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## Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy

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# BEYOND TRANSPARENCY: POLICE UNION COLLECTIVE BARGAINING AND PARTICIPATORY DEMOCRACY

Walter Katz\*

## ABSTRACT

*Police unions rose in power partially in response to the civil unrest in urban neighborhoods in the 1960s. As unions gained political power, critics argue that they have frequently stood as obstacles to accountability-related reforms. One vehicle of the exercise of such power is through collective bargaining agreements negotiated between unions and public bodies representing cities and counties. Contracts that civilian policymakers negotiate with police unions shield officers from accountability for misconduct and excessive force. Through a lack of political will, expediency, and a lack of public transparency during negotiations, civilian leaders agree to contracts that, for example, erect obstacles to the filing of complaints, enact artificial time limits on investigations, and make it difficult for the public to have insight in whether and how officers are disciplined. The impact on poor Black, Brown and Indigenous communities can be profound. The members of such communities already face more aggressive policing yet are also distanced from the negotiations and political processes that shape labor agreements that shape those practices. Community members from such environments are deeply distrustful of not only law enforcement, but also government. Labor contracts negotiated by policymakers which shield officers from being held accountable for actions taken during the very exercise of the more aggressive policing visible in poorer communities do so at the cost of the marginalized public's well-being. This paper proposes that members of low-income communities that experience high crime and over-policing have a meaningful role in a police union bargaining process that actively foments dialogue and participation. The aim could be brought about by narrowing the scope of bargaining, adopting steps to render the negotiation process more transparent, or by creating mechanisms that require the participation of community members in negotiations. More research is needed to test these potential solutions in these areas of participatory democracy and labor negotiations.*

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## I. INTRODUCTION

**I**N January of 2021, a union president representing officers of a Montgomery County, Maryland police department proclaimed in a letter to a newspaper that

nowhere in county collective bargaining law does it say that a third party or the County Council need to be able to decipher all collective bargaining documents. They are legal documents and should be understood by the parties who are subject to them—in this case, the county executive (the employer) and the Fraternal Order of Police (the employee representatives).<sup>1</sup>

The statement was in response to a report issued by the Montgomery County Office of Legislative Oversight, which sought to describe “the terms and conditions of the County Government’s collective bargaining agreement (CBA) with County police officers.”<sup>2</sup> The authors concluded it was “impossible” for a third party to understand all of the provisions of the contract “between the County and FOP Lodge 35,” let alone which primary documents, side letters, and memoranda of agreements served as the basis of the parties’ understanding.<sup>3</sup>

If another government agency cannot discern the terms of a police labor contract, how could the public be expected to do so? The perspective that the public—or even another government agency—has no need to understand a contract between a public employer and its law enforcement officers is not unique to suburban Maryland. Over the past forty

1. Torrie Cooke, *Opinion: County Report on Police Contract Missed the Mark on Transparency, Tasers*, BETHESDA MAG. (Jan. 30, 2021, 3:53 AM), <https://bethesdamagazine.com/bethesda-beat/opinion/opinion-county-report-on-police-contract-missed-the-mark-on-transparency-tasers> [https://perma.cc/47TN-QV25].

2. LESLIE RUBIN & ARON TROMBKA, OFF. LEGIS. OVERSIGHT, LABOR AGREEMENTS WITH MONTGOMERY COUNTY POLICE OFFICERS: OLO REPORT 2021-1 ii (2021), [https://montgomerycountymd.gov/OLO/Resources/Files/2021\\_Reports/OLOReport2021-1.pdf](https://montgomerycountymd.gov/OLO/Resources/Files/2021_Reports/OLOReport2021-1.pdf) [https://perma.cc/RP2U-ZM2D].

3. *Id.* at 11.

years, the power of police unions has “surged,”<sup>4</sup> and it is not a coincidence that the ascendance of police labor organizations closely followed protests for civil rights for Black people in the 1960s.<sup>5</sup>

The latest crisis in policing, catalyzed by the 2020 police killings of George Floyd in Minneapolis and Breonna Taylor in Louisville, has also brought needed attention to deeply entrenched aspects of American society that have relegated Black Americans, especially poor Black Americans, to conditions of inequity and substantially reduced opportunity for empowerment and economic advancement.<sup>6</sup> That separation is enforced by a criminal justice system that has too often relied on tough-on-crime strategies and over-enforcement tactics, while simultaneously failing to keep residents in these same neighborhoods safe from crime.<sup>7</sup>

This moment, unfortunately, is not a new one. Less than a decade ago, the names of Michael Brown, Eric Garner, and Sandra Bland were spurring the calls for police reform.<sup>8</sup> Like in 2020, those high-profile deaths of Black people led not only to protests but also to government-led convenings, as well as new policies, training, and equipment intended to increase accountability, decrease use of force, and reduce inequities in the criminal justice system.<sup>9</sup> However, those efforts did not explore the relationship between police unions and local government officials in erecting and maintaining barriers to police reforms.<sup>10</sup> Only recently has the role of police unions and collective bargaining started to receive academic attention.<sup>11</sup> For example, one commentator has noted that “[i]n the past, participants in this conversation have not fully recognized the ways that

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4. Ayesha Bell Hardaway, *Time is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts*, 15 *STAN. J. C.R. & C.L.* 137, 197 (2019).

5. *See id.* at 170–71 (“The tumultuous relations between African Americans and police officers in major cities during the mid-to-late 1960s provided a new opportunity for officers to organize and to leverage their power while seeking better wages and fair treatment.”).

6. *See, e.g.*, Colleen Walsh, *Solving Racial Disparities in Policing*, *HARV. GAZETTE* (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing> [<https://perma.cc/GW9Y-YRGT>].

7. *See* Benjamin Levin, *What’s Wrong with Police Unions?*, 120 *COLUM. L. REV.* 1333, 1349 (2020).

8. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2058 (2017); Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, *BLOOMBERG* (June 9, 2020, 12:39 PM), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality> [<https://perma.cc/7B9U-73RW>].

9. *See generally, e.g.*, PRESIDENT’S TASK FORCE 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) [<https://perma.cc/9L9C-C2J8>].

10. For example, the *Final Report of The President’s Task Force on 21st Century Policing* mentions police unions only a handful of times. *See id.* at 35 (suggesting that law enforcement agencies create an advisory group to include “union representatives” to assess new technologies); *id.* at 61 (focusing on partnerships with “unions” to support officers’ safety and wellness); *id.* at 85–86 (calling on “[u]nion leadership” to partner with agency leadership to incorporate procedural justice into the internal discipline process).

11. Christopher Harris & Matthew M. Sweeney, *Police Union Contracts: An Analysis of Large Cities*, *POLICING: J. POL’Y & PRAC.* 1–2 (June 25, 2019), <https://doi.org/10.1093/police/paz042> [<https://perma.cc/6A8S-DB29>]; Levin, *supra* note 7, at 1336.

police labor and employment law may contribute to questionable internal disciplinary measures.”<sup>12</sup> For that matter, policymakers have avoided critiquing their own role in giving police unions the power to define not only the extent of accountability measures but also the methods through which their members police neighborhoods with large populations of Black, Brown, or poor people.<sup>13</sup>

This Article overlays the environment of marginalized communities with the rise of police union power and the manifestation of that power in collective bargaining agreements. The public, especially the portion that is most impacted by policing practices, is locked out of the negotiation process and relies on elected officials to look out for its interests in having an accountable police force that treats members in predominantly racial minority neighborhoods fairly.

While the expressed ethos of American democracy is grounded in the twin pillars of “transparency” and “accountability,”<sup>14</sup> the police union collective bargaining process undermines both. Part I of this Article describes the theory of “legal estrangement” developed by Yale Law School professor Monica Bell<sup>15</sup> and how the theory explains the inaccessibility to political power following the uprising of the 1960s and the ensuing backlash that helped give rise to police union power. Part II examines the relationship between police unions and race, and whether the attitudes of largely white-led police unions dominate the legal and policy positions taken by unions on accountability-related terms of labor agreements. Part III explores how police collective bargaining agreements (CBAs) hinder accountability reforms where policymakers have insufficiently looked out for the interests of the part of the public that most directly encounters aggressive policing but has the least political power. Part IV describes the purported value of government transparency; examines how public employee collective bargaining is, for the most part, exempt from open government rules; and argues that transparency without meaningful access to the negotiating process is ineffectual in the context of local contract bargaining. Finally, Part V uses the goal of social inclusion as a framework for participatory democracy reforms to increase the access of the public to the negotiation process.

This Article is not a call to dismantle public employee unions. The right of public employees to advocate and bargain for their pay, benefits, and work conditions is grounded in the understanding that public employ-

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12. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1241 (2017).

13. See Levin, *supra* note 7, at 1399 (“Currently, unions stand guard over [the] structures [of modern policing], but so too do the elected officials who capitulate to union demands and sacrifice community will on the altar of political expediency. Reducing these problems to a critique of union power would effectively let politicians off the hook . . .”).

14. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 83 (2012) (“Public accountability has been inseparably linked to transparency; and transparency is routinely regarded as a necessary precondition of accountability.”).

15. See generally Bell, *supra* note 8, at 2100–26.

ment is a property interest.<sup>16</sup> The role of union leaders is to protect the interests of their members, and they do so very well. This Article posits that reform efforts should focus on elected officials who have acquiesced in moving what are political questions that should involve open debate into closed-door negotiations. While it is important to protect the interests of workers, government officials have an obligation “to ensure that the constitutional protections guaranteed to all individuals do not take a back seat.”<sup>17</sup> The lack of meaningful public accessibility to the negotiation process has contributed to officials agreeing to police labor contracts that undermine accountability and run counter to the interests of residents who are already estranged from the political process.

## II. LEGAL ESTRANGEMENT AND THE EXCLUSION FROM POLITICAL POWER

Understanding the roots of carceral strategies and policies is vital to understanding the relationship between members of under-resourced communities that are subjected to aggressive policing, primarily those with Black or Brown populations. That condition has led to deep distrust of policing and, according to legal scholars, a crisis in legitimacy that undermines efforts to keep communities safe because residents “are less likely to obey officers’ commands or assist with investigations.”<sup>18</sup> The model that a decrease in trust due to police behavior undermines the legitimacy of policing, which in turn leads to decreased individual compliance and cooperation, is at the heart of what is known as “procedurally just policing.”<sup>19</sup> Professor Bell forcefully and effectively argues that if an observer steps back and sees a broader horizon, a more complex picture emerges:

[T]he full body of research on race and trust is one of profound marginalization, a social diminishment that—while not encapsulating the fullness of the African American experience—indicates that poor African Americans as a whole tend to have a social experience distinctive from those of other ethnic and class groups in the United States. Structural disadvantage yields a broader cultural structure of mistrust. Most discussions of African American distrust of the police only skirt the edges of a deeper well of estrangement between poor communities of color and the law—and, in turn, society.<sup>20</sup>

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16. See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 718 (2017) (“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.” (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540–41 (1985); *Bishop v. Wood*, 426 U.S. 341, 343–44 (1976); *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972))).

17. Hardaway, *supra* note 4, at 197.

18. Bell, *supra* note 8, at 2058.

19. *Id.* at 2077; see Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 294–95 (2003).

20. Bell, *supra* note 8, at 2072.

An examination of policing in marginalized neighborhoods over the past fifty years reveals that the very notion of what is assumed in the goals of criminal justice needs re-examination. It cannot be assumed that better results in policing are about getting the trust-legitimacy-compliance sequence right, because that is built on a norm that “the community (including victims) is on the side of policing or prosecution.”<sup>21</sup> This begs the question whether distrust in such communities is too deep to make such an assumption. Understanding how policing, as the most visible face of the state, has contributed to that distrust is essential.

Political scientists Soss and Weaver use the term “race–class subjugated (RCS) communities” to describe overpoliced Black and Brown communities in order to “call attention to the interweaving of race and class relations, especially as they concern . . . the activities of governing institutions and officials that exercise social control by means of coercion, containment, repression, surveillance, regulation, predation, discipline, and violence.”<sup>22</sup>

Police officers began to organize in the late nineteenth century.<sup>23</sup> The goals of organization at the time were primarily economic, primarily lying in securing pensions and insurance programs and improving hours.<sup>24</sup> By 1919, police unions had organized in large cities “to improve working conditions and increase compensation.”<sup>25</sup> After the First World War, a number of police unions went on strike.<sup>26</sup> In Boston, the ensuing absence of a police presence led to several days of rioting and looting.<sup>27</sup> The striking officers were fired, but the episode led to hostility toward police unions.<sup>28</sup>

The mid-1960s saw upheaval and uprisings by Black people in cities across the United States in response to police violence.<sup>29</sup> In the aftermath

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21. Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 278 (2019).

22. Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017).

23. See JAMEIN CUNNINGHAM, DONNA FEIR & ROB GILLEZEAU, OVERVIEW OF RESEARCH ON COLLECTIVE BARGAINING RIGHTS AND LAW ENFORCEMENT OFFICER’S BILL OF RIGHTS 2 (2020) [http://craftmediabucket.s3.amazonaws.com/uploads/LEOBR\\_Cunningham\\_12\\_3\\_20.pdf](http://craftmediabucket.s3.amazonaws.com/uploads/LEOBR_Cunningham_12_3_20.pdf) [<https://perma.cc/9NC8-PP2H>].

24. *Id.*

25. *Id.*; see also *id.* (“Police officers rarely got raises, typically had to purchase their uniforms, and were subjected to long work hours. For example, police officers in Boston worked between 73 to 91 hours per week and were required to spend one night per week at the station.” (citations omitted)).

26. *Id.*

27. *Id.*

28. *Id.*

29. See Clyde Haberman, *The 1968 Kerner Commission Report Still Echoes Across America*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/06/23/us/kerner-commission-report.html> [<https://perma.cc/N9YJ-DAQA>]. Protests included the New York neighborhoods of Harlem and Bedford-Stuyvesant in 1964, Watts in Los Angeles in 1965, and Cleveland in 1966. *Id.* “Then came the disastrous summer of 1967,” in which “[c]haos enveloped more than 160 American cities and towns, the most ruinous riots leading to 43 deaths in Detroit and 26 in Newark.” *Id.*

of the civil unrest, the National Advisory Commission on Civil Disorders, better known as the Kerner Commission, issued its report in 1968 identifying that many Black Americans led lives of economic exclusion and segregation, and it equated the police with “white power, white racism, and white repression.”<sup>30</sup> The commission made recommendations regarding employment, education, welfare, housing, and policing.<sup>31</sup>

Unfortunately, the Kerner Commission report did not usher in an economic renaissance or a new era of egalitarian policing for Black communities. In fact, the incidents of civil unrest were seen by political elites and white citizens as signs of entrenched disorder for which a heavy-handed response by policymakers and police was the prescription:

In the decades between the Kerner Commission report and the DOJ’s [Department of Justice’s] Ferguson report, government authorities refashioned the policing of RCS communities. . . . [A]fter years of stagnant budgets and little growth, “law and order” political agendas put new muscle behind policing operations throughout the nation. Local police agencies received a powerful influx of federal resources (alongside rising subnational investments) and became the target of new federal agendas and modes of administrative support. Federal financial resources underwrote new policing initiatives throughout the 1970s and 1980s, many of which were promoted and guided by the Law Enforcement Assistance Administration (LEAA).<sup>32</sup>

Such federal grant programs have had few restrictions on how they could be spent.<sup>33</sup> As federal spending on policing increased, local policymakers have steadily increased police budgets over the past forty years.<sup>34</sup> Along with more spending, they obtained greater authority to impose “law and order” tactics such as “capacities to stop, arrest, detain, investigate, and deploy force.”<sup>35</sup> In adopting new concepts such as “broken windows,” police aggressively enforced civil-order and quality-of-life offenses.<sup>36</sup> “In contrast to middle-class white communities, police in RCS communities visually and dramatically asserted control of the

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30. Bell, *supra* note 8, at 2069 (quoting NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968)).

31. *Key Kerner Commission Recommendations*, OTHERING & BELONGING INST. UNIV. CAL., BERKELEY, <https://belonging.berkeley.edu/key-kerner-commission-recommendations#policing> [<https://perma.cc/QA2G-8N7M>] (organizing the Kerner Report’s recommendations regarding policing into five categories: (1) “change in police operations in the ghetto to ensure proper conduct by individual officers and to eliminate abrasive practices”; (2) “more adequate police protection of ghetto residents, to eliminate the high sense of insecurity”; (3) “effective mechanisms for resolving citizens’ grievances against the police”; (4) “policy guidelines to assist police in areas where police conduct can create tension”; (5) and the “develop[ment] [of] community support for law enforcement”).

32. Soss & Weaver, *supra* note 22, at 569 (citations omitted).

33. *Id.* at 570.

34. Emily Badger & Quoc Trung Bui, *Cities Grew Safer. Police Budgets Kept Growing.*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/interactive/2020/06/12/upshot/cities-grew-safer-police-budgets-kept-growing.html> [<https://perma.cc/9EGA-X2KD>].

35. Soss & Weaver, *supra* note 22, at 570.

36. *Id.*



streets . . . .”<sup>37</sup> The impacts of the aggressive tactics on criminal justice were profound:

On virtually every measure one could conceive, from arrest rates to use of force, the authority and reach of policing expanded. In New York City, for example, police stops of pedestrians increased from 90,000 to just under 700,000 between 2002 and 2011; low-level summonses expanded from 160,000 in the early 1990s to 650,000 in 2005; and since 2002, New York City police have made 350,000 misdemeanor arrests for small amounts of marijuana. The Big Apple was not alone. Cities across the country adopted tougher stances in policing and made greater use of vertical patrols and surveillance in public housing, trespass arrests, gang injunctions, loitering ordinances, and Special Weapons and Tactics (SWAT) deployments.<sup>38</sup>

As police are often the most visible face of the state in high-poverty neighborhoods, they are looked to for a multitude of services and protection because there is a deficit of other services. But police are simultaneously the locus of residents’ ire over the prevalent role of state power in their lives.<sup>39</sup> Bell describes what follows from these conditions as a legal estrangement, or “‘anomie’ about law” that is “more than distrust.”<sup>40</sup> She continues, “[I]t is a sense that the very fabric of the social world is in chaos—a sense of social estrangement, meaninglessness, and powerlessness, often a result of structural instability and social change. It is a sense founded on legal and institutional exclusion and liminality.”<sup>41</sup> Legal estrangement is not a product of a person’s involvement in illegal behavior; rather, it is a product of the everyday encounters experienced by individuals and their relatives, friends, and neighbors at the hands of government systems that consistently dehumanize people living in high-poverty Black communities, thus leaving them “structurally ostracized through law’s ideals and priorities.”<sup>42</sup> Put another way,

A combined municipal–state–federal legal architecture permits routine police violence by granting police discretion over when and how to arrest or deploy force in a wide variety of settings. This discretion allows police to target poor, Black, and brown people. Police violence effectively becomes justified force at various stages: when internal affairs dismisses a civilian complaint as insignificant, when a prosecutor refuses to file charges against the police, when a grand jury refuses to indict, and when the use of force is deemed reasona-

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37. *Id.* at 573.

38. *Id.* at 571 (citations omitted).

39. *See id.* at 574–75.

40. Bell, *supra* note 8, at 2084 (citing Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 *LAW & SOC’Y REV.* 777, 778 (1998)).

41. *Id.* at 2084–85 (footnote omitted); *see also id.* at 2085 n.123 (describing “liminality” as “a state of being in-between, not fully inside a particular institution or cultural milieu, but not fully detached from it”).

42. *Id.* at 2086; *see* JESSE JANNETTA, JEREMY TRAVIS & EVELYN MCCOY, *US P’SHIP ON MOBILITY FROM POVERTY, PARTICIPATORY JUSTICE 2* (2018), <https://www.mobilitypartnership.org/file/1218816/download?token=C1cK2B4j> [<https://perma.cc/KMA6-VXU2>].

ble and therefore justified in either a criminal or civil process. Qualified immunity provides police an almost insurmountable defense against civil rights claims. Police union contracts protect police power and insulate police violence from review and consequence. Moreover, indemnification practices mean that police do not pay an actual dime of any civil damage awards—local governments do.<sup>43</sup>

Bell posits that “legal estrangement is a product of three socio-legal processes: procedural injustice, vicarious marginalization, and structural exclusion.”<sup>44</sup> This Article will focus on how this third process, structural exclusion, relates to police union contract negotiations. In the context of police services, residents of high-poverty neighborhoods see that they are “lock[ed] . . . out of the benefits of law enforcement,” in a condition of being “harshly policed yet underprotected.”<sup>45</sup> However, “Structural exclusion often occurs in ways that community members do not recognize,” as they withdraw from, or never enter, civic discourse.<sup>46</sup>

The broad discretion that officers have falls disproportionately on members of the very marginalized communities that “are not in a position to make things politically difficult.”<sup>47</sup> In fact, “Most discussions of African American distrust of the police only skirt the edges of a deeper well of estrangement between poor communities of color and the law—and, in turn, society” as well as political participation.<sup>48</sup> That discussion must include an acknowledgement of the roots of modern policing that occurred simultaneous to the law-and-order movement that began in the late 1960s.

### III. POLICE UNIONS AND ATTITUDES ABOUT RACE

About two-thirds of police officers are members of labor organizations.<sup>49</sup> Prior to the 1960s, police officers faced significant obstacles in organizing, partially due to general hostility toward public-employee labor organizing and from the legacy of police officers striking in the early twentieth century.<sup>50</sup> Police organizers saw the tensions between police officers and Black Americans calling for their civil rights as “a new oppor-

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43. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1791–92 (2020) (footnotes omitted).

44. Bell, *supra* note 8, at 2100.

45. *Id.* at 2115.

46. *Id.* at 2116.

47. Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 28 (2019). An analysis of City of Chicago civilian complaint data found that requiring complainants to travel to the oversight office to sign an affidavit attesting to the accuracy of the complaint decreases the likelihood of a signature the farther the office is from one’s neighborhood. Bocar A. Ba, *How Far Are You Willing to Go Against the Police? Evaluating the Effects of Citizen Affidavits in Chicago 2* (Sept. 26, 2016), <https://papers.ssrn.com/abstract=2897063> [<https://perma.cc/3AV9-LHRV>]. The effect is more pronounced for Black residents who reside in a neighborhood that is demographically dissimilar from the neighborhood of the oversight office, thus preventing political and administrative principals from effectively governing law enforcement officers. *See id.* at 2–3.

48. Bell, *supra* note 8, at 2072.

49. Harris & Sweeney, *supra* note 11, at 2.

50. *See* Hardaway, *supra* note 4, at 170.

tunity for officers to organize and to leverage their power while seeking better wages and fair treatment.”<sup>51</sup> Their efforts paid off with new state laws providing police officers and other municipal employees the right to collectively bargain.<sup>52</sup> Today, five states (Georgia, North Carolina, South Carolina, Tennessee, and Virginia) still prohibit police officers from collective bargaining.<sup>53</sup>

Police unions have since become a “significant component of the . . . criminal system.”<sup>54</sup> Police unions have used their political power to resist efforts such as the creation of civilian review boards and disclosure of discipline records.<sup>55</sup> Part of their success is through successful framing of reform proposals and criticism of excessive force as “tantamount to abetting ‘gun-toting criminals,’ which oversight is implicitly linked to violent crime rates. The voice of the union, then, is one that brooks no compromise and is open to no critique.”<sup>56</sup> For example, in the 1960s, the union for officers of the New York Police Department ran advertisements that played into the fear of violence to counter calls for a complaint review board; one such advertisement “showed a young middle-class white woman emerging from the subway onto a darkened street, looking frightened, with an accompanying text that read, ‘The Civilian Review Board

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51. *Id.* at 170–71.

52. *Id.* at 171; 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, 196 (2005).

53. MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POL’Y RSCH., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 4 (2014), <https://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/6C7H-58YG>]; Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 53–54 (2015) (explaining that in states that prohibit unionizing, police associations provide legal or advocacy assistance).

54. Levin, *supra* note 7, at 1337; see Jorge L. Ortiz, ‘The Major Stumbling Block’: Powerful Police Unions Stand in the Way of Structural Reform, Experts Say, USA TODAY (June 12, 2020, 2:18 PM), <https://www.usatoday.com/story/news/nation/2020/06/12/george-floyd-police-unions-stand-way-reform-experts-say/5347136002> [<https://perma.cc/XWX5-EY2D>].

55. Harris & Sweeney, *supra* note 11, at 2; see, e.g., Uriel J. Garcia, *Viral Police Video May Be Tipping Point for Phoenix to Create Citizen Review Board for Use-of-Force Cases*, ARIZ. REPUBLIC (July 3, 2019, 5:18 PM), <https://www.azcentral.com/story/news/local/phoenix/2019/07/03/phoenix-police-unions-oppose-creating-a-citizen-oversight-board-use-of-force-viral-video/1628581001> [<https://perma.cc/H73Q-N9VH>]; Jessica Anderson, *ACLU Challenges FOP Lawsuit Attempting to Limit Civilian Review Board Access to Files*, BALT. SUN (July 14, 2016, 8:08 PM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-fop-civilian-review-board-suit-20160714-story.html> [<https://perma.cc/AVR2-WG4W>]; Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [<https://perma.cc/G32F-NAXZ>]; Daniel Oates, *Opinion: I Used to Be a Police Chief. This Is Why It’s So Hard to Fire Bad Cops.*, WASH. POST (June 12, 2020, 6:30 AM), <https://www.washingtonpost.com/opinions/2020/06/12/i-used-be-police-chief-this-is-why-its-so-hard-fire-bad-cops/> [<https://perma.cc/D8E2-D5BE>].

56. Levin, *supra* note 7, at 1351; see also Fisk & Richardson, *supra* note 16, at 756–58 (describing perception that recently elected Seattle mayor was acceding to union leadership wishes by “demoting and forcing out individuals who were working with the DOJ to institute reforms,” which thereby “created fear, silenced more progressive voices amongst the rank-and-file, and made them reluctant to engage in reform-oriented efforts”).

must be stopped! Her life . . . your life . . . may depend on it.’”<sup>57</sup>

The rise of unions against the backdrop of community demands for non-discriminatory and humane policing during the civil rights era unfortunately resulted in the continuation of diametrically opposed interests between the government employers and their employee groups. This is demonstrated by continued efforts by law enforcement organizations to prevent community involvement in accountability practices, such as civilian oversight.<sup>58</sup>

This positioning against robust accountability that emerges from the Civil Rights Movement is reflected in studies of officer attitudes and behavior today. A Pew survey of nearly 8,000 police officers in 2016 found that many officers questioned the sincerity of protesters criticizing policing and were “deeply skeptical of the motives of the demonstrators who protested after many of the deadly encounters between police and blacks.”<sup>59</sup> Pew found that Black and white officers have starkly different ideas over the motivations for protests over policing.<sup>60</sup> White officers and Black officers also see overall race relations very differently, given that “virtually all white officers (92%) but only 29% of their black colleagues say that the country has made the changes needed to assure equal rights for blacks.”<sup>61</sup>

White and Hispanic officers were more likely to respond that police had a positive relationship with racial or ethnic minorities in their communities than were Black officers.<sup>62</sup> However, 56% of officers “feel that in some neighborhoods being aggressive is more effective than being courteous.”<sup>63</sup>

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57. William Finnegan, *How Police Unions Fight Reform*, NEW YORKER (July 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> [<https://perma.cc/67GR-PHH3>].

58. Hardaway, *supra* note 4, at 172–73 (footnote omitted).

59. RICH MORIN, KIM PARKER, RENEE STEPLER & ANDREW MERCHER, PEW RSCH. CTR., *BEHIND THE BADGE 17* (2017), [https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report\\_FINAL\\_web.pdf](https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf) [<https://perma.cc/CJ9H-SDWC>] (reporting that 92% of officers believe that bias against the police is a “great deal (68%) or some (24%) of the motivation behind demonstrations,” whereas “only about a third (35%) of officers say in a separate question that a genuine desire to hold officers accountable for their actions is at least some of the motivation for the protests”).

60. *See id.* at 6 (“When considered together, the frequency and sheer size of the differences between the views of black and white officers mark one of the singular findings of this survey. For example, only about a quarter of all white officers (27%) but seven-in-ten of their black colleagues (69%) say the protests that followed fatal encounters between police and black citizens have been motivated at least to some extent by a genuine desire to hold police accountable.”).

61. *Id.* at 6; *see also id.* at 6–7 (“Not only do the views of white officers differ from those of their black colleagues, but they stand far apart from those of whites overall: 57% of all white adults say no more changes are needed, as measured in the Center’s survey of the general public.”).

62. *Id.* at 16 (“A consistently smaller share of black officers than their white or Hispanic colleagues say the police have a positive relationship with minorities in the community they serve. Roughly a third of all black officers (32%) characterize relations with blacks in their community as either excellent or good, while majorities of white and Hispanic officers (60% for both) offer a positive assessment.”).

63. *Id.* at 18.

The Pew findings in 2016 align with an earlier Police Foundation survey of a nationwide sample of police officers.<sup>64</sup> Nearly 12% of white officers “agreed or strongly agreed that police officers often treat whites better than they treat blacks and other minorities.”<sup>65</sup> In contrast, “more than half (51.3 percent) of the black officers agreed or strongly agreed” with the sentiment about disparate treatment.<sup>66</sup>

The Police Foundation survey uncovered a divide between racial subgroups of officers over perceptions of the unequal use of force against civilians based on race:

The divergence between the views of black officers and those of other officers was even more pronounced on the question of whether police officers are more likely to use physical force against blacks and other minorities than against whites in similar situations. Although only 1 in 20 (5.1 percent) white officers in the sample believed that blacks and other minorities received such unequal treatment, well over half of the black officers surveyed (57.1 percent) thought that police officers were more likely to use physical force against blacks and other minorities than against whites in similar situations.<sup>67</sup>

A study published in 2021 by economists examined officer behavior in Chicago using census and city administrative data and found racial distinctions in officer conduct—including in stops, searches, and use of force—in a pattern paralleling the attitudes reflected in the surveys.<sup>68</sup>

By their nature, unions are majoritarian institutions and their elected leadership can wield enormous political power.<sup>69</sup> Even in police departments where the majority of officers are people of color, union leadership is frequently white.<sup>70</sup> The result is that politically powerful police unions take stances that can significantly diverge from the preferences of politically and socially isolated “residents in heavily policed communities,” as

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64. See DAVID WEISBURD & ROSANN GREENSPAN, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ No. 181312, *POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY* 8 (2000), <https://www.ojp.gov/pdffiles1/nij/181312.pdf> [<https://perma.cc/TMW9-8JJC>].

65. *Id.*

66. *Id.* In a survey of residents of high-crime, low-income neighborhoods in six U.S. cities, 55.5% of respondents agreed or strongly agreed with a similar sentiment, that “police officers will treat you differently because of your race/ethnicity.” NANCY LA VIGNE, JOCELYN FONTAINE & ANAMIKA DWIVEDI, URB. INST. JUST. POL'Y CTR., *HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE?* 9 (2017).

67. WEISBURD & GREENSPAN, *supra* note 64, at 9.

68. Bocar A. Ba, Dean Knox, Jonathan Mummolo & Roman Rivera, *The Role of Officer Race and Gender in Police-Civilian Interactions in Chicago*, 371 *Sci.* 696, 696 (2021) (“Relative to white officers, Black and Hispanic officers make far fewer stops and arrests, and they use force less often, especially against Black civilians. These effects are largest in majority-Black areas of Chicago and stem from reduced focus on enforcing low-level offenses, with greatest impact on Black civilians.”).

69. Fisk & Richardson, *supra* note 16, at 756.

70. Eli Hager & Weihua Li, *A Major Obstacle to Police Reform: The Whiteness of Their Union Bosses*, MARSHALL PROJECT (June 10, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/06/10/a-major-obstacle-to-police-reform-the-whiteness-of-their-union-bosses> [<https://perma.cc/APC4-7SMW>].

well as from some officers in their own ranks.<sup>71</sup> Police unions—and the contracts they negotiate—can “operate as markers or structural guarantors of obstruction and unaccountable policing, particularly as they affect communities of color, poor people, and other marginalized groups.”<sup>72</sup>

#### IV. USING COLLECTIVE BARGAINING TO UNDERMINE ACCOUNTABILITY

Collective bargaining is the process between employee representatives and management in which the two sides are obligated to negotiate in good faith to reach a mutually agreeable binding contract over the wages, benefits, and work conditions of that employee group.<sup>73</sup> State and local public employees are not entitled to collective bargaining under the federal National Labor Relations Act.<sup>74</sup> Instead, the question of whether non-federal public-sector employees can join a labor organization for the purposes of collective bargaining is a matter of state law.<sup>75</sup>

How work conditions are defined, and which matters are subject to mandatory bargaining (versus permissive or prohibited subjects), is also a matter of state law.<sup>76</sup> The focus of this Article, however, is on police contract collective bargaining over discipline.<sup>77</sup>

If the parties reach a tentative agreement, the members vote whether to ratify the agreement. On the management side, negotiated agreements

71. Ponomarenko, *supra* note 47, at 55–56; *see also* Erik Ortiz, ‘Embrace the Change’: Some Black Officers Sidestep Unions to Support Police Reform, NBC NEWS (June 15, 2020, 1:01 PM), <https://www.nbcnews.com/news/us-news/embrace-change-some-black-officers-sidestep-unions-support-police-reform-n1231024> [<https://perma.cc/4HN2-9776>] (“But in cities like St. Louis, Miami and New York, some of the calls for significant reform are coming from another place: within police departments themselves, among smaller pockets of officers who don’t necessarily feel heard by their police unions or the department brass, which are largely white.”).

72. Levin, *supra* note 7, at 1343.

73. *See, e.g.*, Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315/7 (2021) (prescribing mutual obligation on part of employer and employee representatives “to negotiate in good faith with respect to wage, hours, and other conditions of employment”); N.J. STAT. ANN. § 34:13A-5.3 (West 2021) (“[T]he public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.”).

74. 29 U.S.C. § 152(2) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . .”).

75. *See* Smith v. Ark. State Hwy. Emps., 441 U.S. 463, 464 (1979) (per curiam).

76. A “mandatory subject” is one that “settle[s] an aspect of the relationship between the employer and the employees.” Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

In narrowly interpreting what the New Jersey Employer–Employee Relations Act meant by “terms and conditions of employment,” and thus subject to mandatory bargaining, the New Jersey Supreme Court concluded that “the very foundation of representative democracy would be endangered if decisions on significant matters of government policy were left to the process of collective negotiation, where citizen participation is precluded.” Ridgefield Park Educ. Ass’n v. Ridgefield Park Bd. of Educ., 393 A.2d 278, 287 (N.J. 1978). Four years later the legislature amended the Act to expressly include negotiations over grievances and discipline within conditions of employment. Act of July 30, 1982, ch. 103, 1982 N.J. Laws 544–46.

77. *See* Harris & Sweeney, *supra* note 11, at 2; Hardaway, *supra* note 4, at 173.

are ratified by the political body, typically a city council or county commission. If an agreement is not reached—that is, an impasse is declared on mandatory subjects—then state law describes the process that follows, such as interest arbitration.<sup>78</sup> Unilateral changes to wages, hours, and other terms and conditions of employment require the employer to meet and confer with union representatives.

For advocates of police reform, the primary point of contention with police collective bargaining is not wages or hours worked but rather the conditions and terms that are attached to disciplinary and accountability procedures. The four primary pillars of “accountability-related” policies and procedures are:

- (1) policies and procedures designed to ensure that police officers obey the law and, also, policies on treating citizens in a lawful, respectful, and unbiased manner; (2) policies and procedures ensuring that incidents of alleged misconduct are properly reported and then investigated thoroughly and fairly; (3) policies and procedures ensuring that proven incidents of misconduct result in appropriate discipline; and (4) policies and procedures ensuring that police departments take proactive steps to prevent officer misconduct in the future.<sup>79</sup>

Such reform-minded objectives frequently run into the terms negotiated during collective bargaining.<sup>80</sup> Union negotiators bargain for terms that “limit the employer’s ability to monitor and manage the misconduct of officers”; these terms “go[] far beyond merely ensuring that disciplinary processes are fair, timely, and impartial.”<sup>81</sup>

An analysis of forty-seven police union contracts among the 100 largest departments explored contract terms that “might impede the effective investigation or misconduct or militate against police accountability more generally.”<sup>82</sup> The authors found several ways in which the contracts undermined accountability. For example, “[S]ix (15.4%) contracts allow[ed] for the officer to know the name of the complainant prior to an interrogation . . . .”<sup>83</sup> More than a quarter of contracts (25.6%) specified time limits so that if a complaint were lodged after the negotiated deadline, an

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78. For example, the Illinois Public Labor Relations Act provides:

The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois “Uniform Arbitration Act” unless agreed by the parties.

5 ILL. COMP. STAT. 315/7 (2021).

79. Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 59 (2012).

80. See Rushin, *supra* note 12, at 1205–06.

81. Hardaway, *supra* note 4, at 173.

82. Harris & Sweeney, *supra* note 11, at 4. None of the forty-seven contracts was from a police department situated in a state that had a law enforcement officer’s bill of rights (LEOBoR). *Id.*

83. *Id.* at 6.

officer could not be disciplined.<sup>84</sup> Seven contracts excluded or restricted the investigation of complaints filed anonymously.<sup>85</sup> Four contracts between the officer employees and their employer specified penalties for filing “false complaints.”<sup>86</sup> Such practices discourage the public from filing complaints and thus make it more difficult for the employer to identify whether an officer is abusing citizens.<sup>87</sup> Twenty-two contracts (56.4%) required waiting periods before investigators could interview an officer who is the subject of an investigation.<sup>88</sup>

Another study examined 178 police union contracts covering about 40% of municipal officers in states that permit or require collective bargaining in police departments.<sup>89</sup> The study assessed whether the terms of these contracts “unreasonably interfere with or otherwise limit the effectiveness of mechanisms designed to hold police officers accountable for their actions.”<sup>90</sup> Rushin identified seven types of “problematic” contract provisions that recurred throughout the dataset; in particular, these included provisions that (1) delay interviews of officers suspected of misconduct; (2) provide officers with access to evidence before interviews about alleged wrongdoing; (3) limit consideration of discipline history; (4) limit length of an investigation or establish a statute of limitations; (5) limit anonymous complaints; (6) limit civilian oversight; and (7) permit or require arbitration for the imposition of discipline.<sup>91</sup> Rushin found that 156 of 178 contracts had “at least one provision that could thwart legitimate disciplinary actions.”<sup>92</sup> On average, three provisions that potentially thwart accountability appeared in contracts in the twenty-five largest cities in the United States.<sup>93</sup> Five contracts had at least five problematic terms.<sup>94</sup>

Whether collective bargaining is the cause of “overly protective inter-

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84. *Id.* Time limits ranged from as few as forty-five days to 1,095 days. *Id.* For allegations filed after the time limit, a complaint could still be investigated, but the findings would not result in discipline. *Id.* Some contracts, however, contained exceptions for complaints alleging criminal conduct. *Id.*

85. *Id.*; *see also id.* at 10 (“Citizens who are the victims of police brutality or coercion in particular likely would fear retribution and therefore may be uncomfortable providing their names to police, and so forbidding anonymous complaints likely discourages information provided by these victims.”).

86. *Id.* at 6.

87. *See id.*

88. *Id.* at 7; *see also id.* (“While police personnel justify formal waiting periods on the grounds that officers need time to obtain representation, critics often view waiting periods as a time during which officers can collude to create similar accounts that will withstand interrogation and ultimately exculpate themselves.”).

89. Rushin, *supra* note 12, at 1198.

90. *Id.*

91. *Id.* at 1220.

92. *Id.* at 1224.

93. *See id.* at 1222–23.

94. *See id.* The five cities with at least five of seven problematic provisions at the time of the study were Austin, Texas; Columbus, Ohio; Portland, Oregon; San Antonio, Texas; and Washington, D.C. *See id.*



nal disciplinary procedures” is still an open question.<sup>95</sup> Even without collective bargaining, it is plausible that police officer associations could persuade policymakers to adopt such procedures.<sup>96</sup>

The role of police unions—in both contract negotiations and the political realm—has historically been oppositional to critics and reform efforts while simultaneously embracing “tough on crime” strategies.<sup>97</sup> Police officer unions have resisted a range of measures that are seemingly within the realm of management, but which have a measurable influence on police operations and community interactions.<sup>98</sup> One such example occurs when officers resist oversight:

When collective bargaining gives line officers more authority to define the police role, officers embrace a legalistic patrol style that results in higher arrests and more aggressive criminal enforcement. The power-shifting effect of collective bargaining is, to a great extent, apparently inconsistent with the hierarchical “chain of command” structure that police agencies adopt. The resulting friction adversely affects officer performance.<sup>99</sup>

The other actors in police union bargaining—management and elected officials—have been insufficiently scrutinized.<sup>100</sup> This is so perhaps because “[o]fficers and their unions are a potent political force, which may make chiefs reluctant to adopt guidelines or policies that officers will oppose.”<sup>101</sup> Political leaders are also “likely to face demands by police officer unions for additional compensation or benefits to offset the [non-economic] changes” to a contract.<sup>102</sup>

Government leaders, however, have an obligation to protect the interests of their residents by exercising their role as manager of police employees:

The existence of public sector collective bargaining rights does not diminish state obligations to manage and direct safety forces. Indeed, the state maintains an affirmative duty to properly train, supervise, and manage its police forces. And while the police union leadership supports and advocates for the interests of its members, the local government is obligated to protect the rights and interests of their

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95. Stephen Rushin & Allison Garnett, *State Labor Law and Federal Police Reform*, 51 GA. L. REV. 1209, 1219 (2017). For example, Rushin concluded that his analysis of CBAs in *Police Union Contracts* “does not show a causal relationship between the use of collective bargaining and the implementation of questionable disciplinary procedures,” but “[n]evertheless, this Article’s findings are consistent with the hypothesis that police labor law can frustrate accountability efforts, thereby limiting the effectiveness of traditional, cost-raising forms of police regulation.” Rushin, *supra* note 12, at 1241.

96. Rushin & Garnett, *supra* note 95, at 1219.

97. See Fisk & Richardson, *supra* note 16, at 744–45.

98. See Harris & Sweeney, *supra* note 11, at 2; Rushin, *supra* note 12, at 1205; Hardaway, *supra* note 4, at 162.

99. Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2216–17 (2014).

100. See Levin, *supra* note 7, at 1366.

101. Ponomarenko, *supra* note 47, at 28–29.

102. Rushin & Garnett, *supra* note 95, at 1220.

constituents. It is a managerial function of government to set the policies and procedures of their police departments.<sup>103</sup>

Political leaders should be balancing the interests of various stakeholders. Instead, “political leaders on both sides of the aisle who once rejected police unionization as a threat to public safety have now widely embraced it.”<sup>104</sup> The picture that has emerged is that of local government policy-makers succumbing to regulatory capture—that is, the “regulatory entity responsible for protecting the public interest instead advances the interests of the entity it was tasked with regulating.”<sup>105</sup>

Unions and city leaders also agree to wage and benefit concessions in exchange for weakened discipline policies and procedures.<sup>106</sup> By design, there is “minimal community input”;<sup>107</sup> the public has no idea what is going on during negotiations. As such, it becomes unclear whom to hold responsible:

Ignoring management’s place in the bargaining process risks letting actual elected officials pass the buck and suggests that it is the job of the union—not the elected officials—to look out for the public interest. (Relatedly, such simplified accounts obscure the fact that government actors might make concessions on CBA provisions relating to oversight as a means of avoiding police demands regarding wages, hours, and benefits.)<sup>108</sup>

It is in this environment of weak regulatory oversight that three out of four residents of high-crime, low-income communities do not believe that officers will be held accountable for misconduct.<sup>109</sup>

Collective bargaining laws have provided police unions the opportunity to make demands for policy change that were not contemplated by state legislators.<sup>110</sup> The trade-offs that are inherent to bargaining are shaping accountability rules that allow for the continuation of police practices that further isolate poor Black people and other racial minorities with

103. Hardaway, *supra* note 4, at 177–78; *see also* Rushin, *supra* note 12, at 1206 (“[C]ourts and state labor relations boards have generally held that managerial prerogatives should not be subject to negotiation as so-called ‘conditions of employment.’ In practice, though, courts have proved fairly deferential to public-employee unions.” (footnote omitted)).

104. Rushin, *supra* note 12, at 1206.

105. *Id.* at 1215 n.117.

106. *See id.* at 1216.

107. Rushin & Garnett, *supra* note 95, at 1217.

108. Levin, *supra* note 7, at 1366–67 (footnote omitted).

109. In a survey of residents of high-crime, low-income neighborhoods in six U.S. cities, only 24.4% of respondents agreed or strongly agreed that “[t]he police department holds officers accountable for wrong or inappropriate conduct in the community.” LA VIGNE, *supra* note 66, at 10.

110. *See* Stoughton, *supra* note 99, at 2195–96 (“The fact that the incidental regulation of policing avoids the deliberative process that safeguards societal interest-balancing makes policing-neutral laws a particular concern. These laws create the status quo, defining the police role in society and shaping the practices that implicate policing’s unique functional and expressive role in society.”).

little public scrutiny.<sup>111</sup> The scope of collective bargaining should be limited in order to keep police unions from having the power to set policy at the expense of less-powerful competing groups.<sup>112</sup>

However, what if it is not simply a matter of public employers exercising their managerial prerogative and removing policy matters from the scope of what is negotiable?<sup>113</sup> The officials generally possess

the tools to prevent countermajoritarian policy outcomes in bargaining, just as they do in legislation or rulemaking. But public officials can also choose not to use these tools—or fail to use them effectively. In other words, conflicts between public sector collective bargaining agreements and public preferences are best attributed not to the bargaining process but rather to the conduct of actors in that process . . . .<sup>114</sup>

## V. COLLECTIVE BARGAINING AND TRANSPARENCY

Is “a dearth of transparency” the distinct flaw of police union collective bargaining?<sup>115</sup> Because negotiations are shrouded in secrecy, there is a risk that the negotiated contract will not accord with “majority preferences.”<sup>116</sup> In this view, the negotiation process runs counter to the democratic process by giving one special interest—police officers—a venue where they can influence public policy that excludes other “competing interest groups.”<sup>117</sup> The counterargument is that a confidential negotiation “provides a forum for rational discussion and accommodation of competing interests.”<sup>118</sup> Closed negotiations allow for a weighing of the advantages and disadvantages of alternative options and for a robust back-and-forth on the issues to reach an agreement.<sup>119</sup> Elected officials have the final say on whether to ratify a negotiated labor contract, thus offering an opportunity for an exchange of ideas and vocalized criticism (or support) by the public. However, the very way in which elected officials ratify contracts makes it difficult for the public to engage in any

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111. *See id.* at 2216–17 (identifying the power-shifting effect where collective bargaining creates the environment for unions to advance aggressive enforcement measures through weak accountability policies).

112. *See, e.g.,* Hardaway, *supra* note 4, at 181; *In re City of Concord*, 651 A.2d 944, 946 (N.H. 1994).

113. *See* Hardaway, *supra* note 4, at 181.

114. Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 OR. L. REV. 673, 706 (2013); *see* Levin, *supra* note 7, at 1399 (observing that local government officials have violated the public’s trust by agreeing to objectionable discipline policies and use-of-force rules).

115. Rosenthal, *supra* note 114, at 703.

116. *Id.*

117. Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from the United States*, 34 COMP. LAB. L. & POL’Y J. 277, 279 (2013); *see also* Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1164 (1974) (“When the union presents its demands, the public official or his representative must respond . . .”).

118. Summers, *supra* note 117, at 1200.

119. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 908 (2006).

meaningful way.<sup>120</sup> This lack of legitimate access contributes to “public apathy and a sense of hopelessness in making any critical judgment of the agreement.”<sup>121</sup>

In theory, greater transparency provides “the free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thereby increases the quality of governance.”<sup>122</sup> In most states, however, collective bargaining happens outside of the public view.<sup>123</sup> The Reporters Committee for Freedom of the Press (RCFP) maintains a compendium of state laws on transparency and open government, and the database includes statutes related to negotiations and collective bargaining of public employees.<sup>124</sup> Each state’s bargaining transparency rules were reviewed using the RCFP compendium and cross-referenced to a similar compendium published by the Commonwealth Foundation.<sup>125</sup> Using the RCFP database of collective bargaining rules reveals that eight states that allow for police officers to collectively bargain also require some degree of transparency (Florida, Idaho, Iowa, Kansas, Minnesota, Montana, Oregon, and Texas).<sup>126</sup>

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120. See Rosenthal, *supra* note 114, at 703–04 (“The opacity of bargaining therefore makes it impossible for citizens to engage in the ‘actual exchange of ideas and participation’ that is the ‘cornerstone of democratic decision making.’”).

121. Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669, 676 (1975); see also Rosenthal, *supra* note 114, at 709–10 (“While the public understands that legislators are responsible for legislation, when policy made through bargaining is unpopular, government officials can claim that they were simply forced to accede to union demands.”).

122. Fenster, *supra* note 119, at 900.

123. See Rushin, *supra* note 12, at 1199; PRIYA M. ABRAHAM, COMMONWEALTH FOUND., OPENING THE CURTAIN ON GOVERNMENT UNIONS 5–8 (2015), [http://www.commonwealthfoundation.org/docLib/20150609\\_CBTransparency.pdf](http://www.commonwealthfoundation.org/docLib/20150609_CBTransparency.pdf) [<https://perma.cc/T22F-765J>] (showing that most states provide only limited transparency into collective bargaining negotiations).

124. *Negotiations and Collective Bargaining of Public Employees*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-sections/k-negotiations-and-collective-bargaining-of-public-employees> [<https://perma.cc/YAX6-T2U9>].

125. *State Labor Laws*, COMMONWEALTH FOUND. (Sept. 16, 2019), [https://www.commonwealthfoundation.org/state\\_labor\\_laws](https://www.commonwealthfoundation.org/state_labor_laws) [<https://perma.cc/WH2B-DGUQ>].

126. See FLA. STAT. § 447.605 (2020) (subjecting negotiations to Florida’s public-meeting rules contained in § 286.011 but exempting employer strategy discussions); IDAHO CODE § 74-206A(1) (2021) (“All negotiations between a governing body and a labor organization shall be in open session and shall be available for the public to attend.”); IOWA CODE § 20.17.3 (2021) (“Negotiating sessions, strategy meetings of public employers, mediation, and the deliberative process of arbitrators shall be exempt from the provisions of chapter 21 [open-meetings rules]. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 21.”); KAN. STAT. ANN. § 75-4319(b)(3) (West, Westlaw through 2021 legislation) (allowing public bodies and agencies subject to open meetings act to go into closed session “to discuss employer-employee negotiations whether or not in consultation with the representative or representatives of the public body or agency”); MINN. STAT. § 179A.14.3 (2020) (“All negotiations, mediation sessions, and hearings between public employers and public employees or their respective representatives are public meetings except when otherwise provided by the commissioner.”); MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations

Even in states where there is a degree of transparency, the terms of the agreement and its motivations are often inadequately explained; as a result, the public cannot participate in a meaningful way.<sup>127</sup> Moreover, while residents of underserved neighborhoods may not know the intricacies of collective bargaining, they do understand their history and their lived experience with policing within their own “cultural and social frames”; thus, their exclusion from meaningful involvement in the collective bargaining process is harmful.<sup>128</sup> Sunshine laws requiring transparency tend to fail to achieve the result that is assumed to accrue from transparency—“an informed, participatory democracy”—because such laws fail to place disclosure in the proper context and do not “tailor the time and manner of disclosure” to the needs of that part of the public that is most likely to benefit from the information.<sup>129</sup> There has been very little scholarship focused on whether sunshine laws are effective in influencing accountability-related contract provisions, or whether the public is even aware that negotiations are open meetings.<sup>130</sup>

For communities that are most impacted by aggressive policing, there is little possibility for meaningful participation when the agenda for that week’s city council meeting includes ratification of a CBA and an attachment of an *already* negotiated collective bargaining agreement.<sup>131</sup> This is so because

[o]nce agreement is reached at the bargaining table, many of the issues are largely foreclosed; a heavy presumption arises against rejection of the agreement, even on budgetary grounds. The political

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of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”); MONT. CODE ANN. § 2-3-203(1) (2019) (“All meetings of public or governmental bodies . . . must be open to the public.”); OR. REV. STAT. § 192.660(3) (2019) (“Labor negotiations shall be conducted in open meetings unless negotiators for both sides request that negotiations be conducted in executive session.”); TEX. LOC. GOV’T CODE ANN. § 146.013(a) (West 2019) (“Deliberations relating to a meet and confer agreement or proposed agreement under this chapter between representatives of the public employer and representatives of the employee association recognized under this chapter as the sole and exclusive bargaining agent for the covered employees must be open to the public and comply with state law.”); *id.* § 146.013(b) (“Subsection (a) may not be construed to prohibit the representatives of the public employer or the representatives of the recognized employee association from conducting private caucuses that are not open to the public during meet and confer negotiations.”); *id.* § 174.018 (“A deliberation relating to collective bargaining between a public employer and an association . . . shall be open to the public and comply with state law.”).

127. See Shkabatur, *supra* note 14, at 84.

128. Fenster, *supra* note 119, at 930.

129. *Id.* at 934–35.

130. A study on the relationship between sunshine laws and collective bargaining focused on the effects of state sunshine laws on wage outcomes for police officers and firefighters. Kevin M. O’Brien, *The Impact of Sunshine Laws on Police and Firefighter Bargaining Outcomes*, 5 APPLIED FIN. ECON. 425, 425 (1995). The study found “some evidence for lower police compensation,” but ultimately, “sunshine laws never decreased employment, wage bills or department spending.” *Id.* at 431. “Thus,” the study concluded, “overall, sunshine laws cannot be considered an effective device for monitoring police and firefighter bargaining outcomes.” *Id.*

131. See Fenster, *supra* note 119, at 934–35.

officials can be held responsible at the polls, but without some knowledge of the positions of the parties at the bargaining table the voter is handicapped in making a judgment. For the political process to be responsive and reliable, members of the public need to know the issues being negotiated and have an opportunity to make their views known before agreement is reached.<sup>132</sup>

Instead, collective bargaining allows for a closed “two-sided process”—with other interest groups kept in the dark, often by law, about what is being deliberated—rather than for a political process with a range of ideas for consideration and debate.<sup>133</sup>

The solution to union contracts that leave a portion of a community further estranged from the public square is not police reform as we traditionally think of “reform,” but rather involves implementing new governance practices that could potentially lead to meaningful public involvement. It is the recognition that “police reform” must encompass the role of police, unions, and local government leaders in the criminal justice system.<sup>134</sup>

#### VI. PROPOSALS FOR PARTICIPATORY DEMOCRACY IN COLLECTIVE BARGAINING

The collective bargaining process has the potential to serve as a major lever to “shift the rules and practices of law enforcement” so that more of these are responsive to community priorities.<sup>135</sup> The goal is to empower members of politically isolated, low-income communities that experience high crime and over-policing so they can have a meaningful role in a police union bargaining process that has historically erected barriers to accountability. Such efforts are built on a theory of change that “legitimacy can be built through dialogue among equal citizens,” which runs counter to a traditional view that public involvement in police governance is a hindrance to managing law enforcement and reducing crime.<sup>136</sup> The intent is to go beyond traditional reform efforts that focus on individual public–police interactions and instead “address deeper structural problems in municipalities” through the creation of mechanisms for dialogue and participation.<sup>137</sup> This intentional approach of inviting the community into accountability matters runs counter to the traditional perspective (rooted in a narrow view of who constitutes “the public”) that residents are mainly interested in getting more and better services for their tax dollars and are not that interested in grievance procedures.<sup>138</sup>

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132. Summers, *supra* note 117, at 1197.

133. *Id.* at 1164.

134. See Levin, *supra* note 7, at 1338–39.

135. *Id.* at 1346.

136. Bell, *supra* note 8, at 2075.

137. Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 656 (2020); see also Ponomarenko, *supra* note 47, at 33 (explaining that an agency is unlikely to put rules in place that, for example, limit officer discretion to arrest a person in an absence of requirements or incentives to do so).

138. See Summers, *supra* note 117, at 1183.

There are three potential pathways to increase community involvement: (1) apply recent refinements of sunshine laws to collective bargaining; (2) broaden the scope of subjects excluded from collective bargaining, thereby moving those topics into the public venue for consideration; and (3) open the collective bargaining process to public participation. Assessing these proposed options requires an evaluation of whether each proposal begins to address the deficits in group societal membership that Black, Brown, and Indigenous people experience in accessing venues where power is negotiated.<sup>139</sup>

The first proposal is to strengthen current transparency laws. Under the Brown Act of California, for example, legislative bodies may hold closed sessions during negotiations with representatives of employee organizations but are prohibited from taking final action on a negotiated agreement in a closed session.<sup>140</sup> One alternative path to allow for public participation is being tried in California: starting in 2012, a number of local governments adopted what became known as Civic Openness in Negotiations (COIN) legislation, which requires that the local government make all contract proposals and supporting documents available both prior to and after negotiation sessions.<sup>141</sup> The provisions generally found in a COIN ordinance include “hiring an independent lead negotiator to represent the agency in labor negotiations; hiring an independent auditor to assess the fiscal impact of each provision of the current labor agreements . . . ; public[ ] disclos[ur]e [of] all proposals, including their fiscal impact . . . ; and posting tentative agreements and associated costs for public review.”<sup>142</sup> The reporting by the auditor and disclosure of proposals and tentative agreements is meant to increase transparency.<sup>143</sup> California localities that have adopted a COIN ordinance include Costa Mesa, Rancho Palos Verdes, Beverly Hills, Fullerton, and Orange County.<sup>144</sup> Though a promising start, these are relatively wealthy municipalities and have very few Black residents.<sup>145</sup> It thus remains to be seen

139. See Bell, *supra* note 8, at 2131.

140. CAL. GOV'T CODE § 54957.6(a) (Deering 2021).

141. See, e.g., CITY OF NOVATO, CAL., RESPONSE TO THE MARIN COUNTY CIVIL GRAND JURY REGARDING CIVIC OPENNESS IN NEGOTIATIONS 1 (2015), [http://cms6ftp.visioninternet.com/novato/agendas/pdfstaffreports/cc091515\\_I-13.pdf](http://cms6ftp.visioninternet.com/novato/agendas/pdfstaffreports/cc091515_I-13.pdf) [<https://perma.cc/4N6X-6JL2>].

142. *Id.*

143. *Id.*

144. *Id.*

145. See *QuickFacts: Costa Mesa City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/costamesacitycalifornia> [<https://perma.cc/7X52-F927>] (11.9% poverty rate, \$84,138 median household income, 1.8% Black population); *QuickFacts: Rancho Palos Verdes City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ranchopalosverdescitycalifornia/PST045219> [<https://perma.cc/Y5H6-3J4A>] (4.1% poverty rate, \$138,557 median household income, 1.9% Black population); *QuickFacts: Beverly Hills City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/beverlyhillscitycalifornia/PST045219> [<https://perma.cc/ZGH4-YQ3X>] (8.3% poverty rate, \$106,936 median household income, 1.9% Black population); *QuickFacts: Fullerton City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/fullertoncitycalifornia/PST045219> [<https://perma.cc/T2ZL-KDMY>] (12.3% poverty rate, \$79,978 median household income, 2.5% Black population). Califor-

whether the model sufficiently encourages meaningful participation by community members who live in under-resourced neighborhoods.

COIN legislation has had a fraught history. The Orange County Employees Association brought a successful claim before the Public Employee Relations Board (PERB) alleging that the county failed to meet and confer with the union prior to adopting their COIN ordinance and thus violated the state's employee relations act.<sup>146</sup> In 2015, California enacted Senate Bill 331, which placed additional burdens on cities and counties that adopted a COIN ordinance.<sup>147</sup> The new law, supported by public employee unions, requires that such cities apply COIN rules to every contract with a value of at least \$250,000 that the city intends to negotiate.<sup>148</sup> As a result of SB 331, cities like Costa Mesa have amended their collective bargaining ordinances to avoid the state-mandated contracting requirements.<sup>149</sup> Research is needed to evaluate whether COIN ordinances are actually effective in encouraging public participation in collective bargaining; nonetheless, the cities that have a COIN ordinance at least seem to be encouraging resident involvement.<sup>150</sup> To be effective, a transparency ordinance should “provide information to citizens and improve their ability to make choices about the services they receive.”<sup>151</sup> It is not clear, though, that simply providing more collective bargaining information earlier, absent an intentional effort to engage estranged populations, will be successful in opening the process to a broader range of communities.

The second proposal is for states to take steps to democratize collective bargaining by moving certain provisions out of the realm of collective

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nia at large has a 11.8% poverty rate, \$75,235 median household income, and a 6.5% Black population. *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA/PST045219> [<https://perma.cc/K2CQ-JB22>].

146. Orange Cnty. Emps. Ass'n v. County of Orange, PERB Decision No. 2594-M, at 39 (Nov. 6, 2018), <https://perb.ca.gov/wp-content/uploads/decision-2594m.pdf> [<https://perma.cc/5SLX-9TP5>] (finding that Orange County violated California's Meyers-Milias-Brown Act).

147. S.B. 331, 2015–2016 Reg. Sess., 2d Extraord. Sess., 2015 Cal. Stat. 5384.

148. CAL. PUB. CONT. CODE § 22178(a) (West 2021).

149. Luke Money, *Costa Mesa Council Tosses Coin Ordinance in Favor of New Transparency Policy*, DAILY PILOT (Jan. 16, 2019, 5:25 PM), <https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-cm-coin-ordinance-20190116-story.html> [<https://perma.cc/MCQ4-Q9ZY>].

150. See, e.g., Press Release, Keith Sterling, Pub. Info. Manager, City of Beverly Hills, City of Beverly Hills Seeks Community Input as Labor Negotiations Set to Begin (Apr. 3, 2019), <http://www.beverlyhills.org/cbhfiles/storage/files/1833799503370391696/LaborCommMeetings4119.pdf> [<https://perma.cc/NM3J-6WZL>].

151. Carolyn Ball, *What Is Transparency?*, 11 PUB. INTEGRITY 293, 300 (2009). Relatedly, Professor Fenster proposes “a context-specific focus on decisional outputs that considers the value of disclosure to the public, in terms of both the timing and content of the disclosure, and the cost of disclosure to government, focusing again on timing.” Fenster, *supra* note 119, at 941. As he explains, “This approach focuses less on the quantity of information available than the effects of disclosure on accountability and decision-making. It assumes that better government information, utilized well both by the state and the public, will in turn produce better decision-making.” *Id.*



bargaining and into the local legislative body for public consideration.<sup>152</sup> The State of Illinois took such steps in 2021 when it enacted accountability-related reforms and, in doing so, explicitly removed certain new provisions from collective bargaining.<sup>153</sup> Enacted House Bill 3653 prohibits the requirement that a complainant include a sworn affidavit with a misconduct complaint and applies the ban to any such provision contained in a CBA.<sup>154</sup> In the same bill, the legislature passed new rules regarding the decertification of an officer's license for misconduct and similarly prohibited collective bargaining over certification requirements.<sup>155</sup> In effect, any effort to change either the affidavit prohibition or decertification rules will need to be debated in the legislature rather than in a closed collective bargaining session.<sup>156</sup> The decision that a "subject should be nonbargainable does not mean that policemen have no legitimate interest in whether their conduct should be subject to public review," and nothing should foreclose their participation in a "political process which [is] equally open to all competing views and interest groups."<sup>157</sup> But police unions are an organized political force who are comfortable influencing the process in state houses in ways that people from marginalized communities are not. It should not be expected that grassroots community advocates will have the same degree of influence without a similar capacity for organized action.<sup>158</sup>

One suggested variation of this model is to have states allow local legislatures to publicly weigh in on subject areas during the negotiation and explicitly define which permissive bargaining subjects to pursue through bargaining:

States could first require that local legislatures receive detailed and regular updates on bargaining, perhaps received by a committee charged with reporting to the wider legislative body when needed. With respect to permissive topics, the local legislature should be explicitly empowered by state law to enact binding resolutions that instruct government negotiators to either bargain on a permissive topic or pull such a topic off the table. Indeed, such votes should be required at the outset of bargaining for significant permissive topics. To further encourage active legislative oversight, the legislature could be required to take periodic votes on whether to continue bargaining

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152. See Rushin, *supra* note 12, at 1244; see also Hardaway, *supra* note 4, at 194 ("Power to create and manage law enforcement agencies rests with the state.").

153. H.R. 3653, 101st Gen. Assemb., Reg. Sess. sec. 10-150, § 3.8(b), sec. 25-40, § 6.7 (Ill. 2021).

154. *Id.* sec. 10-150, § 3.8.

155. *Id.* sec. 25-40, § 6.7 ("Notwithstanding any other law, the certification and decertification procedures, including the conduct of any investigation or hearing, under this Act are the sole and exclusive procedures for certification as law enforcement officers in Illinois and are not subject to collective bargaining under the Illinois Public Labor Relations Act or appealable except as set forth herein.").

156. See 5 ILL. COMP. STAT. 120/2(c)(2) (2021) (providing that collective bargaining sessions may be excepted from open-meeting requirements).

157. Summers, *supra* note 117, at 1197.

158. See Leah Sakala & Nancy La Vigne, *Community-Driven Models for Safety and Justice*, 16 DU BOIS REV. 253, 255 (2019).

on permissive topics.<sup>159</sup>

Any effort to narrow the scope of bargaining approaches at the local level will require care, as employers cannot unilaterally move to change terms of a contract under the claim of managerial prerogative without a thoughtful analysis of whether the modification violates the requirement to meet and confer with the union.<sup>160</sup> Conversely, promises to shrink what is bargainable may lead to overly optimistic expectations and may do little to bring legally estranged community members into the process, which would continue to be dominated by the will of the legislature.<sup>161</sup>

The third proposal is for states to open collective bargaining to the public by amending their employee relations laws to emulate those states that require open negotiation sessions.<sup>162</sup> The work of grassroots organizers in Austin, Texas, provides an example of what is possible when impacted communities get a seat in the bargaining process.<sup>163</sup> In Austin, “black people represent only 8 percent of the population yet are subjected to 14 percent of stops, 26 percent of searches, 24 percent of arrests and 31 percent of officer-involved shootings.”<sup>164</sup> The Austin Justice Coalition (AJC) launched a strategic campaign in 2016 that had the ultimate goal of influencing the terms of the collective bargaining agreement to reflect community needs better than the contract that was being negotiated at the time:

The campaign strategically started during the 2016 budget session so that demands would interrupt the flow of money into the police department. AJC members attended a rare public hearing on the police contract and were able to demand their participation in subsequent weekly hearings throughout 2017, making sure to physically pack hearing rooms with community members and to take detailed notes for cross-referencing every change from previous contracts. City council members stated that AJC’s presence at the hearings helped them feel more comfortable in dialogue around reforms . . . .<sup>165</sup>

At the urging of AJC, the Austin city council initially rejected a negoti-

159. Rosenthal, *supra* note 114, at 712–13 (footnote omitted).

160. *See* Long Beach Peace Officer Ass’n. v. City of Long Beach, 203 Cal. Rptr. 494, 505 (Cal. Ct. App. 1984) (concluding that police officers’ practice of receiving consultation from an association representative or attorney prior to writing a report concerning an officer-involved shooting was ‘past practice’ not subject to a unilateral change by the police department).

161. *See* Hardaway, *supra* note 4, at 195 n.382 (“There is an assumption that elected officials represent the viewpoints of their respective communities by sheer virtue of being duly elected. The belief that civilians should simply use the ballot box as the sole avenue to express their support or disdain for the acts of local government officials is problematic.”).

162. *See* Rushin, *supra* note 12, at 1244.

163. *See generally* Sukyi McMahon & Chas Moore, *Opinion: To Reform the Police, Target Their Union Contract*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/opinion/austin-police-union-contract.html> [<https://perma.cc/C4UL-N9T6>].

164. *Id.*

165. KELCEY DUGGAN, CMTY. RES. HUB FOR SAFETY AND ACCOUNTABILITY, RESEARCH MEMO: POLICE UNIONS AND THE OBSTACLES THEY POSE 22 (2020), [https://communityresourcehub.org/wp-content/uploads/2020/09/2020\\_FINAL\\_Unions\\_Obstacles\\_Memo.pdf](https://communityresourcehub.org/wp-content/uploads/2020/09/2020_FINAL_Unions_Obstacles_Memo.pdf) [<https://perma.cc/2MS8-XPDG>].

ated agreement.<sup>166</sup> AJC then directly influenced the renewed negotiations.<sup>167</sup> The contract that was ultimately agreed upon includes the creation of a civilian oversight office and provides that the police department will no longer automatically downgrade short suspensions to confidential written reprimands.<sup>168</sup> Also, the contract requires that investigators have more time to investigate complaints that allege criminal conduct, and misconduct complaints can now be filed online.<sup>169</sup>

These were significant advances but did not come without dire warnings that “hundreds of officers would retire en masse if the council rejected the [original] contract.”<sup>170</sup> The experience in Austin is a real-world example that “the public must be able to evaluate the government’s decision as soon as possible—and, where possible and appropriate, in order to allow public input and oversight before a final decision is made.”<sup>171</sup> Efforts like the AJC’s demonstrate the importance of opening the process and centering stakeholders in justice reform efforts. Yet for that exercise to have legitimacy, it must “respect[ ] the leadership of community players rather than including them as an afterthought.”<sup>172</sup>

## VII. CONCLUSION

Police unions rose in power partially in response to the civil unrest in urban neighborhoods in the 1960s.<sup>173</sup> Since then, they have frequently stood as obstacles to accountability-related reforms.<sup>174</sup> The phenomenon of over-criminalization and under-policing is an outgrowth of the aggressive policing strategies that emerged in the 1970s.<sup>175</sup> Contracts that civilian policymakers negotiate with police unions shield officers from accountability for misconduct and excessive force.<sup>176</sup> This contributes not just to undermining police legitimacy in communities that are already vulnerable to poverty, elevated crime, and limited services but also to an estrangement, or separation, from the greater polity.<sup>177</sup>

The involvement of people from historically marginalized and over-policed communities in labor contract negotiations will unfortunately cause organizations that have an interest in maintaining the current structure to use scare tactics, such as the threat of mass officer retirements. Fear of crime and disorder in urban neighborhoods has allowed for policing that seeks to deemphasize the strict discipline of police officers who are ac-

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166. *See id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. McMahan & Moore, *supra* note 163.

171. Fenster, *supra* note 119, at 940.

172. Sakala & La Vigne, *supra* note 158, at 255.

173. *See supra* notes 50–52 and accompanying text.

174. *See supra* notes 54–58 and accompanying text.

175. *See generally* Soss & Weaver, *supra* note 22, at 569–73.

176. *See supra* notes 80–109 and accompanying text.

177. *See supra* notes 39–48 and accompanying text.

cused of harming community members.<sup>178</sup> Post-Ferguson, the media, policymakers, and academics paid only moderate attention to the role of police unions in use of force policies and accountability procedures.<sup>179</sup> This new iteration of the Civil Rights Movement will “require a more aggressive infusion of deliberative participation” that includes the very people whose disenfranchisement from the public square is a major contributor to the sense of deep detachment in Black, Brown, and poor communities.<sup>180</sup>

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178. *See supra* notes 56–57 and accompanying text.

179. *See* McCormick, *supra* note 53, at 51–52.

180. *Id.*

