICE REFORM FROM THE BOTTOM UP, *supra* note 27, at 156, 161.

<sup>293</sup> *Id.* at 162.

<sup>294</sup> *Id.*

<sup>295</sup> Kelling & Kliesmet, *supra* note 33, at 207 (summarizing the findings of TOCH & GRANT, *supra* note 291, at 77–85).

<sup>296</sup> JIM ISENBERG, POLICE LEADERSHIP IN A DEMOCRACY 92 (2010).

<sup>297</sup> Kelling & Kliesmet, *supra* note 33, at 207.

tions between the police and citizens.<sup>298</sup> As with many such reforms, however, it was discontinued due to department budget cuts.<sup>299</sup> And almost as soon as it was, police violence problems recurred.<sup>300</sup>

One more example is from Milwaukee in the 1960s and 1970s. Despite the fact that the police chief, Harold Brier, had no interest in improving relations with the Black community, the union saw things differently.<sup>301</sup> The union recognized that its members were on the street as line officers and that they were the ones who suffered from the antagonism from the Black community.<sup>302</sup> So the union organized meetings with citizen groups using community relations techniques then in vogue.<sup>303</sup> Like the Oakland experiment, however, the program soon faded. In Milwaukee, unlike in Oakland, the Police Department never formalized the program and never made funds available to reimburse officers for time spent with citizen groups.<sup>304</sup> Although the government's Law Enforcement Administration Assistance ("LEAA") program used to give grants to police departments that were interested in developing community relations programs, it excluded unions.<sup>305</sup> In the years since, "LEAA has been replaced by several funding bureaus within the" DOJ, but these new bureaus still will not fund union projects.<sup>306</sup>

The Metro-Dade Police-Citizen Violence Reduction Project is another example of rank-and-file officer involvement in police reform. The Project involved a task force made up of officers, management, and others who were tasked with reviewing a random sample of citizen complaints involving "police abuse, officers' use of force," and officer injuries during police-citizen interactions.<sup>307</sup> Based on the lessons they learned from this review, a new training program involving role-plays was developed and implemented.<sup>308</sup> The preliminary results from the training program showed a thirty to fifty percent reduction

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<sup>298</sup> *Id.*

<sup>299</sup> SKOLNICK & BAYLEY, *supra* note 283, at 151–52.

<sup>300</sup> TOCH & GRANT, *supra* note 291, at 85 n.3.

<sup>301</sup> Kelling & Kliesmet, *supra* note 33, at 208.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *POLICE VIOLENCE* *supra* note 33, at 165, 174.

<sup>308</sup> *Id.*

“in injuries to officers, officers’ use of force, and citizens’ complaints of abuse.”<sup>309</sup>

Occasionally, police unions have formed alliances with civil rights leaders or their organizations. In Los Angeles, the Police Protective League (“PPL”) (“a notoriously inward-looking organization”) commissioned a report by law professor and civil liberties activist Erwin Chemerinsky.<sup>310</sup> They did so because the union’s members feared reprisals by the controversial new chief of police, Bernard Parks, whom some League leaders believed would draw the wrong lessons from a corruption scandal in the LAPD’s Rampart Division.<sup>311</sup>

In Newark, New Jersey, union president James Stewart helped the DOJ during its investigation of the police department. According to him, the “union’s attitude was ‘come on in,’” and it helped the DOJ uncover problems within the police department, including “frequent pedestrian stops that violated residents’ civil rights three out of every four times they occurred.”<sup>312</sup> Stewart even indicated that he “approves of DOJ-mandated reforms related to the department’s officer training and community relations.”<sup>313</sup> Simultaneously, however, Stewart strongly opposed any reforms that would create a civilian review board.<sup>314</sup> The union threatened to bring a lawsuit, arguing that changes to officer discipline must be part of collective bargaining.<sup>315</sup>

In Los Angeles, the LAPD created a Community Safety Partnership unit that operates in some of the most dangerous and violent housing developments.<sup>316</sup> The officers in the unit patrol the neighborhoods on foot and know residents by name.<sup>317</sup> They also earn the trust

<sup>309</sup> *Id.*

<sup>310</sup> SKLANSKY, *supra* note 119, at 183.

<sup>311</sup> “Two years later, the PPL’s efforts to oust Parks triggered a decertification drive by dissent officers supported by the Teamsters; in response the PPL joined the IUPA.” *Id.* “The PPL had earlier supported Chemerinsky’s successful bid to serve on the Los Angeles Charter Reform Commission.” *Id.* at 254 n.114.

<sup>312</sup> Emmanuel, *supra* note 147.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> Charlie Beck & Connie Rice, *How Community Policing Can Work*, N.Y. TIMES (Aug. 12, 2016), <http://www.nytimes.com/2016/08/12/opinion/how-community-policing-can-work.html>. See generally News Release, LAPD, LAPD’s Community Safety Partnership Program: NR15021SF, L.A. POLICE DEP’T (Jan. 22, 2015), [http://www.lapdonline.org/newsroom/news\\_view/57887](http://www.lapdonline.org/newsroom/news_view/57887); Constance Rice & Susan K. Lee, Advancement Project, Relationship-Based Policing Achieving Safety in Watts, <http://advancementprojectca.org/wp/wp-content/uploads/2015/09/imce/President’s%20Task%20Force%20CSP%20Policy%20Brief%20FINAL%20002-27-15.pdf> (last visited Mar. 12, 2017).

<sup>317</sup> See Beck & Rice, *supra* note 316.

of the community by providing social services to residents as well as participating in neighborhood activities.<sup>318</sup> Additionally, unlike the ubiquitous practice of promoting officers based on the numbers of arrests they make, officers in this unit are rewarded for diverting people from the criminal justice system and fostering positive relationships in the community.<sup>319</sup> While it is unclear how much the union was involved in these efforts, it did not file any grievances to stop the program or dissuade rank-and-file officers from participating in it.

Surprisingly, the experience in Seattle also provides an example of how unions can work to facilitate reforms. In 2014, after some of the events discussed in Section II.C, Ron Smith was elected as the new President of SPOG. During his time in office from 2014 to 2016, SPOG continued to vociferously defend and protect officers who were accused of misconduct.<sup>320</sup> However, Smith simultaneously worked closely and collaboratively with the new Police Chief, Kathleen O’Toole, and with reformers outside the department, to implement DOJ-mandated reforms.<sup>321</sup> The consent decree between the City and the DOJ, which was in place for two years by the time Smith was elected, required the adoption of extensive reforms to curb excessive force and racially biased policing.<sup>322</sup> In a move that was remarkable to outside observers, Smith told his membership that bias-free policing was important and if they did not like it, they could “leave and go to a place that serves [their] worldview.”<sup>323</sup> This is from the same union that had, in 2010, “described efforts to combat racial profiling as ‘socialist policies’ from ‘the enemy’ and argued that officers should be able to call citizens ‘bitch’ and ‘n\*\*\*a.’”<sup>324</sup>

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> See, e.g., Ansel Herz, *Seattle Police Union Says Contract Violation Prevents SPD from Firing Officer Cynthia Whitlatch*, STRANGER: SLOG (Sept. 3, 2015, 3:32 PM), <http://www.thestranger.com/blogs/slog/2015/09/03/22808730/seattle-police-union-says-contract-violation-prevents-spd-from-firing-officer-cynthia-whitlatch>.

<sup>321</sup> See Steve Miletich, *Seattle Police Union President Says He Quit Over Facebook Post Before His Board Tried to Fire Him*, SEATTLE TIMES (July 14, 2016, 12:12 AM), <http://www.seattletimes.com/seattle-news/crime/seattle-police-guild-president-says-he-quit-before-his-board-tried-to-fire-him/>.

<sup>322</sup> See *id.*

<sup>323</sup> Ansel Herz, *Seattle Police Union President to Cops: Get with the Times or Get Out of This City*, STRANGER: SLOG (Feb. 18, 2015, 4:05 PM), <http://www.thestranger.com/blogs/slog/2015/02/18/21739167/seattle-police-union-president-to-cops-get-with-the-times-or-get-out-of-this-city> (emphasis removed).

<sup>324</sup> *Id.*; see also Holden, *supra* note 270.

Negotiations on the collective bargaining agreement between SPOG and the City began in 2015.<sup>325</sup> These negotiations had to be completed before reforms under the consent decree could continue because some of the measures to improve police accountability potentially conflicted with the current contract.<sup>326</sup> During the negotiations, SPOG President Smith was supportive of adopting some accountability measures that would lead to more transparency. For instance, he supported changes to the collective bargaining agreement that would have opened disciplinary hearings to certain outsiders, including a citizen observer appointed by the mayor and members of the Community Police Commission (“CPC”).<sup>327</sup> The CPC is a group created by the DOJ consent decree<sup>328</sup> made up primarily of community groups, including the ACLU and the National Association for the Advancement of Colored People (“NAACP”), that had asked the DOJ to investigate the SPD.<sup>329</sup> The CPC also has a guaranteed spot for a representative from SPOG and from the Seattle Police Management Association.<sup>330</sup>

Under Smith’s leadership, SPOG did not file any grievances or do anything else to block any of the reform efforts.<sup>331</sup> One of the co-chairs of the CPC, Lisa Daugaard, noted that during the reform process, “things could have gone terribly with SPOG, but [didn’t].”<sup>332</sup> She continued:

To the surprise of many including me, . . . SPOG really has not impeded the reform process. There were many points

<sup>325</sup> Herz, *supra* note 269.

<sup>326</sup> *See id.*

<sup>327</sup> Ansel Herz, *Inside the City’s Negotiations with the Police Union*, STRANGER (June 22, 2016), <http://www.thestranger.com/news/2016/06/22/24243759/inside-the-citys-negotiations-with-the-police-union/>; *see also* Miletich, *supra* note 321.

<sup>328</sup> Steve Miletich & Mike Carter, *SPD Faces New Oversight, Scrutiny of Use of Force*, SEATTLE TIMES (July 28, 2012, 12:16 AM), <http://www.seattletimes.com/seattle-news/spd-faces-new-oversight-scrutiny-of-use-of-force/>. The purpose of the group is to review the semiannual reports completed by the court appointed monitor, “hold public meetings, make recommendations to the city, and engage the community in police reforms. It also will review recommended changes to the department’s civilian-run Office of Professional Accountability, among other tasks.” *Id.*; *see also* *Community Police Commission: About Us*, SEATTLE.GOV, <http://www.seattle.gov/community-police-commission/about-us> (last visited Mar. 26, 2017) (providing more information about the Community Police Commission).

<sup>329</sup> *See* David Kroman, *Reformers Aren’t Celebrating Police Union Leader’s Resignation*, CROSSCUT (July 14, 2016), <http://crosscut.com/2016/07/ron-smith-seattle-police-cpc/>.

<sup>330</sup> David Kroman, *Police Unions, Citizen Group Forge Unlikely Partnership*, CROSSCUT (Feb. 9, 2016), <http://crosscut.com/2016/02/police-citizen-group-forge-unlikely-partnership/>.

<sup>331</sup> Interview with Lisa Daugaard, Co-Chair of the CPC and Director of the Public Defenders Association (July 14, 2016).

<sup>332</sup> Kroman, *supra* note 329.

along the way when many police unions might have filed grievances or unfair labor practice complaints about the changes that have been implemented without bargaining. They've chosen not to do that.<sup>333</sup>

She concluded, "It's not as simple as the labor union being the problem, tempting as that idea is, and true as it may have been in the past."<sup>334</sup> And when, in 2014, rank-and-file officers from the North Precinct attempted to derail the new use of force policy adopted by the police department by filing a lawsuit, SPOG President Smith publicly voiced his disapproval and the union did not join the lawsuit.<sup>335</sup>

The relationship between the CPC and the police union has been described as "among the healthiest between any two parties in the [reform] process."<sup>336</sup> Smith notes that the CPC treats the SPOG representative with respect and stated that while SPOG and the CPC do not agree on everything, at least they "can talk to each other."<sup>337</sup> He further shared that he has "a really good relationship with [CPC co-chair] Lisa [Daugaard]."<sup>338</sup> The relationship is such that when the federal district court judge in charge of overseeing the consent decree suggested that "any new appeal process for police discipline cases created through ongoing collective bargaining negotiations must get approval from the court," the CPC filed an amicus brief supporting SPOG's resistance to this suggestion.<sup>339</sup> Ironically, observers note that most of the tension "has been between the CPC and other parties to the consent decree, namely the Mayor's Office and the independent monitor team."<sup>340</sup>

Unfortunately, the rosy situation in Seattle may have come to an end. In early June 2016, SPOG President Ron Smith resigned after a scandal involving a controversial Facebook post in which he blamed the Dallas police officer shootings on what he termed the "minority movement."<sup>341</sup> He denies that he was referring to the Black Lives

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> Steve Miletich, *SPD Officers Say City 'Playing Politics' with Their Lives*, SEATTLE TIMES (Aug. 29, 2014, 8:15 PM), <http://www.seattletimes.com/seattle-news/spd-officers-say-city-lsquoisplaying-politicsrsquo-with-their-lives/>.

<sup>336</sup> Kroman, *supra* note 330.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* (alteration in original).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Miletich, *supra* note 321. Over a year earlier, in the December 2014 edition of the union newsletter, Smith accused Barack Obama, Eric Holder, and Reverend Al Sharpton of carrying out a "divisive political agenda" in response to Michael Brown's death in Ferguson. *See* Ansel

Matter movement, claiming instead that he was referring to “the small segment of society which has the propensity for violence toward law enforcement.”<sup>342</sup> However, he resigned because the negative publicity was pulling attention away from the reform efforts being made in the City.<sup>343</sup>

In a later interview, however, Smith disclosed that he also resigned because the Executive Board of the union was going to attempt to force him out because of his acceptance of police accountability measures in the proposed union contract and for being too conciliatory to outside reformers and the Police Chief.<sup>344</sup> He had been described as a “bootlicker” because of his relationship with the Chief, despite the fact that his collaboration with Chief O’Toole was crucial to his ability to negotiate improvements to officer working conditions.<sup>345</sup> While he expected that he could win the fight and stay in office because of support he had amongst some members of the Executive Board and the rank-and-file, he did not want the controversy over his Facebook post to distract from the ongoing reform process.<sup>346</sup> After he resigned, officers voted 823 to 156 to reject the contract.<sup>347</sup> One of the reasons was the inclusion of civilian review in the proposed agreement.<sup>348</sup>

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HERZ, *SPOG is Still an Obstacle to Reform at the Seattle Police Department*, STRANGER: SLOG (Dec. 22, 2014, 4:01 PM), <http://slog.thestranger.com/slog/archives/2014/12/22/spog-is-still-an-obstacle-to-reform-at-the-seattle-police-department> (emphasis removed).

<sup>342</sup> Ansel Herz, *Seattle Police Guild President Resigns After Offensive Facebook Post*, STRANGER, SLOG (July 12, 2016, 9:51 PM), <http://www.thestranger.com/slog/2016/07/12/24337587/seattle-police-guild-president-resigns>.

<sup>343</sup> *Id.*

<sup>344</sup> Miletich, *supra* note 321.

<sup>345</sup> Jennifer Sullivan, ‘Mellowed’ Leader at Helm of SPD Union Reflects on First Year, SEATTLE TIMES (Apr. 16, 2015, 6:28 AM), <http://www.seattletimes.com/seattle-news/mellowed-leader-at-helm-of-spd-union-reflects-on-first-year/>. Smith praised the Chief for being the first in recent history to work closely with the union. *Id.* Under past chiefs, he stated, the union had to file grievances and unfair labor practices claims. *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Seattle Police Union Overwhelmingly Rejects Contract Offer*, Q13 FOX (July 21, 2016, 3:52 PM), <http://q13fox.com/2016/07/21/seattle-police-officers-union-spog-overwhelmingly-rejects-contract-offer/>.

<sup>348</sup> *Id.* (“An email from the Seattle Police Guild (SPOG) said officers voted 823–156 to reject the proposal. A source told Q13 News that among the sticking points, two loomed large. The first was that officers oppose involuntary transfers for non-disciplinary reasons. The second was that officers don’t want civilian investigators in the Office of Professional Accountability, preferring instead that complaints be handled by sworn officers.”).



### B. *Drawing Lessons from Experiences*

One of the most important lessons from the examples above is that while it might be difficult to convince unions to move away from their core mission to protect their membership from discipline, their defense of officers does not necessarily signal a lack of willingness to engage in other reform efforts. Although reformers often view a union's defense of officers as a hindrance, sometimes this defense can even facilitate reforms by exposing institutional and systemic problems. For instance, as discussed in Part I, broken windows policing, the War on Drugs, and CompStat have together created intense pressures on rank-and-file officers to increase summonses, arrests, and stops and frisks. When officers complain or fail to meet their numbers, they might be given negative performance evaluations, affecting their ability to get promoted.

This occurred in 2012 when some NYPD officers believed that their negative performance evaluations were the result of their complaints about their precinct's quota system.<sup>349</sup> Patrick Lynch, the President of the NYPD's police union, the PBA, brought attention to these problems when he told newspaper reporters that these quotas were "a department-wide problem."<sup>350</sup> A *New York Times Magazine* article on the persistence of arrest quotas reported that officers who shared their belief that the emphasis on numbers resulted in unnecessary arrests feared retribution from the brass. One officer said that the rank-and-file were "utterly demoralized and critical of the department. But they don't have a voice . . . . If they speak out, they get crushed."<sup>351</sup>

In 2005, the PBA challenged "the department's obsession with numbers" in a case involving an officer employed by the seventy-fifth precinct who received a negative evaluation allegedly based on his failure to meet the unofficial quota.<sup>352</sup> Years later, on May 7, 2012, the PBA took out a newspaper ad attacking the quotas which read: "Don't blame the cop . . . . Blame NYPD management for pressure to write summonses and the pressure to convict motorists."<sup>353</sup> The ad claimed the Department punished officers who did not write enough tickets.<sup>354</sup> Similarly, in New Jersey, the union opposed orders from po-

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349 GRAHAM A. RAYMAN, *THE NYPD TAPES* 233 (2013).

350 *Id.*

351 Knafo, *supra* note 106. Interestingly, however, the article never mentioned the NYPD police union as a source of protection for officers seeking to challenge harassment of minority communities; officers instead turned to a civil rights suit against the NYPD. *Id.*

352 RAYMAN, *supra* note 349, at 43.

353 *Id.* at 234.

354 *Id.*

lice management to meet quotas, which union president Stewart claims created pressure on officers “to conduct baseless stops and strained relations with community members.”<sup>355</sup>

Additionally, a union’s defense of officers can also facilitate structural reforms. For instance, NYPD officers who spoke out against the Department’s controversial stop and frisk practices did so anonymously because they feared retaliation and punishment.<sup>356</sup> One officer said that “punishments for falling short of quotas ranged from losing a longtime partner, low evaluation scores, retraining and denial of days off or overtime requests.”<sup>357</sup> Other officers shared similar stories.<sup>358</sup> Although it is unclear whether the union played any role in protecting these officers’ right to speak out against prevailing management practices, doing so would certainly fall within the union’s function.

Another lesson from the examples is the importance of giving voice to rank-and-file officers in reform efforts. However, much of the policing literature observes that most reform efforts take a top-down approach. Police chiefs, politicians, and reformers often complain that the union and the collective bargaining agreement are obstacles to reform, and many police reformers have long accepted the idea that reform can only be accomplished through a top-down process.<sup>359</sup>

The wariness of some reformers about the willingness of police unions to embrace reform can be traced to the political activism of

<sup>355</sup> Emmanuel, *supra* note 147.

<sup>356</sup> E.g., The Nation, *The Hunted and the Hated: An Inside Look at the NYPD’s Stop-and-Frisk Policy*, YouTube 1:10 (Oct. 9, 2012), <https://www.youtube.com/watch?v=7rWtDMPaRD8>.

<sup>357</sup> Ryan Devereaux, ‘We Were Handcuffing Kids for No Reason’: Stop-and-Frisk Goes on Trial, NATION (Mar. 28, 2013), <https://www.thenation.com/article/we-were-handcuffing-kids-no-reason-stop-and-frisk-goes-trial/>.

<sup>358</sup> *Id.* (“[A]nother Bronx police officer, Pedro Serrano . . . testified that failing to meet the precinct’s quotas translated in low evaluation marks. From 2010 to 2011, his scores dropped in every evaluation category. In 2012, he recorded more arrests and summonses, he testified, but his evaluations stayed the same because he performed only two stop-and-frisks for the entire year.”).

<sup>359</sup> See Skogan, *supra* note 42, at 149 (describing union resistance to community policing efforts); Wesley G. Skogan, *Community Policing: Common Impediments to Success*, in COMMUNITY POLICING 159, 164 (Lorie Fridell & Mary Ann Wycoff eds., 2004) (noting that “[i]n a West Coast city, the union protested strongly against the community policing program (giving it the familiar ‘social work’ label) and threatened to keep officers from appearing at training at all”); Walker, *supra* note 28, at 92; see also SKLANSKY, *supra* note 119, at 156 (“The dominant mind-set of police departments, police reformers, appellate judges, and criminal justice scholars—the dominant mind-set, in short, of nearly everyone who thinks about policing and its problems—is, and has long been, that policing is a place for top-down management. Good police officers are police officers who follow rules. Police unions, and police organizing more generally, are obstacles, not opportunities.”).

unions during the late 1960s,<sup>360</sup> when unions opposed citizen review boards and reform-oriented chiefs,<sup>361</sup> in addition to pursuing improvements in wages, benefits, and seniority.<sup>362</sup> Police activism during this time often took the form of “rabid, knee-jerk opposition to civilian oversight, active participation in far right-wing organizations, vigilante attacks on black activists, [and] organized brutality against political protesters.”<sup>363</sup> Today, statements and actions by police unions and rank-and-file officers continue to lend support to the view that police rank-and-file share a monolithic occupational mindset and subculture of paranoia, insularity, and intolerance.<sup>364</sup>

It is also undoubtedly true that the crime-fighting ideology of professionalism in policing and the law-and-order rhetoric of the political right had a long-term impact on police officers and their unions, even though most police union leaders now are in the middle of the political spectrum.<sup>365</sup> Additionally, some resistance to reforms can be explained by rank-and-file opposition to policies that require them to retreat from their traditional, aggressive crime-control orientation. This should not be surprising, however, because many likely joined the police department relying upon the type of policing that is cur-

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<sup>360</sup> SKLANSKY, *supra* note 119, at 55 (“Skolnick . . . saw police activism as a threat to the rule of law: like judges or soldiers, police officers should be apolitical.”) (citing JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 286–88 (1966)).

<sup>361</sup> *See id.* at 55 (citing STEPHEN C. HALPERN, *POLICE-ASSOCIATION AND DEPARTMENT LEADERS* 11–88 (1974)); *see also* SAMUEL WALKER, *POLICE ACCOUNTABILITY* 27–29 (2001); SKOLNICK, *supra* note 360, at 278–81. For instance, “the 1971 vote of no confidence in Chief Charles Gain of the Oakland Police Department by the local Police Officers’ Association. Gain was a committed reformer who won the respect not only of Skolnick but also other scholars who used the Oakland department for sociological research on the police.” SKLANSKY, *supra* note 119, at 217 n.144.

<sup>362</sup> SKLANSKY, *supra* note 119, at 55.

<sup>363</sup> Sklansky, *supra* note 40, at 1241; *see, e.g.*, Paoline, *supra* note 52, at 200 (“[M]any have asserted that the major barrier to reforming the police is the [police] culture.”); Skogan, *supra* note 42, at 148–49 (describing union resistance to community policing efforts in Chicago); Walker, *supra* note 28, at 95 (“Anecdotally, police chiefs routinely complain that they are unable to undertake certain innovations because of the police union and the collective bargaining agreement.”).

<sup>364</sup> Sklansky, *supra* note 80, at 20; *see* Manning, *supra* note 41, at 59 (noting that discussions of the rank-and-file “have been conflated into a caricature”); Paoline, *supra* note 52, at 200 (“Most connotations of police culture are negative.”); REPORT OF THE NEW YORK CITY COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994), *reprinted in* 6 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894–1994, 1, 107 (Gabriel J. Chin ed., 1997) (discussing the culture of corruption within the organization); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ix–xii (1991) (documenting a similar culture of corruption).

<sup>365</sup> *See* Kelling & Kliesmet, *supra* note 33, at 204.

rently in vogue and taught in most police academies and in their departments. Thus, changes to policing tactics might seem like a bait-and-switch, especially when measures of officer success have not kept pace with changes in policing tactics such as community policing.

However, attributing resistance solely to rank-and-file intransigence ignores how the typical top-down approach to reforms can also predictably lead to resistance. Resistance often stems from people's "opposition to, or frustration with, enactments of power."<sup>366</sup> Research from the study of power reveals that certain exercises of authority can breed deep resentment among lower-level employees, resulting in resistance to employer-mandated policies and procedures. One form of power that predictably produces frustration is failing to provide employees with a voice in decisionmaking.<sup>367</sup> Voice is important because it expresses to workers that their views are significant enough to be considered.<sup>368</sup> Failing to give employees' voice, or providing them with illusory voice,<sup>369</sup> not only serves as a sign of their low status, but also deprives them of interactions with power holders that can favorably influence their attitudes.<sup>370</sup>

These studies of the significance of voice in the workplace correspond to studies of police culture and suggest the importance of police union involvement in police reform. Studies of the successes and failures of community policing models have found that proper training of officers and a participatory management style are correlated with more positive officer attitudes about community policing.<sup>371</sup> For instance:

Street officers in Chicago who feel well trained in COP [community-oriented policing] hold much more positive attitudes about their jobs than officers who do not feel well

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<sup>366</sup> Thomas B. Lawrence & Sandra L. Robinson, *Ain't Misbehavin: Workplace Deviance as Organizational Resistance*, 33 J. MGMT. 378, 380 (2007); see also Mitch Rose, *The Seduction of Resistance: Power, Politics, and a Performative Style of Systems*, 20 ENV'T & PLAN. D 383, 387 (2002) (noting that "practices of 'resistance cannot be separated from practices of domination: they are always entangled in some configuration'").

<sup>367</sup> See David I. Levine, *How Business and Employees Can Both Win: Advantages and Disadvantages of Employee Involvement*, U.C. BERKLEY: COHRE (Jan. 27, 1999), <http://www.irle.berkeley.edu/cohre/levine/adv.html>.

<sup>368</sup> E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 952 (1990).

<sup>369</sup> See *id.* at 953 ("[P]eople react quite negatively to ostensibly high voice procedures when repeated unfavorable outcomes or communications from others focus attention on possible biases that might subvert the impact of their voice.").

<sup>370</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 176 (2006).

<sup>371</sup> Richard E. Adams et al., *Implementing Community-Oriented Policing: Organizational Change and Street Officer Attitudes*, 48 CRIME & DELINQ. 399, 403–04, 421 (2002).

trained; they are also more optimistic about the impact of COP on crime if they feel a part of the decision-making process. Agencies that imposed community policing and maintained a top-down, paramilitary decision-making style tended to meet with strong officer resistance.<sup>372</sup>

Moreover, it is likely that the insights and creativity of rank-and-file officers can revolutionize policing. “[L]ine personnel are a powerful and important resource . . . to improve policing [and] the relationship between police and citizens.”<sup>373</sup> Another example from Seattle demonstrates this point. In October of 2011, Seattle unveiled an ambitious and unique four-year pilot program to address the major problem of open-air drug markets in the downtown Seattle corridor.<sup>374</sup> The Law Enforcement Assisted Diversion (“LEAD”) program is a prebooking program that gives police officers the discretion to divert individuals engaged in low-level drug and prostitution crimes to community-based services instead of jail and prosecution.<sup>375</sup> The program was the first of its kind in the country and resulted from a successful collaboration between unlikely partners including the public defender’s office, the prosecutor’s office, community groups, nonprofit organizations such as the ACLU, and top command from the SPD.<sup>376</sup>

Like many other reform efforts that seek to change street-level policing practices, LEAD policymakers followed a top-down approach. They sought input from high-level police officials, social scientists, advocates, and community leaders.<sup>377</sup> Although patrol officers from one precinct of the SPD were given significant responsibility for

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<sup>372</sup> *Id.* at 404 (citations omitted).

<sup>373</sup> Kelling & Kliesmet, *supra* note 33, at 210.

<sup>374</sup> KATHERINE BECKETT, SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM 4 (2014), <http://leadkingcounty.org/lead-evaluation/> (follow “View previous 2014-LEAD Process Evaluation” hyperlink).

<sup>375</sup> Dan Satterberg, a King County prosecutor, stated that officers will continue to patrol open air drug markets, “but they will now have . . . a compassionate option and a hopeful option for people who have lost their way.” Millionair Club Charity, *Law Enforcement Assisted Diversion (LEAD) Program News Conference 10/13/2001*, YouTube 2:04 (Dec. 9, 2011), <https://www.youtube.com/watch?v=fls4B4V5-1U>; see also KingCountyTV, *Prosecutor’s Partners - Evergreen Treatment Services*, YouTube 4:17 (July 22, 2014), [https://www.youtube.com/watch?v=fxo8qPgQq\\_M](https://www.youtube.com/watch?v=fxo8qPgQq_M) (“The officer gives that person a choice. Do you want to go to jail or do you want to go to LEAD?”).

<sup>376</sup> See LFA GROUP, LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) PROGRAM AND EVALUATION PLAN NARRATIVE (2011), <http://leadwa.squarespace.com/storage/LFA%20Evaluation%20Narrative%20-%20February%202012.pdf>.

<sup>377</sup> Cf. Mark Bevir & Ben Krupicka, *Police Reform, Governance, and Democracy*, in POLICE OCCUPATIONAL CULTURE, *supra* note 41, at 153, 173 (discussing top-down approach).

making the program work, their input was never sought.<sup>378</sup> Rather, the reformers used the ubiquitous top-down approach and worked only with top command in developing the policy.<sup>379</sup>

The new program was poised to be a huge success.<sup>380</sup> Command-level officers within the police department fully supported the program.<sup>381</sup> As a result, they instituted new rules and policies for patrol officers to follow.<sup>382</sup> There was just one problem. Despite the absence of overt resistance to the program from the rank-and-file officers responsible for its implementation, there was significant opposition behind the scenes.<sup>383</sup> In fact, not only did patrol officers resent the program, but middle managers within the department were also suspicious.<sup>384</sup> The unique and groundbreaking cooperation between top command and outside agencies and experts may have aggravated rank-and-file resentments. As two policing scholars note, rank-and-file officers do “not appreciate being told what to do by outsiders, especially outsiders whom they perceive as unacquainted, or at least out of touch, with the daily demands of their job.”<sup>385</sup> Consequently, while these officers did not publicly voice their disapproval of LEAD, some quietly and covertly failed to implement it.<sup>386</sup> This hidden resistance would not have been discovered but for the fact that the program’s evaluation process included focus groups with middle management.<sup>387</sup>

It is unsurprising that the rank-and-file were suspicious of the policy. Although top command was heavily involved in working out its

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<sup>378</sup> See Sara Jean Green, *LEAD Program for Low-Level Drug Criminals Sees Success*, SEATTLE TIMES (Apr. 9, 2015, 12:00 PM), <http://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success/>; Interview with Lisa Daugaard, *supra* note 331.

<sup>379</sup> See Toch, *supra* note 54, at 66; see also Bevir & Krupicka, *supra* note 377, at 173 (“The top-down view of the policy process held by many reformers means that local police departments and rank and file officers are often only cursorily consulted about reform programs.”); Walker, *supra* note 28, at 103 (“One aspect of the neglect of police unions has been the failure of accountability advocates to involve union leaders in discussions of reform measures.”).

<sup>380</sup> See Green, *supra* note 378 (quoting an author of a LEAD evaluation saying that the program “looks very promising”).

<sup>381</sup> See BECKETT, *supra* note 374, at 21.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> Interview with Lisa Daugaard, *supra* note 331; see also BECKETT, *supra* note 374, at 21–27; Skogan, *supra* note 42, at 145.

<sup>385</sup> See Bevir & Krupicka, *supra* note 377, at 173; see also Skogan, *supra* note 42, at 147 (“Police are skeptical about programs invented by civilians.”).

<sup>386</sup> See BECKETT, *supra* note 374, at 25.

<sup>387</sup> See generally *id.*

final details, this was unlikely to alleviate rank-and-file concerns.<sup>388</sup> Furthermore, failing to give them any voice likely fueled existing resentments because it communicated to them just how unimportant their views were and just how low their status was within the department. To make matters worse, they were one of the only groups excluded from policymaking that would actually be affected by the policy. Members of the community and other organizations throughout the City gave their input.<sup>389</sup> Finally, because the rank-and-file had no contact with the civilian reformers, they had no opportunity to develop a different opinion about their motives.<sup>390</sup>

Rank-and-file resistance to LEAD was not open and obvious. There was no public position taken by the union against the policy and the officers did not publicly voice their disapproval. Rather, they engaged in what political scientist James Scott refers to as “everyday resistance”: acts of resistance that are meant to frustrate or defeat formal dictates in ways that are designed not to be discernible.<sup>391</sup> Their resistance was only discovered because LEAD’s evaluation process called for the creation of focus groups made up of sergeants from the department.<sup>392</sup> During discussions, the sergeants not only disclosed their own reservations about the policy, but they also shared the resentments of the rank-and-file.<sup>393</sup> These resentments and mistrust had led the rank-and-file to quietly and covertly undermine the policy on the street.<sup>394</sup>

In response, the group began to work closely with the sergeants and some rank-and-file officers to determine what the problems were

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<sup>388</sup> *Id.* at 2 (“One of the most significant challenges for LEAD stakeholders in Seattle has been eliciting officer buy-in despite strong support from police leadership for LEAD.”).

<sup>389</sup> *See id.* at 5; *Innovative LEAD Project Sends Drug Offenders to Services Instead of Jail*, ACLU OF WASHINGTON (Oct. 13, 2011), <http://www.aclu-wa.org/news/innovative-lead-project-sends-drug-offenders-services-instead-jail> (noting that LEAD’s Policy Coordinating group includes “representatives from the Seattle Office of the Mayor; King County Executive Office; Seattle City Council; King County Council; Seattle City Attorney’s Office; King County Prosecuting Attorney’s Office; Seattle Police Department; King County Sheriff’s Office; Washington State Department of Corrections; Belltown LEAD Community Advisory Board; Skyway LEAD Community Advisory Board; The Defender Association; and the ACLU of Washington”).

<sup>390</sup> Additionally, they had no opportunity to voice their valid concerns such as whether their new responsibilities would simply be added on to their existing duties, whether they would be given credit for referring people to treatment, and whether these new responsibilities would require more paperwork without any decrease in their existing duties.

<sup>391</sup> SCOTT, *supra* note 77, at 190, 195, 198.

<sup>392</sup> BECKETT, *supra* note 374, at 22–26.

<sup>393</sup> Interview with Lisa Daugaard, Director of the Public Defenders Association (Nov. 18, 2011).

<sup>394</sup> *Id.*; *see also* BECKETT, *supra* note 374, at 25.

and how to best address them.<sup>395</sup> This process entailed giving these groups a voice and the ability to make changes to LEAD in response to their concerns. While the officers were initially skeptical about whether the group was actually interested in obtaining their input, they slowly came around.<sup>396</sup>

Today, not only has the program improved,<sup>397</sup> but the relationships of trust that were formed between members of the police department and reformers have fostered additional gains in other areas. Importantly, it is not that all rank-and-file officers bought into the program, but, rather, that while some still questioned the substance of the policy, they also worked towards improving its efficacy.<sup>398</sup> Giving genuine voice to officers and treating them with respect affected their attitudes and behaviors towards LEAD.<sup>399</sup> This occurred even though many continue to disagree with the substance of the policy.<sup>400</sup> Being included in the process, rather than being marginalized, and having quality interpersonal interactions with reformers helped mitigate feelings of distrust and skepticism from the lower ranks.<sup>401</sup> According to one of the reformers who founded LEAD, the program is having an important and positive impact in the community due to innovations from rank-and-file police officers and sergeants.<sup>402</sup>

In sum, the Seattle experience provides some evidence that rank-and-file officers can play a significant role in reform-oriented policymaking. Although this role did not involve the union *per se*, the union also did not file grievances and other collective bargaining challenges that they could have brought. Furthermore, the relationships of trust that developed between some members of the rank-and-file and the outside reformers have facilitated other reform efforts. With this type of close contact, reformers can gain a better understanding of the major concerns of the rank-and-file and the union and attempt to address them.

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<sup>395</sup> See BECKETT, *supra* note 374, at 22.

<sup>396</sup> See *id.* at 23 (“In these groups, too, officers noted that some of their critiques and suggestions had resulted in concrete changes to the protocol. For example, [one] sergeant commented that the fact that officers got ‘a say’ in how the program would work enhanced police cooperation . . . .”); see also *id.* at 36, 42.

<sup>397</sup> Green, *supra* note 378 (discussing study which shows success of the program).

<sup>398</sup> See BECKETT, *supra* note 374, at 26–27.

<sup>399</sup> *Id.* at 23.

<sup>400</sup> *Id.* at 26.

<sup>401</sup> *Id.* at 27–28.

<sup>402</sup> *Id.* at 43.



Giving the rank-and-file a voice in implementing reforms can also facilitate more positive relationships between the rank-and-file and police management. The more contact management has with the rank-and-file, the less likely union leadership can successfully paint a falsely negative picture of management to ensure that rank-and-file officers continue to join the union, increasing the power, influence, and budget of union leadership.

Policymakers cannot afford to disregard the dynamics of power within police departments for at least two reasons. First, the way that power is exercised within departments can influence whether rank-and-file officers view reforms as legitimate and entitled to deference, or whether they attempt to undermine them through acts of resistance. Policymakers should recognize that when they work solely with the top command levels of police departments, they might unintentionally exacerbate rank-and-file frustrations with existing power arrangements, leading to resistance to any new policies that might be enacted.<sup>403</sup> Thus, although reformers may believe they have achieved success because police management has enacted new policies and procedures in response to their concerns, their failure to engage the rank-and-file may ultimately doom their efforts.

Second, the dynamics of power also reveal that resistance may occur without the knowledge of police management or outside policymakers. Hidden acts of resistance in the face of power are ubiquitous because open opposition by subordinate groups often has adverse consequences, especially in the workplace.<sup>404</sup> For instance, an employee who candidly expresses her displeasure and disagreement with rules and policies directly to her supervisor may significantly reduce her opportunities for promotion or other discretionary employment benefits. Because street officers operate primarily out of sight of management, they have numerous opportunities to engage in covert resistance to reform-oriented policies. When resistance is subtle rather than overt, management and reformers may be unaware that the new policy is not being implemented.<sup>405</sup>

What the analysis thus far has shown is that police unions have strong incentives to resist policies imposed without their involvement in policy development, but also that when they are involved in policy development and when the reforms are not simply focused on harsher and swifter punishment of officers, police unions have supported

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<sup>403</sup> *Id.* at 26.

<sup>404</sup> See SCOTT, *supra* note 77, at 155.

<sup>405</sup> See BECKETT, *supra* note 374, at 21–26.

them. The question to which this Article now turn is whether it is feasible to use the levers of labor law to increase the incentives for departments and unions to collaborate in developing and implementing reforms.

#### IV. CHANGING POLICE UNIONS

One would search in vain for any account of the problems with policing or the avenues for reform that doesn't place substantial emphasis on changing rank-and-file police culture and the supervision and training of the rank-and-file. As the DOJ concluded in its August 2016 Report on the Baltimore Police Department ("BPD"), "[t]he constitutional violations described in [the] findings result in part from critical deficiencies in the BPD's systems to train, equip, supervise, and hold officers accountable."<sup>406</sup> DOJ found that, among other things, the BPD does not "collect and analyze reliable data" to allow early interventions to deal with problematic officer conduct; does not consistently accept, investigate, or respond to complaints of even serious misconduct; and "many officers are reluctant to report misconduct for fear that doing so is fruitless and may provoke retaliation."<sup>407</sup> The set of best practices promulgated by the International Association of Chiefs of Police, along with empirical research on police, agree that rank-and-file officers should be involved in the development of policies, and in-depth analyses of problematic police departments often find that the rank-and-file are not involved in policymaking and resist the implementation of reforms.<sup>408</sup> Although scholars and commentators urge greater public involvement and transparency, more will be required than just public involvement and transparency to get police culture to change.<sup>409</sup> The question this Article answers is whether

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<sup>406</sup> DOJ BALT. REP., *supra* note 13, at 128.

<sup>407</sup> *Id.* The DOJ made similar findings in the recent DOJ Chicago Report. See DOJ CHI. REP., *supra* note 10, at 110, 124.

<sup>408</sup> See W. Dwayne Orrick, Int'l Ass'n of Chiefs of Police, Best Practices Guide: Developing a Police Department Policy-Procedure Manual 2-3, <http://www.theiacp.org/portals/0/documents/pdfs/BP-PolicyProcedures.pdf> (last visited Mar. 29, 2017); see, e.g., Nicole E. Haas et al., *Explaining Officer Compliance: The Importance of Procedural Justice and Trust Inside a Police Organization*, 15 CRIMINOLOGY & CRIM. JUST. 442, 445, 457 (2015); see also DOJ BALT. REP., *supra* note 13, at 129-30 (finding that BPD does not seek officer input into policy development with the result that officers find policies to be "confusing and opaque" and "lack . . . confidence in the policy guidance BPD provides").

<sup>409</sup> The recent proposal by Professor Rushin proposes greater public involvement as the major policy reform to address police misconduct. See generally Rushin, *supra* note 20. Past experiments with increased public oversight alone suggest that this reform is likely to encounter substantial resistance from rank-and-file insufficient to transform police practices absent dramatic changes in management that will generate trust of the rank-and-file. What is needed are

changing certain institutional structures of employee representation, including police unions, will promote rank-and-file support for measures that would improve community policing, transparency, and accountability. In short: yes.

Principles of labor law should be used to create leverage within police departments for officers and supervisors who support reform. In particular, organizations of officers other than the majority union should be empowered to meet and confer with department leaders over the formulation and implementation of policies relating to community policing, data collection and analysis, and transparency. Section A outlines the appropriate incursions on the labor law principle of exclusive representation. Section B then addresses the specifics of the proposal. This Part concludes by addressing some potential questions.

#### A. *Why Empower New Labor Organizations in Police Departments?*

The literature on policing, the investigations of particular police departments, and the news coverage of policing since Ferguson suggest that officers throughout the hierarchy in many police departments are receptive to reform and willing to report and to try to prevent unconstitutional conduct.<sup>410</sup> But most accounts of supporters of reform either make no mention of the police union or suggest that the union was at best indifferent to the problems and at worst hostile to reform efforts and whistleblowers.<sup>411</sup> For example, the NYPD officer profiled in the February 2016 *New York Times Magazine* for his efforts to challenge the persistence of racial inequities in police-citizen encounters described being retaliated against and seeking support not from the police union but from an association of Black NYPD officers and joining a class action suit.<sup>412</sup> Another NYPD officer, Adrian Schoolcraft, was retaliated against by management when he exposed the crime data manipulation occurring due to the Department's unofficial quota policy, and the PBA did nothing to protect him.<sup>413</sup> In the

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reforms that garner rank-and-file support so that the practices are embraced willingly rather than imposed through threat of discipline and public exposure. The reforms proposed here should be considered in addition to public involvement, not in lieu of it.

<sup>410</sup> See *supra* Section III.A.

<sup>411</sup> See *supra* Part II.

<sup>412</sup> Knafo, *supra* note 106.

<sup>413</sup> See Len Levitt, *Adrian Schoolcraft: Now It's Getting Serious*, HUFFINGTON POST (MAY 25, 2011), [http://www.huffingtonpost.com/len-levitt/adrian-schoolcraft-now-it\\_b\\_816281.html](http://www.huffingtonpost.com/len-levitt/adrian-schoolcraft-now-it_b_816281.html); Graham Rayman, *Adrian Schoolcraft, NYPD Whistleblower, Gets Law and Order: SVU Treat-*

LAPD, an association of Black officers supports Black Lives Matter while the union does not.<sup>414</sup> The DOJ report on the BPD states that investigators met with leadership of the Baltimore City Lodge No. 3 of the FOP, which represents all sworn BPD officers, and repeatedly cites a 2012 FOP report critical of certain aspects of BPD. The DOJ report notes a few provisions of the union contract that make officer discipline more difficult but says relatively little about how the FOP could be either an obstacle to or an agent of reform.<sup>415</sup> The DOJ report on the Chicago Police Department states its investigators met with representatives of the unions for rank-and-file, sergeants, lieutenants, and captains, and the report notes that although there are obstacles to accountability in the union contracts, there are also ways to override these contractual impediments that the City rarely invokes.<sup>416</sup> If the reformers at the top of a police department had institutionalized connections to reform supporters at the bottom of the hierarchy, things might change.

In theory, unions could facilitate accountability. By protecting rank-and-file officers from unfair decisions, unions could enable these officers to exercise discretion and judgment, assure fairness in punishing mistakes, and enable whistleblowing. Unions might prevent scapegoating a single hapless officer when blame for mistreatment of citizens belongs elsewhere. They could also work to counter management's insistence on dangerous policies, such as the case of NYPD Officer Peter Liang, who shot an unarmed Black youth in a stairwell while on duty in accordance with a policy of "training" rookie officers by placing them in extremely dangerous situations, which had previously been identified by Commissioner Bratton "as a ticking time bomb."<sup>417</sup> Yet the examples above and in Part II suggest that unions do not always play this role.

Changing demographics of large urban police forces may provide a path forward to create such institutionalized connections among reformers throughout the hierarchy. As police departments have be-

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ment, VILLAGE VOICE (Oct. 17, 2013, 7:00 AM), <http://www.villagevoice.com/news/adrian-schoolcraft-nypd-whistleblower-gets-law-and-order-svu-treatment-6687138>; Graham Rayman, *NYPD Tapes 4: The WhistleBlower, Adrian Schoolcraft*, VILLAGE VOICE (June 15, 2010, 4:00 AM), <http://www.villagevoice.com/news/nypd-tapes-4-the-whistleblower-adrian-schoolcraft-6429143>.

<sup>414</sup> See Abcarian, *supra* note 64.

<sup>415</sup> DOJ BALT. REP., *supra* note 13, at 4, 17, 131–33, 151.

<sup>416</sup> DOJ CHI. REP., *supra* note 10, at 46–47.

<sup>417</sup> See Murray Weiss, *NYPD Phases Out Programs that Pair Rookie Officers to Fight Crime*, DNAINFO: ON THE INSIDE (Feb. 12, 2016, 4:08 PM), <https://www.dnainfo.com/new-york/20160212/civic-center/nypd-phases-out-programs-that-pair-rookie-officers-fight-crime>.

come more diverse, identity-based groups representing officers have gained members and influence. Recent work shows that “[a] diverse police force mitigates group threat and thereby reduces the number of officer-involved killings.”<sup>418</sup> The diversity of the police force is thought to reduce excessive force through four processes: (1) it increases legitimacy of the police among minority communities; (2) it increases the number of officers who may be more compassionate toward minority communities; (3) it increases opportunities for contact between police and citizens; and, perhaps most important, (4) it weakens solidarity within the police community when confronted with threats.<sup>419</sup> Thus, although data remain unclear on whether the representation of African Americans in the police directly influences the number of officer-involved killings of African Americans, it is linked with “various factors associated with group threat and thereby eases the tensions between the police and African-American communities.”<sup>420</sup>

A diverse workforce is less likely to have a monolithic attitude toward issues, but it is necessary to have a mechanism to translate the diversity of perspectives into policymaking and implementation. That institutional mechanism could be a diversity of labor organizations. Such organizations already exist in many large departments. The next step is to make them more effective in becoming a voice for reform. That process may already be happening, as some mainstream police unions are staving off the threat to their dominance as the police labor representative by building their own bridges to civilian groups, both inside and outside the labor movement.<sup>421</sup>

A second and related way the institutionalization of alternative labor organizations might transform police departments is by combating the proven tendency of police unions toward oligarchy. The solidarity that is essential for any union to function is especially powerful in a workforce in which officers can endanger each other’s safety by refusing to respond to a call for backup. The duty of fair representation, along with union constitutions and bylaws requiring regular dem-

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<sup>418</sup> Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force* 30 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-512, 2016).

<sup>419</sup> *Id.* at 7–9; see SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE* 180 (5th ed. 2012); Brad W. Smith, *The Impact of Police Officer Diversity on Police-Caused Homicides*, 31 POL’Y STUD. J. 147, 150 (2003).

<sup>420</sup> Legewie & Fagan, *supra* note 418, at 32–33.

<sup>421</sup> See WALKER ET AL., *supra* note 419, at 180; Sklansky, *supra* note 80, at 21. See generally Ivan Y. Sun & Brian K. Payne, *Racial Differences in Resolving Conflicts: A Comparison Between Black and White Police Officers*, 50 CRIME & DELINQ. 516 (2004).

ocratic elections of leadership, are supposed to temper the tendency toward oligarchy and to make the union leadership responsive to the disparate views of the members.<sup>422</sup> Yet, as labor scholars have long observed, oligarchy remains a significant issue for many unions, and police unions are no exception.<sup>423</sup> But the problem is not simply oligarchy, in the sense of control of the union by a few, but also that union leadership in many cities seems unresponsive to the segment of the rank-and-file who favor greater engagement with minority communities especially. For example, as discussed above, in a number of circumstances union leadership's embrace of reform elicited a threat from a segment of the membership to vote the reformers out of union office, as happened in Seattle.<sup>424</sup> A Boston Police Department veteran noted that "[u]nion leaders who might seek a collaborative role with management in facilitating reform would not be re-elected to office."<sup>425</sup> Alternatively, progressive forces within police departments have struggled with more regressive union leadership. NYPD officers attempted to oust PBA President Lynch after his hostile comments following the killings of Eric Garner and others, but they were unsuccessful.<sup>426</sup> Empowering a minority union might either goad the majority union into supporting reform or provide an alternate channel for reform-oriented officers to meet and confer with management about reform with legal protection from retaliation for doing so.

Third, minority unionism might address the major criticisms of public employee unions. One criticism is that they are not responsive to the views of the full range of public employees and they promote

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<sup>422</sup> See, e.g., Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 127–28 (1992).

<sup>423</sup> The classic work on democracy and oligarchy in union governance is SEYMOUR MARTIN LIPSET, MARTIN A. TROW & JAMES S. COLEMAN, *UNION DEMOCRACY* (1956). A more recent discussion of the anomalous features of union governance is Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015). See also Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQUIRIES L. 101, 106–07, 107 n.17, 113–16 (2016) (collecting and discussing other sources).

<sup>424</sup> See *supra* notes 341–48 and accompanying text (referencing ouster of Seattle police union President Smith).

<sup>425</sup> Karoliszyn, *supra* note 9 (quoting Tom Nolan, a twenty-seven-year veteran of the Boston Police Department and current professor of criminology at Merrimack College).

<sup>426</sup> See Alan Feuer, *Patrick Lynch, Police Union Chief Who Fought de Blasio, Wins a 5th Term*, N.Y. TIMES (June 5, 2015), [https://www.nytimes.com/2015/06/06/nyregion/patrick-lynch-re-elected-to-lead-new-york-police-union.html?\\_r=0](https://www.nytimes.com/2015/06/06/nyregion/patrick-lynch-re-elected-to-lead-new-york-police-union.html?_r=0); Andres Jauregui, *Coalition of NYC Cops Seek Ouster of 'Arrogant' PBA President Patrick Lynch*, HUFFINGTON POST (Jan. 21, 2015, 10:24 AM), [http://www.huffingtonpost.com/2015/01/21/patrick-lynch-nyc-pba-boss-arrogant\\_n\\_6515016.html](http://www.huffingtonpost.com/2015/01/21/patrick-lynch-nyc-pba-boss-arrogant_n_6515016.html).

bad governance.<sup>427</sup> Another is that public employees and governments agree to terms that are not in the public interest because taxpayers are not represented in bargaining and public employee unions are a special interest with disproportionate influence in the political process; unions are able to get legislators and executive branch officials elected and to lobby for legislation (e.g., the construction of more prisons or harsher criminal sentences) that increase employment. Empirical support for and modeling that attempts to prove this argument exist, but the evidence is mixed.<sup>428</sup>

These criticisms were explored in a classic work written early in the development of public sector unions, using the example of police. Clyde Summers, a thoughtful scholar of labor law and a proponent of the benefits of unionization, observed that government employee collective bargaining is a political policymaking process and that the bargaining process and the subjects over which public employees bargain should be regulated by law to produce a desirable political framework in which to make policy decisions.<sup>429</sup> Discussing police disciplinary procedures, Summers postulated that a police union “probably represents the consensus of” officers in negotiating to foreclose public review of discipline.<sup>430</sup> He suggested that a public review board perhaps ought not be subject to bargaining, because there would not be a fair airing of all sides of the issue.<sup>431</sup> A public review board, he said, is unlikely to be opposed by “those interested in more police protection,” or by “the chief of police and the police commissioners who sit on the employer’s side of the bargaining table,” and in bargaining between the union and the brass, no one represents the interests of “those who fear that policemen will act abusively or unlawfully and that their superiors will not take appropriate disciplinary action.”<sup>432</sup>

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<sup>427</sup> See DiSALVO, *supra* note 16 (criticizing public sector unions); see also Summers, *supra* note 151; Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1109, 1126 (1969) (proposing that the constitutional nondelegation doctrine limit collective bargaining over certain public policy matters so that policy will “be made solely on the basis of the judgment of a designated official”). Even the staunch defenders of public sector unionism acknowledge the potential for it to affect the democratic process. See, e.g., Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 445–47 (2003).

<sup>428</sup> See, e.g., Kenneth G. Dau-Schmidt & Mohammad Khan, *Undermining or Promoting Democratic Government? An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Law*, 14 NEV. L.J. 414, 424 (2014).

<sup>429</sup> See generally Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

<sup>430</sup> *Id.* at 1196.

<sup>431</sup> See *id.* at 1197.

<sup>432</sup> *Id.* at 1196–97.

Thus, he concluded, collective bargaining “does not provide an appropriate political process for full discussion of the issue or for weighing and reconciling the competing interests.”<sup>433</sup> The labor law doctrinal response to the Summers argument would be to declare that citizen review boards are not a permissible subject of bargaining so that neither management nor the union could negotiate away the public’s right to review some police policies.

Yet, for the reasons given above and in the literature on other forms of institutional reform, limiting the power of a police union by simply taking some issues off the negotiating table is not a solution to the problem of police misconduct. It is essential to marshal the support of the labor force to implement policy, and the more discretion, skill, and expertise is required for the work, the more important it is to ensure that police officers at the bottom of the organization are given an opportunity to voice their ideas and concerns. Moreover, the evidence from states that prohibit public employee bargaining does not suggest that having no union produces less police abuse.<sup>434</sup>

The questions of accountability of police officers to the public and police union leadership to the members exist even where there is no institutionalized collective bargaining, as in North Carolina.<sup>435</sup> In North Carolina, which prohibits governments from collectively bargaining with organizations representing public employees, the FOP, which claims 6,000 members among city police departments statewide, decided to endorse the Republican candidate for governor because the Democratic candidate, who was the North Carolina Attorney General, brought criminal charges against a Charlotte-Mecklenburg police officer who shot an unarmed Black man in 2013.<sup>436</sup> The absence

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<sup>433</sup> *Id.* at 1197.

<sup>434</sup> See Reuben Fischer-Baum & Carl Bialik, *Blacks Are Killed by Police at a Higher Rate in South Carolina and the U.S.*, FIVETHIRTYEIGHT (Apr. 8, 2015, 7:08 PM), <https://fivethirtyeight.com/datalab/blacks-are-killed-at-a-higher-rate-in-south-carolina-and-the-u-s/>; see also Gary A. Harki, *Norfolk Police Have Shot and Killed Twice as Many People as Any Other Agency in Virginia Since 2010. Why?*, VIRGINIAN-PILOT: COURTS & CRIME (May 1, 2016), [http://pilotonline.com/news/local/crime/norfolk-police-have-shot-and-killed-twice-as-many-people/article\\_7ec82615-67e3-5668-bfa4-928bdc4a3874.html](http://pilotonline.com/news/local/crime/norfolk-police-have-shot-and-killed-twice-as-many-people/article_7ec82615-67e3-5668-bfa4-928bdc4a3874.html) (discussing police violence in Virginia); *Spirit of Stokes’ Comments: Black Life Matters, Too*, MISSISSIPPI NAACP (Jan. 7, 2016), <http://naacpms.org/category/police-brutality/> (discussing police violence in Mississippi).

<sup>435</sup> The most thoughtful analysis of the operation of public sector unions in states that do not recognize public sector bargaining is Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL’Y 735 (2009). We have not found a sustained effort to explain whether or why police misconduct is less pervasive than in comparable states with unionized police forces in the literature critiquing police unions and police union contracts.

<sup>436</sup> Michael Gordon & Jim Morrill, *Lingering Anger Over Kerrick Case Boils Up in N.C.*



of institutionalized negotiating relationships in North Carolina means that the decision about whom the FOP will endorse is perhaps one of the most important things that the FOP decides. There is no legal obstacle to police officers forming other groups to represent a different point of view and collect contributions from their members to spend on political activity. But the absence of such a tradition, and the absence of institutional support for such organizations in the states that do allow public employee bargaining, give the FOP the practical ability to “speak for” all North Carolina police officers in the way news organizations cover the event. What if there were an alternative organization that could rally the members and engage in discussions with management over an alternative point of view?<sup>437</sup> To create such an institutional mechanism without producing a cacophony of voices and chaos in negotiations would require some mechanism to cause organizations to merge or form coalitions in order to match the leverage a long-established police union can exert. How that can be done is described below.

### B. *A Form of Members-Only Bargaining*

One old criticism of unions that has gained recent support, especially among conservatives and libertarians, asserts that collective bargaining by a union chosen by the majority violates the rights of the minority who disagree with the union’s position.<sup>438</sup> This objection to unions has particular salience in the case of police unions, especially in departments where officers disagree about how to police minority communities and whether arrests for certain relatively minor offenses serve the public interest. While, for the moment, public employee unions chosen by the majority remain the exclusive representative of all employees in the bargaining unit, the recent litigation and legislative

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*Governor’s Race*, NEWS & OBSERVER (Aug. 16, 2016, 6:11 PM), <http://www.newsobserver.com/news/politics-government/election/article96030727.html>. The Democratic candidate won the election, though much of the coverage of the election focused on the Republican governor’s support for H.B. 2, a bill that critics assailed as institutionalizing legal discrimination against LGBT people. See Richard Fausset, *Pat McCrory, North Carolina Governor, Concedes After Acrimonious Race*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/north-carolina-governor.html>.

<sup>437</sup> In *Ricci v. DeStefano*, 557 U.S. 557 (2009), a reverse discrimination challenge to New Haven’s decision to discard the results of tests that had a disparate impact on Black firefighters’ chances for promotion, the firefighters’ union opposed the department’s decision to discard the test results. See *id.* at 641 (Ginsburg, J., dissenting). This is another example of how a union can hurt members of minority groups in ways other than through collective bargaining.

<sup>438</sup> See SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 2* (2014); Estlund, *supra* note 423, at 173–74.

efforts to dramatically curtail bargaining rights of government workers have invited consideration of alternative models.<sup>439</sup>

One model is members-only union representation with some kind of proportional representation rule. This type of system existed for some government employees prior to the development of modern public sector labor law. California, for example, had a proportional representation system for some public employees from 1961, when it enacted its first public sector labor law statute, to 1976, when it adopted new public sector labor statutes providing for exclusive representation.<sup>440</sup> The Winton Act,<sup>441</sup> as the old statute was known, did not allow public employers to recognize an exclusive bargaining representative chosen by the majority.<sup>442</sup> Instead, employee councils consisting of representatives from the gamut of employee organizations were authorized to meet with employers.<sup>443</sup> These councils were ostensibly to save time for government agencies, allowing them to hear all opinions at once.<sup>444</sup> The council included representatives from employees in the form of organization representatives or even individuals.<sup>445</sup> The Act permitted the majority-employee organization to articulate the official position of the employees, but provided a forum for other minority organization representatives and individuals to express points of view.<sup>446</sup>

The suggestions gleaned from these council meetings were handled by the employer agency (i.e., the school board, because the Winton Act applied to teachers).<sup>447</sup> The employer had the legal right

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439 See generally *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083, 1083 (2016) (per curiam) (affirming by equally divided Court legality of union opt-out regime); *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014) (holding that the First Amendment does not permit “a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support”).

440 CAL. GOV'T CODE §§ 3500–3511 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.). The Winton Act was enacted in 1965 and covered only public school teachers. The Brown Act, which covered other government employees, operated slightly differently. The systems are explained in Darrell Johnson, Note, *Collective Bargaining and the California Public Teacher*, 21 STAN. L. REV. 340 (1969). They were replaced by four statewide public sector labor laws, including the MMBA which established collective bargaining rights for county and municipal employees (including county sheriffs and city police). See generally Joseph R. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 50 HASTINGS L.J. 717 (1999).

441 Winton Act, 1965 Cal. Stat. 4660.

442 See Grodin, *supra* note 440, at 718–19.

443 Johnson, *supra* note 440, at 355–56.

444 *Id.*

445 *Id.*

446 *Id.* See generally Grodin, *supra* note 440, at 732.

447 Johnson, *supra* note 440, at 354.

under the Winton Act to make the final decision on all matters.<sup>448</sup> The Act recommended that employers incorporate agreed-upon items into written resolutions, regulations, or policies, but these directives were implemented in various ways across the state, and council procedures differed from one city, county, or school district to another.<sup>449</sup>

This proportional representation system was replaced in California in 1976, and in other states by the early 1970s, for a variety of good reasons. It was far from ideal. It was expensive and cumbersome. It did not provide an organized system for shared decisionmaking between government employees and public administrators because decisionmaking authority was left in the hands of the government agency.<sup>450</sup> It instead generated conflict among different groups of employees and it was an obstacle to uniform policies across governmental units.<sup>451</sup>

Majority rule through exclusive representation, in contrast, can be more efficient as a system of governance, which is why it is the rule in every democracy. But, sticking with political analogies, many parliamentary democracies have governance systems that involve multiple parties that form coalitions to create a majority, and that might be a pattern worth considering for police unions if the concern is that union leadership are systematically excluding voices within the rank-and-file.

A variety of issues would need to be addressed, depending on how radical a change in the existing system of representation a state chose to adopt. If officers chose not to belong to the existing union, in the twenty-two states that allow employers and unions to negotiate contracts requiring payment of agency fees to a recognized labor organization,<sup>452</sup> would employees be obligated to pay an agency fee to the majority union or could they instead pay fees to their own? Would the majority union retain the duty of fair representation to all represented employees or only some duty to its members?<sup>453</sup> Would the

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<sup>448</sup> *Id.*

<sup>449</sup> *See id.*

<sup>450</sup> *See* Catherine Fisk, *Challenge to 'Fair Share' Union Fees Unfair and Unworkable*, EDUC. WK.: ON CAL. (Oct. 6, 2015, 5:12 PM), [http://blogs.edweek.org/edweek/on\\_california/2015/10/challenge\\_to\\_fair\\_share\\_union\\_fees\\_unfair\\_and\\_unworkable.html](http://blogs.edweek.org/edweek/on_california/2015/10/challenge_to_fair_share_union_fees_unfair_and_unworkable.html).

<sup>451</sup> *Id.*

<sup>452</sup> *See Right to Work States*, NAT'L RIGHT TO WORK: LEGAL DEF. FOUND., <http://www.nrtw.org/right-to-work%20states> [<https://perma.cc/NHV2-GGL7>] (last visited Mar. 29, 2017) (listing the states that have enacted legislation prohibiting contracts requiring payment of fair share fees).

<sup>453</sup> *See, e.g.,* Fisk & Sachs, *supra* note 153, at 858.

same collective bargaining agreement apply to all officers or only to the members?

For the moment, a modest change is the best course of action because it is the only one that might conceivably be adopted (as legislative change is likely necessary), because it might allow beneficial changes without destroying the police unions that function well, and because incremental changes might allow governments to assess the impact and unintended consequences and make corrections before completely upending existing bargaining agreements and personnel practices. To prevent undue disruption to existing unions and bargaining relationships, the same principles of dues and fees as exist under current law would apply, as would the duty of fair representation and all the labor law that turns on the duty of fair representation. All that would change is the department would have the duty to meet and confer with a minority union provided it demonstrated a minimum level of support—say, membership of twenty percent or more of the officers in the department. The minimum threshold of support would, ideally, minimize the burden on police departments to meet and confer with too many groups and would provide incentives for groups of employees to band together to make their voices heard.

The scope of that duty to meet and confer would extend to any topic relating to conditions of police employment *other than terms in the existing contract*. In labor law terms, the duty to confer would cover matters of policy that are not mandatory subjects of bargaining under existing law. The purposes of this limit are several. It would theoretically reduce majority union opposition to the proposal. It would avoid destabilizing existing bargaining agreements and the department's and government's budget expectations resting on them. It would prevent departments from cutting officer pay and benefits by trading off responsiveness to minority unions about policing practices and community relations for economic and job protections enjoyed by all officers. The purpose of this limited duty to confer is to create an institutional mechanism for police officers to be involved in policymaking and problem solving.<sup>454</sup> That is why the scope of the new

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<sup>454</sup> This proposal might look a bit like what has been happening in Missouri since 2007, when the Missouri Supreme Court declared public employees have a state constitutional right to bargain collectively even though the state lacks statutory regimes for union representation and bargaining. *Indep.-Nat'l Educ. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131, 133 (Mo. 2007) (en banc). See generally MALIN ET AL., *supra* note 19, at 413–56. Some cities have adopted systems providing for selection of an exclusive bargaining representative chosen by a majority, as under the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012). See, e.g., Howard Wright, *City Can Establish Rules for Decertification of Police Union*, MISSOURI PUB. POL'Y & L. (May 24,

duty omits the wages and working conditions as to which public sector labor law currently imposes a duty to bargain. But it is not intended to weaken the economic and disciplinary protections for which police unions have bargained.

The proposal resembles some that have been made for the reform of teaching, another area of public sector employment with high union density and substantial controversy about whether unionization serves the interests of the government employees and the public.<sup>455</sup> It also more generally resembles proposals to create institutions of labor-management cooperation that have been made many times for different industries in that it provides a framework for collective discussion of issues of mutual concern outside the context of union-management negotiations over wages and working conditions.<sup>456</sup> It echoes criticisms of labor law scholars, including Martin Malin and Joseph Slater, concerning the scope of the duty to meet and confer in the public sector.<sup>457</sup> According to Professor Malin, there is a lot of evidence that when workers, through their unions, are given a voice in areas where they have no right to bargain, the union's role is transformed and better policies result. For example, when school boards unilaterally impose performance standards, it is not a surprise that unions do what they can to protect teachers from adverse actions based on failing to meet those standards. When school boards opt instead to work with the union to develop those standards and use peer review to implement them, the unions become the protectors of the standards rather

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2016), <https://momunicipallaw.com/2016/05/24/city-can-establish-rules-for-decertification-of-police-union/> (discussing St. Louis Police Department). Some issues common to other labor law regimes have arisen, including, for example, proposals to make it more difficult for unions to collect dues from members. See Jason Hancock, *Missouri Republicans Fail to Override Veto of Union Legislation*, KANSAS CITY STAR: BUZZ (May 13, 2016, 1:19 AM), <http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article77382392.html>. But without a statewide bargaining law, Missouri would be free to adopt an approach to union representation and bargaining that departs from the usual majority rule and exclusive representation regime, although it does not appear that Missouri or any of its political subdivisions have done so yet.

<sup>455</sup> See generally Madeline L. Sims, Note, *The Business of Teaching: Can a New Contract Change the Culture?*, 48 COLUM. J.L. & SOC. PROBS. 605 (2015) (proposing reforms to teachers' union negotiations, including an expansion of subjects of bargaining, as a part of school reform, and arguing that outright elimination of teachers' unions or narrowing the subjects of bargaining will not improve education).

<sup>456</sup> See, e.g., U.S. DEP'T OF LABOR, WORKING TOGETHER FOR PUBLIC SERVICE: FINAL REPORT 1-12 (1996), <https://www.dol.gov/dol/aboutdol/history/reich/reports/worktogether/working.pdf>.

<sup>457</sup> See, e.g., Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1370 (2009); Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 1032 (2000).

than knee-jerk opponents. Union involvement in teacher peer review leads to greater levels of attrition among poor performers than traditional methods of principal observation and discipline or dismissal for failure to meet the standards.<sup>458</sup>

A similar phenomenon occurred in the 1990s, when President Clinton by Executive Order created partnership councils and thereby spurred the creation of a very successful partnership between the Customs Service<sup>459</sup> and the National Treasury Employees Union that represented customs agents.<sup>460</sup> Data showed a substantial improvement in job performance, even by metrics such as increased drug and currency seizures.<sup>461</sup> Similar results were seen in Oakland, when the police department developed a peer review system for reviewing officer uses of force.<sup>462</sup> As indicated above, during the pendency of the project the department experienced a reduction in officer use of force.<sup>463</sup>

This proposal also incorporates suggestions that labor law scholars have made to incorporate identity-based groups into unionized workplaces as a way of ensuring that the majority union does not systematically overlook the interests of minorities.<sup>464</sup> Officers could belong both to the minority union and to the majority union so that they would not have to give up the benefits of majority union membership, including the ability to vote on leadership and contract ratification

458 See Malin, *supra* note 457, at 1393–94; Charles Taylor Kerchner & Julia E. Koppich, *Organizing Around Quality: The Frontiers of Teacher Unionism*, in *CONFLICTING MISSIONS? TEACHERS UNIONS AND EDUCATIONAL REFORM* 281, 290–91 (Tom Loveless ed., 2000).

459 The entity now known as the Bureau of Customs and Border Protection was formerly known as the Customs Service. See *CBP Through the Years*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about/history> [<https://perma.cc/6BQ3-YQ8P>] (last visited Mar. 29, 2017).

460 U.S. OFFICE OF PERSONNEL MGMT., *LABOR-MANAGEMENT PARTNERSHIP: A REPORT TO THE PRESIDENT* (2000), <http://www.opm.gov/lmr/report>.

461 Malin, *supra* note 457, at 1396. A variation is the Minnesota law creating a meet and confer process for professional employees, although it allows for only a single representative. MINN. STAT. § 179A.08 (2015).

462 See Sklansky, *supra* note 80, at 30.

463 See *supra* Section III.A (discussing Chief Gain and his collaboration with Hans Toch).

464 See, e.g., Michael Selmi & Molly S. McUsic, *Difference and Solidarity: Unions in A Postmodern Age*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION* 429, 433–34 (Joanne Conaghan et al. eds., 2002); see also Marion Crain, *Colorblind Unionism*, 49 *UCLA L. REV.* 1313, 1322–23 (2002); Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 *BERKELEY J. EMP. & LAB. L.* 211, 224–29 (2002); Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege and the United Front Ideology*, 84 *CORNELL L. REV.* 1542, 1599–1601 (1999); Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 *HASTINGS L.J.* 79, 102–12 (2002); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 *CHI.-KENT. L. REV.* 149, 159–62 (1993); Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION*, *supra*, at 417, 422–24.

and the right to receive insurance and legal representation paid for by union dues. Officers also could gain the benefits of membership in the minority union, principally the ability to have a voice in the minority union's governance and priority-setting policies.

This proposal solves many of the unique problems associated with police unions in the quest for reform. Police unions have been isolated from the rest of the labor movement in many ways, but particularly in their disconnectedness from the social movement unionism principles and practices that have reinvigorated many other unions. A police minority group that shares a self-interest with Black Lives Matter or Moral Mondays is ideally situated to start trying to transform the culture of the police department and the police union. A minority union might find allies among the activists of Black Lives Matter and other groups, which might empower the minority union to stand up to what might be considerable pressure from the police union. That is a type of protection for whistleblowing that simply cannot be legislated or enforced by contract. And it might create momentum that would attract quiescent dissenters from among the rank-and-file to abandon their reflexive support for the union and its defense of miscreant officers.<sup>465</sup>

*C. Will This Version of Members-Only Unionism Weaken Public Sector Unions? And Is That a Bad Thing?*

There are certain large and small objections to any proposal to adopt any form of members-only bargaining, even one as minor as this. We address two clusters of the most important objections below.

One major concern is that the proposal does too little. It is not clear that adopting this limited duty to meet and confer with minority organizations will change very much. Police officers have shown themselves to be quite loyal to their unions.<sup>466</sup> This proposal leaves the majority union in charge of the economic contract terms and the disciplinary system, at least in the jurisdictions where the disciplinary system is in the contract rather than written into statute.<sup>467</sup> These are

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<sup>465</sup> There are precedents for this. As noted above, in Los Angeles, the police union partnered with a civil rights lawyer and law professor to investigate the Rampart scandal precisely because they feared the union and individual officers would be scapegoated for a larger problem, and other unions have tried to build bridges to civilian groups to stave off attacks on the union. See *supra* notes 61–63 and accompanying text.

<sup>466</sup> See discussion *supra* Section I.C.

<sup>467</sup> See discussion *supra* Section IV.B (regarding the nature of the proposal) and Section II.A (describing police discipline).

the two top priorities for police,<sup>468</sup> and the disciplinary system is the biggest concern of police reformers.<sup>469</sup> Moreover, many protections are written into statutes, and no system of union representation will change that unless the majority union is weakened to the point that it cannot block legislative change.<sup>470</sup> But the modesty of this proposal should be seen as a feature rather than a bug, at least to those who favor some reform but fear that radical change is either politically impossible or would wreak havoc on public employee labor relations and thereby do more harm than good. As a modest development, it would not change too much too fast, which might allow for innovation in the fertile pockets of progressive police activism that do exist without destabilizing existing bargaining relationships in departments that are not already dysfunctional.

A second major concern is that the minority union would be easily undermined. Given the radioactive nature of some of the issues the minority union might wish to discuss with management—e.g., civilian review boards, the officers’ practice of “huddling” before making reports on violence, racial disparities in arrests for minor infractions<sup>471</sup>—a minority union would face considerable pressure from the majority union and its members unlike those faced by other caucuses within unionized workplaces. In some low-wage workers’ unions, for example, few members of the union show up at meetings (because union meetings take free time that many workers juggling jobs and family do not have) and many probably do not care much about non-core contractual issues.<sup>472</sup> But one can imagine police having intense interest in

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468 See *supra* Section I.C.1 (discussing goals for members in collective bargaining agreements).

469 For example, Professor Rushin labels as problematic seven features of union contracts or statutes, all of which concern the investigation and handling of discipline: (1) delays in interrogating officers suspected of misconduct; (2) giving officers access to evidence before interrogation; (3) limiting consideration of or supervisor access to disciplinary history; (4) limiting length of interrogation; (5) limits on the investigation of anonymous complaints; (6) limits on civilian oversight of discipline; and (7) allowing arbitration of disputed disciplinary sanctions. See Rushin, *supra* note 20, at 1220 fig.1.

470 See discussion *supra* Section II.A.

471 See *supra* note 145 and accompanying text (civilian review boards); *supra* notes 184–86 and accompanying text (“huddling”); *supra* note 9 and accompanying text (racial disparities in arrests).

472 See *Meeting Attendance Rule in Utility Workers Local Disqualifies Reform Candidates*, ASS’N FOR UNION DEMOCRACY, <https://uniondemocracy.org/meeting-attendance-rule-in-utility-workers-local-disqualifies-reform-candidates/> (last visited May 11, 2017); Nazgol Ghandnoosh, *Organizing Workers Along Ethnic Lines: The Pilipino Workers’ Center*, in *WORKING FOR JUSTICE* 49, 55 (Ruth Milkman, Joshua Bloom & Victor Narro eds., 2010) (noting difficulty of identifying workers and persuading them to take the risk and time to become involved in a worker organization).



these non-core contractual issues. Once minority unions have real power, unlike the minority caucuses now, it is easy to imagine a police minority union being quickly co-opted or sabotaged by internal union confederates. Minority unions would, under this proposal, have the right and responsibility to discuss contentious issues, like use of force, statistical measures of police productivity, and other policing tactics that have become extremely divisive. One could imagine officers who are hostile to reform having intense interest in preventing the minority union from persuading management to make any significant changes. Officers opposed to reform might sign up en masse to join the minority union precisely to take it over and kill it. Or minority union members might face intense pressure to defect to the majority union so that the minority union would dissolve.

There are ways to design a minority union system to address these concerns. Perhaps minority union membership could be confidential, leaving the job of physically meeting and conferring with the brass to the most courageous few who felt they could publicly stand the pressure. Or the minority union might rely on the labor law principles that have allowed unions to fire stewards when they believe the steward has become ideologically opposed to the union.<sup>473</sup> Public sector labor law in most jurisdictions already protects union activists from retaliation or harassment,<sup>474</sup> and such protection would need to be extended to supporters of the minority union as well as the majority union.

To the extent that a system of representation gained traction, it could produce the kind of chaos and cacophony that led to criticisms of the proportional representation system in California before 1976.<sup>475</sup> It could lead to expensive and slow discussions rather than any real change in policy. Management could play the two unions off against each other, thus weakening both. Those concerns could be ameliorated by careful design. The system could be limited to just one majority and one minority union.

Moreover, to the extent that the change gave a minority union power to negotiate any kind of binding agreement on any terms currently subject to the duty to bargain with the exclusive representative, some complex problems would arise. Courts or public employee rela-

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<sup>473</sup> See *THE DEVELOPING LABOR LAW* 2153–54 (Gwynne A. Wilcox et al. eds., 6th ed. 2014 & Supp. 2015).

<sup>474</sup> See generally *MALIN ET AL.*, *supra* note 19, at 428–50.

<sup>475</sup> See, e.g., Grodin, *supra* note 440, at 728 (describing the uncertainty under the Brown Act as to with whom the public employer was obligated to meet and confer).

tions boards would have to decide how to recalibrate the mandatory subjects of bargaining to enable participation of the minority union. Significantly, they would have to decide whether discipline remains a mandatory subject of bargaining, because so much of the controversy over police violence focuses on the appropriate disciplinary process. If it is, they would have to determine how to allow the minority union to play a role in negotiation over the disciplinary system. If the minority union were empowered to be at the bargaining table over design of the disciplinary system, then questions would arise over how to involve the minority union in the interest arbitration or fact-finding process that often resolves bargaining disputes over mandatory subjects of bargaining.

*D. The Benefits of the Proposal Outweigh the Risks*

The advantage this proposal has over most others being offered is that this one has the possibility of garnering support from some rank-and-file police officers who are dissatisfied with their union but see a wholesale assault on police unionism as worse than the status quo. Of course, if even the mildest version of this proposal were offered as legislation, it may be impossible to enact or implement, precisely to the extent it would weaken extant unions. In 2011, when Wisconsin eliminated bargaining rights for most public sector employees, it did not eliminate such rights for public safety employees.<sup>476</sup> Ohio, in contrast, tried to eliminate bargaining for every public employee and the voters repealed the law by referendum.<sup>477</sup> Both of these are reminders of the power of public safety unions even in climates that have a strong antiunion strain.

Advocates of the benefits of police unions to police reform in the 1960s insisted that police unions could train officers in the values of democracy and could remedy the alienated and repressive mentality of the police by “involving as many policemen as possible in decision making on all aspects of the department’s job.”<sup>478</sup> Creating an institutional mechanism that gives space for minority unions to voice their concerns would create incentives for existing unions to account for

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<sup>476</sup> Act of Mar. 11, 2011, 2011 Wis. Sess. Laws 23; see *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013) (rejecting equal protection challenge to Act 10’s exclusion of some employees from statutory right to bargain); *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 347 (Wis. 2014) (same).

<sup>477</sup> See Rosenthal, *supra* note 8, at 693.

<sup>478</sup> WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY* xvii (1970); see also GEORGE E. BERKLEY, *THE DEMOCRATIC POLICEMAN* 29–39 (1969).

these opposing views. This might facilitate the development of the values of “trust, cooperation, communication, . . . leadership, . . . [and] respect.”<sup>479</sup> Working through inevitable disagreements would provide opportunities for officers to learn these important values.<sup>480</sup> Officers might gain maturity, patience, and tolerance for different points of view that can translate into better relationships and engagements with the communities they serve.<sup>481</sup> Additionally, deliberating through disputes and coming to a successful resolution will involve creativity and problem solving; skills that are consonant with abilities they will have to develop to successfully engage in community policing.<sup>482</sup>

The reasons for encouraging a multitude of voices in reform-oriented policymaking is not simply to increase buy-in and reduce resistance. Rather, their contributions can help make the reforms themselves more effective.<sup>483</sup> There are two reasons for this. First, policymakers both within and outside the department often believe that their expertise makes them better equipped than the rank-and-file to determine what reforms are necessary and how best to bring them to fruition. They may be completely unaware of their own limitations and information gaps. This “fallacy of expertise”<sup>484</sup> causes policymakers to overlook the benefits of obtaining input from the individuals who will be tasked with executing their vision.<sup>485</sup>

479 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, *supra* note 98, at 25.

480 Political scientist William Ker Muir concludes that “an enjoyment of talk” is a quality of good policemen, because officers who can handle “the contradiction of achieving just ends with coercive means,” can avoid isolation and add to their “repertoire[s] of potential responses to violence.” WILLIAM K. MUIR, *POLICE: STREETCORNER POLITICIANS* 4 (1977).

481 See Wuestewald & Steinheider, *supra* note 55, at 54 (noting that rank-and-file graduates of the Leadership Program gained maturity, were groomed for leadership such that a disproportionate number have achieved promotions, and continued to remain “consistently . . . more engaged in city and community issues generally. The communications and interpersonal skills individuals learn and apply in the process of making collaborative, department-wide decisions has a maturing affect [sic] on those involved.”).

482 George L. Kelling et al., *supra* note 54, at 272 (“Often, management’s attempt to manage culture through command and control merely fosters suspicion, isolation, insularity, demeaning perception of citizens, grumpiness, the ‘blue curtain,’ and cynicism.”) (citing PETER K. MANNING, *POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING* (1979)); *see also* Edwin Meese III, *Community Policing and the Police Officer*, in *COMMUNITY POLICING*, *supra* note 41, at 297, 310 (“It is unlikely that improved communication will occur between police officers and citizens if effective communication within the department has not been established first.”).

483 Wuestewald & Steinheider, *supra* note 55, at 54 (noting that when shared leadership was employed in Oklahoma, accepting the decisions made by the group “were usually vindicated because they proved to be sound choices based on the firsthand knowledge and insights of those closest to the work”).

484 Bevir & Krupicka, *supra* note 377, at 171.

485 *Id.* at 172 (“All too often the reformers have not recognized the particularity of their own narrative, the importance of including actual police officers in the policy development pro-

However, as previously discussed, rank-and-file officers will have insights to share based upon their day-to-day engagement in street policing. Involving top command in policymaking is not an adequate substitute for the expertise and knowledge of the rank-and-file because high-level police managers might have lost touch with changed circumstances on the street. Furthermore, top command officers may be disconnected from the actual experiences of officers on the street and thus may be unaware of the challenges posed by the reform to street officers' daily work. It would be more efficient to identify these issues prior to implementation rather than after policies and procedures have been changed.

The second reason to create mechanisms to ensure that a multitude of voices are heard is that involvement of the rank-and-file in decisionmaking can help mitigate inevitable misunderstandings and miscommunications that occur when new policies are explained to them. The rank-and-file will undoubtedly encounter unexpected problems during the process of implementation. This "implementation gap"<sup>486</sup> can occur even if officers are attempting to apply the reform in good faith. Policymakers cannot anticipate every circumstance that officers will confront when they attempt to put a new policy into practice. Thus, they cannot possibly create rules that govern every situation.<sup>487</sup> As a consequence, officers inevitably interpret and modify policy.<sup>488</sup> This process of interpretation can have both unforeseen and unintended consequences not contemplated by the reformers.<sup>489</sup> Also, if officers were not involved in conceiving the policy, they may not appreciate its goals and intent. Hence, their choices and judgments will not be informed by a deep understanding of the policy's purpose.

As a result of the implementation gap, policies may not work as reformers intended, even when the rank-and-file are doing their best to abide by them. If the rank-and-file are not given a voice, reformers may not find out about the problems. Furthermore, top command and policymakers may attribute the gap between theory and practice to

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cess, or the variable and open-ended nature of the cultures and actions within which and to which the reforms will have to apply.").

486 *Id.* at 171; *see also* BROWN, *supra* note 60, at 22 (noting that the "politics of implementation" affect the outcomes of policies).

487 Bevir & Krupicka, *supra* note 377, at 171.

488 *Id.* at 170.

489 *Id.* ("Crucially, when the police interpret the reforms, they transform them, resisting them or domesticating them in ways that have consequences unforeseen and certainly unintended by the advocates of the reforms.").

rank-and-file obstinacy.<sup>490</sup> In response, top command may increase rank-and-file surveillance in order to control their behavior and punish them for transgressions, not realizing that the problems are due to their own inability to anticipate how the policy would actually work in practice.<sup>491</sup> Ironically, this increased surveillance and control can lead to resistance that may not have existed in the first place.<sup>492</sup>

Thus, the failure to involve the rank-and-file not only deprives the reform of being more effective, but it may also have the unintended effect of generating resistance, as reformers attribute the failure of the policy solely to rank-and-file resistance. Two scholars observe,

All too often, . . . this whole process becomes reiterative. The reforms meet with police skepticism, the way the police respond to them generates unintended consequences, the negative consequences then inspire another set of reforms that again meets with local skepticism, and so on.

The continuous process of reform soon will reach . . . a point where police are so weary of reform that they become increasingly immovable. Constant reform undermines morale and breeds ever-greater skepticism about reform.<sup>493</sup>

Engaging the rank-and-file in policymaking could help to avoid some of the problems caused by the fallacy of expertise and the implementation gap. With involvement, rank-and-file officers could make reformers aware of the challenges posed by the policies, both *ex ante* and *ex post*. Rank-and-file officers inevitably make policy on the street through their day-to-day interactions with the public.<sup>494</sup> Involving the rank-and-file in formal policymaking might enhance the effectiveness of the reform by improving information flows and rank-and-file compliance.<sup>495</sup>

This proposal can also help to change the notoriously entrenched culture of police departments.<sup>496</sup> Research suggests that people often

<sup>490</sup> *Id.* at 171.

<sup>491</sup> *Id.*

<sup>492</sup> Allen, *supra* note 52, at 94 (“[C]lose supervision and productivity are negatively correlated.”) (citation omitted); Toch, *supra* note 54, at 63 (“Actions inspired by mistrust tend to breed resentment, which fuels obduracy and resistance. Resistance reinforces suspicion, which incites intrusive monitoring moves, which breed resentment. And so the cycle continues . . .”).

<sup>493</sup> Bevir & Krupicka, *supra* note 377, at 170.

<sup>494</sup> Allen, *supra* note 52, at 93.

<sup>495</sup> See Bevir & Krupicka, *supra* note 377, at 176 (“Perhaps a more bottom-up approach to police reform will bring greater success in implementing reforms.”).

<sup>496</sup> See *supra* Part II.

engage in behaviors that they believe others are also engaged in.<sup>497</sup> In other words, people imitate those around them. Psychologists refer to this as “social proof.”<sup>498</sup> However, often assumptions about another’s beliefs are based on inaccurate information.<sup>499</sup> One way to overcome mistaken beliefs about what others are thinking is to make other views salient and public. Minority union representation will show rank-and-file officers that their potentially more open-minded and progressive views are shared by others. Additionally, this minority unionism would give outside reformers the opportunity to understand that there are officers within the department who support their proposals and this could lead to the forging of partnerships between police reformers and officers within the department that can facilitate reforms.

Moreover, if decisionmakers are truly considering input from the rank-and-file, it is likely that the policies that are eventually enacted will incorporate some of their suggestions. Rank-and-file officers have knowledge and expertise to share given their familiarity with the street.<sup>500</sup> They will have ideas that policymakers did not consider and they can also highlight unanticipated problems. Additionally, reformers may be unaware that their ideas as initially proposed are simply unworkable for a variety of reasons from the mundane to the insurmountable.<sup>501</sup> Thus, rank-and-file officers can help fill the gap between theory and practice.

Mechanisms to improve labor-management cooperation are essential to police reform. It is misguided to suggest that the solution is simply to make it easier for departments to fire or discipline officers without changing the way that management relates to the rank-and-

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497 See JONAH BERGER, *CONTAGIOUS: WHY THINGS CATCH ON* 128 (2013).

498 *Id.*

499 See *id.* at 130.

500 As one policing scholar notes, the rank and file “often have important insights into the impediments to more effective policing. . . . [They] have a wealth of unorganized and under-utilizing knowledge about which police activities are not working and why. . . . Sadly, this kind of knowledge is not exploited . . . in shaping strategies . . . .” BAYLEY, *supra* note 48, at 22 (citation omitted); see also Herman Goldstein, *The New Policing: Confronting Complexity*, in *COMMUNITY POLICING*, *supra* note 41, at 71, 79 (“In rank-and-file officers, there exists an enormous supply of talent, energy, and commitment that, under quality leadership, could rapidly transform American policing.”). When shared leadership was employed in Oklahoma, accepting the decisions made by the group “were usually vindicated because they proved to be sound choices based on the firsthand knowledge and insights of those closest to the work.” Wuestewald & Steinheider, *supra* note 55, at 54. Additionally, when “senior managers doubted a Leadership Team decision . . . yet lent their support regardless, [such instances] became milestones of trust and confidence for the agency.” *Id.*

501 Bevir & Krupicka, *supra* note 377, at 157; see also *id.* at 170 (noting that the reforms may not be “a suitable fit with the lived experience of the officers”).

file for at least three reasons. First, it may be politically impossible to significantly reduce contractual or statutory protections for officers accused of misconduct. Second, and by far more important, even if every officer who kills a civilian unjustifiably were fired promptly and criminally prosecuted, it is an empirical question whether police violence would decline through the operation of specific or general deterrence.<sup>502</sup> If some number of unjustified police shootings are the result of poor training or bad management, one puts a great deal of faith in enlightened police management to assume that eliminating job protections for rank-and-file officers will allow management to dramatically alter patrol officers' behavior to better safeguard the public. Even if police union contracts and statutory LEOBORs were revised to provide a speedier and more transparent disciplinary process that would make it easier to terminate the employment of officers found to have used improper force, still policing behavior might not change dramatically if police management encourages practices that lead to excessive force, arrests for minor infractions, or other kinds of law enforcement strategies that harm minority communities.

#### CONCLUSION

The prevailing narrative suggests that rank-and-file officers in general, and police unions in particular, are obstacles to reforms that would make policing more transparent, accountable, and legitimate to the citizenry. While there is certainly strong evidence to support this view, this Article highlights examples of rank-and-file officers acting individually, and some unions acting representatively, as key partners in reform efforts that can improve the quality of policing. The essential question is how to increase the opportunities for officers to be a positive force for the improvement of police services.

Discussions of the need for police reform understandably focus on problematic officers and on unions that appear to be irredeemably opposed to any reform oriented policies. What is lost in these discussions is the recognition of the officers who could be partners in reform efforts and who do not have a mechanism for making their voices heard within the department, especially when the police union for whatever reason either does not support their views or does not take their views into account. Minority unionism in police departments

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<sup>502</sup> In this context, as noted above, *see supra* note 436 and accompanying text, there is no evidence of less unconstitutional police conduct in jurisdictions like Virginia and North Carolina that have no public sector bargaining than in jurisdictions that have it.

gives these officers a voice by creating an institutional mechanism to ensure that their views are heard.

This proposal expands the duty of management to meet and confer with the police union to include subjects relating to reform. It prevents the minority union from renegotiating the economic terms and disciplinary system created by the majority union in the collective bargaining agreement or invoking the interest arbitration system used to resolve bargaining disputes between the majority union and the department. Thus, departments and police unions should support this reform, as it respects their interests. The proposal, moreover, is built on successful labor-management partnerships that have been used in both federal and state systems and that demonstrably improved productivity, morale, and the quality of service provided by government agencies in which these types of labor-management councils have been implemented.

Alternative proposals such as increasing public scrutiny of police discipline and reducing job protections for police officers may not achieve greater accountability or reduce unwarranted police violence. While it is important to increase public scrutiny of police actions, doing so will not necessarily further the goals of police accountability. For instance, civilian members of panels that review the disciplinary decisions of LAPD Police Chief Beck were “more likely than officers to oppose the chief’s discipline recommendations.”<sup>503</sup> Furthermore, if eliminating job protections for officers would reduce police violence, then it should be done. However, this proposal addresses the normative question of what kinds of procedural protections police officers should have when accused of misconduct.<sup>504</sup> Allowing a diverse set of officers to participate in reform-oriented policymaking would force the primary union to account for minority voices, force management to account for a diversity of views, and help management and rank-and-file officers to develop trust. Providing them voice and accounting for their input shows them respect, gives them a sense of ownership,<sup>505</sup>

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<sup>503</sup> Editorial, *Backers of Police Discipline Change Should Be Careful What They Wish for*, L.A. TIMES (Jan. 11, 2017, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-lapd-board-of-rights-20170111-story.html>.

<sup>504</sup> As Kate Levine argues, the procedural protections that police have negotiated for in their union contracts or lobbied for in legislation are a model for how the most troubling aspects of the criminal justice system should be reformed. Instead of eliminating these protections when police are suspected of crime, she argues, these protections should be extended to all criminal suspects. See Levine, *supra* note 20, at 1202.

<sup>505</sup> Bevir & Krupicka, *supra* note 377, at 173 (“Reformers need to do more to secure prior buy-in from rank and file officers, or the professional organizations that represent them, if they want the rank and file to have a sense of ownership over the reforms.”).



and will likely increase their perceptions of the department's legitimacy. The benefits of experimenting with giving diverse voices a say in reform-oriented policymaking is well worth the effort.