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CAN POLICE UNIONS HELP CHANGE AMERICAN POLICING?

Michelle M.K. Hatfield*

“Until we tell the truth, we deny ourselves the opportunity for beauty. Justice can be beautiful. Reconciliation can be beautiful. Repair can be beautiful. It’s powerful to actually *experience* redemption. And we deny ourselves that when we insist on denying our broken past, our ugly past, our racist past, when we insist on avoiding the truth.”¹

–Bryan Stevenson, Founder, Equal Justice Initiative

Abstract

Police unions are part of the problem in American policing. Could police unions also be part of the solution? This Comment begins by putting into practice the dialectic we must achieve at a societal level by detailing the ways in which police and Black Americans have been positioned to be in conflict from the seventeenth century to the present, and by discussing the formation of police unions. American society needs truth-telling about the history and present context that drives police officers into deadly conflict with Black Americans to heal, trust, and effectuate a more perfect system for public safety. This Comment wrestles with the need to understand several truths at once: that police organized into unions in part to protect the rank-and-file from managerial abuse; that the American policing system is in many ways designed and implemented against Black

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1. Ezra Klein, *Bryan Stevenson on How America Can Heal*, Vox (July 20, 2020, 9:20 AM), <https://www.vox.com/21327742/bryan-stevenson-the-ezra-klein-show-america-slavery-healing-racism-george-floyd-protests> [https://perma.cc/AWS3-6S8V] (emphasis added).

Americans; that police unions organized in the Civil Rights Era to protect police officers from discipline for following orders; and that deep, structural change should include police unions. Less fundamental changes that leave in place the core of American policing, without examining its racist foundations and incentives toward brutality and lethal force, will not serve to bring about lasting reconciliation. This Comment reviews several ways to improve the management of police departments put forth by labor and policing scholars and suggests that the promise of such reforms could motivate participation in a truth process. The conversation about policing reform in the United States has expanded and deepened tremendously in the past year, and it continues to evolve and take on new dimensions. This Comment urges policymakers to create a truth process as part of police reform and suggests that the process be implemented via the police unions because the voices of police organizations that represent rank-and-file officers are a critical ingredient for meaningful change.

Table of Contents

INTRODUCTION	213
I. HISTORY OF BRUTALITY IN POLICING AND POLICE UNIONS: ENFORCING THE AMERICAN CASTE SYSTEM.....	215
A. <i>Slave Patrols</i>	216
B. <i>Policing Origins in the North</i>	216
C. <i>Post-Emancipation Policing</i>	217
D. <i>Lynching and Law Enforcement</i>	220
E. <i>Civil Rights, America's First Televised War</i>	222
F. <i>The War on Drugs, Mass Incarceration, and Profit-Driven Prisons</i>	222
G. <i>Police Send Black People to Prison: So What?</i>	224
II. POLICE UNIONS AS LABOR UNIONS.....	226
A. <i>The Boston Police Strike of 1919: The Ethno-Racial Tension Central to America's Infamously Unsuccessful Police Strike</i>	226
B. <i>Police as Labor</i>	229
C. <i>Police Unions and Politics</i>	233
D. <i>Police Unions and Internal Discipline</i>	234
III. THE POTENTIAL FOR CHANGE WITH POLICE UNIONS.....	236
A. <i>Limits on Public Sector Bargaining</i>	236
B. <i>Police Culture and Practice: How Can Unions Foster Change</i>	238
C. <i>New Models of Police Management</i>	240
CONCLUSION: THE NEED FOR TRUTH AND RECONCILIATION.....	242

Introduction

The question of how to bring meaningful change to American policing attracted a great deal of thought and attention thanks to the Black Lives Matter movement and the video of the murder of George Floyd, which presented incontrovertible evidence of police brutality. Mr. Floyd's words, "I can't breathe," continue to haunt our collective psyche because they remind us of the American history of police killings.²

No one will ever precisely know the thoughts in Officer Chauvin's mind that night. What one can discern, however, are the mechanics of the system that seems to allow officers to act with impunity and how police union bargaining helps to create that system. It is more difficult to discern how the collective bargaining process might be used to bring reform and healing to American policing.

The present system governing American policing, enacted via negotiations between departments and police unions, discourages officers from intervening to stop another officer. The three other police officers present on the scene allowed their fellow officer (and police union member) to brutally restrain and kill an unarmed Black man who had neither been formally charged with any crime, nor stood to be charged with any violent crime. These officers deferred to their fellow officer rather than stand up to their colleague to protect the life and liberty of George Floyd. How is it that these three officers—charged to serve and protect their communities, sworn to uphold the laws of their city, state, and nation—chose to stand back rather than confront Officer Chauvin?

The crisis in American policing demands thoughtful solutions. This Comment first discusses the racist origins of American policing, for this history is fundamental to understanding the urgency and validity of the cries for police reform as part of criminal justice reform. Often, the culture of policing is implicated in episodes of excessive use of force and in poor relationships between police forces and the communities they serve. The culture of policing is unavoidably tied to its history. Police brutality will continue unless and until the culture is intentionally elevated beyond the traditional to the transformational, informed by a new understanding of what policing should be.

Part II of this Comment discusses the history and context of police unions and their relationship to the broader U.S. labor movement, the specific ways in which unions use collective bargaining to protect members from discipline, and the impact of that protection. In their effort to insulate police officers from accountability, police unions have an advantage

2. See Evan Hill et al., *How George Floyd Died in Police Custody*, N.Y. TIMES, (May 31, 2020), <https://www.nytimes.com/video/us/100000007159353/george-floyd-arrest-death-video.html> [<https://perma.cc/NGF2-P2YJ>] (warning: the video contains graphic violence); see also Ashley Southall, "I Can't Breathe": 5 Years After Eric Garner's Death, an Officer Faces Trial, N.Y. TIMES, (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html> [<https://perma.cc/U8Y8-NDNT>].

created by the courts. The court-created principle of qualified immunity effectively shields government employees from civil liability by requiring a prior ruling on the precise issue before the court in order to hold a government employee accountable for knowing their behavior was illegal.³ The requirement of “clearly established” law in the qualified immunity principle creates a circular logic in which courts can avoid establishing law that holds civil servants to account, including police.⁴ The practice of police indemnification⁵ also contributes to a dearth of accountability when police departments carry insurance to cover damages from judgments arising from officers’ excessive behavior.⁶ Both qualified immunity and police department indemnification form obstacles to police accountability that contribute to how departments handle civil actions against members of their departments. This Comment focuses on the role of police unions in police disciplinary issues, specifically how unions have constructed legal barriers that shield officers from accountability.

Part III of this Comment focuses on how police unions can be part of a new system of policing, with policy recommendations from leading scholars of labor law and policing. This Comment ultimately calls for a foundational first step, a community-driven truth and reconciliation process to liberate the discourse around policing from its racist history and

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3. The “clearly established law” standard for qualified immunity was created in 1982. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). With this decision “the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith” in the qualified immunity analysis. *Baxter v. Bracey*, 140 U.S. 1862 (2020) (Thomas, J. dissenting).
 4. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 45 (2018) (“The doctrine of qualified immunity operates as an unwritten defense to civil rights lawsuits brought under 42 U.S.C. § 1983. It prevents plaintiffs from recovering damages for violations of their constitutional rights unless a government official violated ‘clearly established law,’ which usually requires specific precedent on point.”). A 2020 decision by the U.S. Court of Appeals for the 4th Circuit overturned a lower court decision in favor of police officers who killed a man experiencing homelessness in which qualified immunity had been used to absolve the officers: *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 671 (4th Cir. 2020) (“[T]he district court erred by holding that the officers are protected by qualified immunity. In 2013, it was clearly established that law enforcement may not constitutionally use force against a secured, incapacitated person—let alone use deadly force against that person.”).
 5. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). According to the author, in spite of a civil rights doctrine which requires that an individual police officer pay the penalty for violations under 42 U.S.C. § 1983, “[g]overnments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy. And governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct,” *id.*
 6. Proposals that would require police officers to individually carry their own liability insurance are gaining traction in the discussions around policing reform. The union’s ability to purchase and provide law enforcement liability insurance would decrease the cost for officers to carry such insurance and dealing with the insurance companies might influence union tolerance of bad behavior.

bring a new level of honesty and accountability to the profession. In addition, police reform must include more modern management practices, and leave behind some of their paramilitary legacy. Management must respect rank-and-file police officers to the same degree that officers are expected to respect nonpolice community members.⁷ In light of the debates over how to fund police departments, police officers and first responders could form working groups and labor federations to redefine the role of the police and to co-create the best system for responding to 911 emergency calls in their communities. Truth-telling is the key ingredient that will catalyze these attempts into successful, meaningful reform in police culture and practice.

I. History of Brutality in Policing and Police Unions: Enforcing the American Caste System

The history of policing in the United States is deeply entangled with the history of slavery and white supremacy. Police units were first formed in the United States to enforce the property rights of slaveholders; in other words, to return enslaved people who tried to escape or resist and gain their freedom.⁸ The policing of Black people is still the most extreme form of policing found in this country, and it is increasingly clear that this is by design.⁹

Isabel Wilkerson argues that police brutality is designed to enforce the American caste system. Wilkerson finds that there is an American caste system, much like the one in India, that demands the policing of Black bodies in order to maintain the dominance of the upper castes:

As a means of assigning value to entire swaths of humankind, caste guides each of us often beyond the reaches of our awareness. It embeds into our bones an unconscious ranking of human characteristics and sets forth the rules, expectations and stereotypes that have been used to justify brutalities against entire groups within our species. In the American caste system, the signal of rank is what we call race, the division of humans on the basis of their appearance.¹⁰

Similarly, Paul Butler argues that the anti-Black racism in policing cannot simply be attributed to the racist attitudes of individual police officers (though overt racism may also be a contributing factor).¹¹ Rather,

7. *Matthew 7:12* (King James Version) (“Therefore all things whatsoever ye would that men should do to you, do ye even so to them . . .”).

8. See generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001).

9. See L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

10. Isabel Wilkerson, *America’s Enduring Caste System*, NY TIMES MAGAZINE (July 1, 2020) <https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> [<https://perma.cc/UV96-R4SK>]; see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

11. PAUL BUTLER, *CHOKE HOLD POLICING BLACK MEN: A RENEGADE PROSECUTOR’S RADICAL THOUGHTS ON HOW TO DISRUPT THE SYSTEM 2* (2017).

police officers, for the most part, are doing their jobs and acting legally in a system designed to oppress Black Americans.¹²

A. *Slave Patrols*

Police brutality in America cannot be treated as an unintended consequence; to the contrary, policing in the United States has been intentionally brutal from its beginnings, and has been specifically deployed against Black people.¹³ Slave patrols were an early form of American policing.¹⁴ The slaving states required white men to serve on the patrols as a civic duty; their task was to track, capture, return, and punish escaped slaves.¹⁵ Though slave owners preferred their fugitive slaves returned alive, the patrols were not expected to handle the enslaved with any measure of humanity.¹⁶ Slave patrols were also charged with deterring enslaved people from revolting; to deter attempts at revolt or escape, patrols disciplined slaves publicly with vicious creativity.¹⁷ As an arm of the state, slave patrols employed terror to maintain slaveholding society, the core principle of which was white supremacy or, as Wilkerson helpfully identifies above, the American caste system.¹⁸ As cities grew, police departments were established in the modern bureaucratic model beginning in the North with Boston in 1838. By the 1880s, all American cities had established police departments.¹⁹

B. *Policing Origins in the North*

As the North industrialized, police were tasked with maintaining order on behalf of the state, specifically in the role of quelling riots.²⁰ Northern laborers, including many recently arrived immigrants, worked in factories, mills, and shipyards, and police did not hesitate to forcefully quell smaller disruptions such as labor organizing, strikes, and work stoppages in these workplaces.²¹ Given their antagonistic role to labor

12. *Id.*

13. ALEXANDER, *supra* note 10, at 1–2, 4; Butler, *supra* note 9, at 1450.

14. GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES* 3 (2013) (“Slave patrols had three primary functions: (1) to chase down, apprehend, and return to their owners, runaway slaves; (2) to provide a form of organized terror to deter slave revolts; and, (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside the law, if they violated any plantation rules.”); *see also* K. B. Turner, David Giacomassi & Margaret Vandiver, *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, 17 J. CRIM. JUST. EDUC. 181, 185 (2006); HADDEN, *supra* note 8, at 19, 24.

15. HADDEN, *supra* note 8, at 24.

16. *Id.*

17. *Id.*

18. *See generally* Wilkerson, *supra* note 10.

19. POTTER, *supra* note 14, at 2. American police departments were preceded by less formal night watches, day watches, and constables. *Id.* (citing RICHARD J. LUNDMAN, *POLICE AND POLICING: AN INTRODUCTION* (1980)).

20. POTTER, *supra* note 14, at 3.

21. Eric H. Monkkonen, *History of Urban Police*, 15 CRIME & JUST. 547, 557 (1992).

interests, it may seem extraordinary that police themselves have consolidated so much power via unionization.²²

The people against whom police were deployed were often racialized as inferior by the dominant white Protestant native-born class, regardless of whether they were of European, African, Asian, American Indian, or mixed origin descent.²³ The racializing and dehumanizing of those workers paralleled the dehumanization of enslaved Blacks, and, according to researcher Phillip A. Goff, the legacy of such thinking persists with violent consequences in modern policing.²⁴

C. *Post-Emancipation Policing*

After the Civil War, the abolition of slavery prompted several states in the South and West to enact Black Codes of 1865–66 to restrict the lives of Black people and codify the superior status of whites.²⁵ Tasked

22. See *infra* Part II.

23. See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (2007). As colonial subjects of Britain, Irish, while light-skinned, were racialized as nonwhite. Terms used to describe Irish included “low-browed,” “savage,” “groveling,” “bestial,” “lazy,” “wild,” “white slave,” and “Irish niggers.” *Id.* at 133, 146. The dehumanizing of Irish worked hand in glove to justify the use of gangs of Irish workers as substitutes for slaves. Irish workers were brought in for dangerous tasks of “ditching and draining plantations, building levees, and sometimes clearing land.” Roediger quotes Frederick Law Olmstead, who recounted a Southerner’s explanation of bringing in Irish workers, “niggers are worth too much to be risked here; if the Paddies are knocked overboard...nobody loses anything.” *Id.* at 146 (quoting OLMSTEAD, *A JOURNEY TO THE SEABOARD SLAVE STATES, 1853–1854, WITH REMARKS ON THEIR ECONOMY* 100–01 (1904)). Roediger emphasizes the ways in which workers defined their racial status and embraced whiteness to climb out of subjugation previously shared with American Blacks. See also Sarah Block, *Stratified Boston: The Brahmins, the Irish and the Boston Police Strike of 1919* (Oct. 22, 2010) (unpublished B.A. thesis, Bucknell University) (on file with Bucknell University) (noting that in the late 1800s, Irish were able to gain access to whiteness and define themselves as non-Black partly by virtue of taking work that was barred to Blacks, including low-paying municipal jobs and police work).

24. Phillip Atiba Goff, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 533–35 (2014).

25. David F. Forte, *Spiritual Equality, The Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 600–01 (1998):

[In 1865] and into 1866, every Southern state published a version of a Black Code, and though they varied, there were common elements in all of them The codes placed blacks in a semi-permanent servitude on plantations Under the Mississippi Code, for example, sheriffs and justices of the peace were directed to apprentice all black orphans or minors whose parents were without means of support with the former owners having first preference. As with slaves, should the apprentice leave his master’s employ, the master was authorized to pursue and recapture the youngster. If the apprentice still refused to return without just cause, he would be arrested and imprisoned If a freedman were to leave his employer before the contract term was up, he forfeited his wages for the year. Freedmen were allowed to marry and to be competent witnesses in court, but were not allowed to buy or sell

with enforcement of Black Codes, law enforcement officers were charged with depriving Black people of what we now understand to be civil rights, which continued under Jim Crow laws that came into effect in the 1870s and were recognized as constitutional with the Supreme Court's decision in *Plessy v. Ferguson*.²⁶

Police played a vital role in a system which essentially re-enslaved many free Blacks called convict leasing.²⁷ The Thirteenth Amendment outlawed slavery and involuntary servitude in the United States “except as a punishment for a crime whereof the party shall have been duly convicted.”²⁸ Convict leasing generated tremendous profit for industry which in turn created a demand for prisoners in the newly slaveless Southern states.²⁹ David M. Lipman wrote about how the system worked in Mississippi:

It is clear that resemblances between the convict leasing system and slavery are not illusory . . . [d]uring the early period of convict leasing, prisoners were generally leased to wealthy speculators who were paid by the state for the convicts' maintenance and transportation. These speculators subsequently leased the convicts to planters and railroad and levee contractors who amassed fortunes by taking advantage of the free labor available through the system.³⁰

Politicians, eager to please captains of industry, pressed police to find convicts to feed the leasing system.³¹ The Thirteenth Amendment

liquor, carry arms, be a minister not licensed by an organized church, create riots, or make 'seditious speeches, insulting gestures, language, or acts, or assaults on any person.'

26. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (“Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . .”). See Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1595 (2018) (describing how Black Americans were denied equal protection vis-à-vis a jury trial in Jim Crow Louisiana as juror service was viewed as a political function rather than a constitutional provision, a problem that continues with an inordinate number of juror challenges being used against Black jurors).
27. Ashley Mott, *Fact Check: Southern States Used Convict Leasing to Force Black People into Unpaid Labor*, USA TODAY (July 7, 2020, 11:12 AM), <https://www.usatoday.com/story/news/factcheck/2020/07/07/fact-check-convict-leasing-forced-black-people-into-unpaid-labor/5368307002> [<https://perma.cc/8GFC-ZJLV>] (noting that convict leasing was adopted in Alabama, Texas, Louisiana, Arkansas, Georgia, Mississippi, Florida, Tennessee, and South Carolina).
28. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); see 13TH (Kandoo Films 2016).
29. Mott, *supra* note 27.
30. David M. Lipman, *Mississippi's Prison Experience*, 45 MISS. L.J. 685, 689–90 (1974).
31. Mary Rose Whitehouse, *Modern Prison Labor: A Reemergence of Convict Leasing under the Guise of Rehabilitation and Private Enterprises*, 18 LOY. J. PUB. INT. L. 89, 94 (2017) (“Although many of these statutes [referring to Black Codes] were not explicitly race-specific, in application they were almost exclusively enforced for [B]lacks.”).

exception allowed convicted men and women to be compelled to work.³² Leased convicts built railroads, worked in mines, and picked cotton.³³ Convict workers often endured even harsher treatment than had been meted out on the enslaved, because the leased convicts were not the private property of the lessee and could be replaced by the state at no expense to the lessee.³⁴ Thus, the police in convict-leasing states were part of the mechanism that maintained white supremacy and wealth accumulation at the expense of Black people's freedom and often their lives.³⁵

While convict leasing may have ended, penal labor remains a contentious topic in prison reform debates. Proponents argue that penal labor stems recidivism, while critics see it as exploitative and potentially abusive.³⁶

The role of police in maintaining white supremacy in the day-to-day experience in Southern states was expansive as the enforcers of Black Codes³⁷ and Jim Crow laws.³⁸ Black families fled to Northern industrial cities in the Great Migration seeking increased opportunities for greater freedom, community, and prosperity,³⁹ while in the South even skilled Black workers struggled, as the advantages of union membership were frequently denied or abridged; worse, union workers attacked Black workers.⁴⁰

32. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”) (emphasis added). See also James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1511 (2019) (“Numerous convict laborers were leased out not because they had been sentenced to hard labor, but to pay off fines or court fees. At the county level, many, if not most, ‘convicts’ were leased without any record of their offenses, sentences, or debts.”).

33. Lipman, *supra* note 30.

34. *Id.* at 692 (“Excesses under convict leasing are clearly reflected in convict death rate statistics during the 1880’s. The average annual death rate among Negro convicts in Mississippi from 1880 to 1885 was almost 11 percent, for white convicts about half that, and in 1887 the general average was 16 percent.”). See also Vernon Lane Wharton, *The Negro in Mississippi 1865–1890*, 53 AM. HIST. REV. 560, 564–565 (1948).

35. Lipman, *supra* note 30, at 692.

36. Whitehouse, *supra* note 31, at 99.

37. Forte, *supra* note 25, at 600.

38. See *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

39. Spencer R. Crew, *The Great Migration of Afro-Americans, 1915–40*, 110 MONTHLY LAB. REV. 34, 34–36 (1987).

40. David E. Bernstein, *Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT. BLACK L.J. 276, 277 (1993):

By the early 20th century, construction craft unions affiliated with the American Federation of Labor (“AFL”) were among the most powerful unions in the United States. Most construction unions excluded Blacks completely, while carpenters and bricklayers, faced with large numbers of potential Black competitors, relegated them to second-class segregated locals. Licensing laws, passed at the behest of unions, were applied discriminatorily to prevent Blacks from gaining more than token representation as plumbers and electricians. Because of the discrimination and hostility faced by Black workers in the AFL,

However, the migrants to the North found the American caste system still in place; for example, while Black people could more easily vote, they have been largely prevented from buying real estate in white neighborhoods.⁴¹ Rental discrimination has had also persisted in spite of Fair Housing Act protections.⁴² Since educational opportunities are tied to neighborhoods and property values, exclusionary real estate practices systematically deny educational opportunities to Black children.⁴³ Communities have used white police officers to police the boundaries of the informally segregated society in the North as well as in the South, targeting Black people walking or driving in predominantly white neighborhoods.⁴⁴

D. *Lynching and Law Enforcement*

Beyond the legal means of oppressing Black people, lynchings were an extralegal terror mechanism that kept Black people in the South from challenging white supremacy.⁴⁵ Sherrilyn Ifill has written an exhaustive

many Black leaders, including Marcus Garvey and Dean Kelly Miller of Howard University, urged Blacks to reject unionism entirely.

41. Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. SOC. JUST. 1, 3, 16 (2013). See also D. O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5, 5–6 (1945) (discusses state rulings against residential segregation, including a Supreme Court of Oklahoma case, *Lyons v. Wallen*).

42. The Fair Housing Act of 1968 § 804 bars discrimination on the basis of race, color, religion, or national origin. See Nikole Hannah-Jones, *No Sting: Feds Won't Go Undercover to Prove Housing Discrimination*, PRO PUBLICA (Dec. 20, 2012), <https://www.propublica.org/article/no-sting-feds-wont-go-undercover-to-prove-housing-discrimination> [<https://perma.cc/JWD3-5YJZ>].

43. Szto, *supra* note 41.

44. See generally David A. Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters*, 84 MINN. L. REV. 265 (1999). *Commonwealth v. Warren*, 475 Mass. 530, 58 N.E.3d 333 (2016); see also Josh Kenworthy, *Justified in Fleeing Police? Mixed Views on Massachusetts Supreme Judicial Court Ruling*, CHRISTIAN SCI. MONITOR (Sept. 23, 2016), reporting on *Commonwealth v. Warren*:

Judges in Massachusetts already are required to weigh whether a defendant's choice to flee a police encounter stemmed from a sense of guilt or innocence—with the judgment affecting what information can be used at trial. But this . . . ruling goes further, saying that black people may be justified in fleeing for reasons having nothing to do with guilt, but rather 'the recurring indignity of being racially profiled.' . . . just because a police officer has a 'hunch' that a black person is acting out of culpability, his or her decision to walk away from police could likely be 'totally unrelated to consciousness of guilt.'

45. Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 HASTINGS WOMEN'S L.J. 27, 37 (2021). Armstrong writes about white women's role in lynchings; while this Comment focuses on police and policing, the following excerpt is included to add to the reader's understanding of the ways in which lynching was used to enforce societal norms about race, sexuality, and gender:

Between 1882 and 1930, there were at least 4,761 reported deaths from lynching in the U.S., around three quarters of which were Black. Journalist Ida B. Wells provides a record of lynching in the U.S., explaining

history and analysis of lynching and how we as a nation can reckon with and heal from this history.⁴⁶

Ifill's discussion on police officers' and other state officials' roles in lynchings is not a complete indictment: she identifies examples of sheriffs who threatened the mob in defense of jailed defendants.⁴⁷ Other sheriffs used humor to defuse the situation when a lynch mob approached a local jail.⁴⁸ Some sheriffs who upheld the defendant's right to due process were attacked by the mob or lynched themselves.⁴⁹

However, far more often police officers and sheriffs were complicit in lynching either by omission or by commission; an example of complicity by omission would be a sheriff's choice to leave a Black defendant in jail overnight unguarded—in a community where lynching was common practice, this would be a tacit invitation to lynch the accused.⁵⁰

Other times sheriffs and police actively participated in lynchings:⁵¹

Sheriff Dwight H. Blackwood of Mississippi County reportedly remarked after one lynching “[n]early every man, woman, and child

its inextricable links to tropes of white women's purity. In *The Red Record*, she explains that one of the major justifications for lynching was to avenge supposed assaults upon white women by Black men. The thought of this crime aroused mania and panic amongst white people, and it was described that nothing could so fill the souls of white people with horror, loathing and fury as the “outraging” of a white woman by a Black man. This idea of white women's purity was used to “defend” white women from Black men through lynching. Wells explains that the South shielded itself “behind the plausible screen of defending the honor of its [white] women. However, the great lie of lynching was that these rapes were happening, when in reality they were not. In fact, this myth had to be created in order to keep justifying lynching, after old excuses no longer made sense. The previous excuse for the killings had been to prevent the domination of Black people over white people; however, once Black people had been eliminated from participation in state and national elections, this no longer held water. Many acts of lynching happened as a result of white women making false accusations, and Wells points out a number of these examples. She explains that white women often felt forced to make accusations after consensual relations with Black men, compelled by threats and violence, and a wish to save their reputations. It was deemed impossible for a white woman to have consented to sexual relations with a Black person, due to stereotypes of purity. Because of the purity trope, white women had their words taken at face value. White people would often excuse the lack of trial (and instead lynch the accused man) on the basis that white women and girls should be spared the mortification of testifying in court.

Id. at 37 (citing Ida B. Wells, *THE RED RECORD* 11 (1895) and Ida B. Wells, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* 13 (1892)).

46. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 *L. & INEQ.* 263, 263 (2003).

47. *Id.* at 299.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 300.

in our county wanted the Negro lynched. When public sentiment is that way, there isn't much chance left for the officers . . ." Police were routinely more solicitous of the feelings of lynch mob members than they were of the life of a black suspect . . . Other police officers actively assisted lynchers or were part of the mob. Local law enforcement routinely failed to participate in efforts to identify and try lynchers for their crimes.⁵²

Fill recommends a Truth and Reconciliation process in America to reckon with lynching, using the Truth and Reconciliation Commission process developed by South Africa just after apartheid as a starting point.⁵³ This Comment discusses the Truth and Reconciliation process further in Part III.

E. *Civil Rights, America's First Televised War*

Media attention to the Civil Rights movement brought police and Black Americans into a new kind of conflict.⁵⁴ Campaigns of nonviolent resistance highlighted the brutal treatment of Black people by the police.⁵⁵ Police acted in accordance with the law, following legal orders, as they beat and bloodied activists to maintain order.⁵⁶ When public opinion turned against the police, the movement to unionize police departments was reinvigorated.⁵⁷ This Comment will discuss police unionization in Part II.

E. *The War on Drugs, Mass Incarceration, and Profit-Driven Prisons*

Look, we understood we couldn't make it illegal to be young or poor or black in the United States, but we could criminalize their common pleasure . . . [w]e understood that drugs were not the health problem we were making them out to be, but it was such a perfect issue . . . we couldn't resist it."⁵⁸

52. *Id.*

53. *Id.* at 309–311.

54. David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 824–26 (1993):

In the course of the interminable crisis in Birmingham, the people of the United States saw on their television screens night after night an unapologetic Eugene "Bull" Connor . . . and the seemingly senseless use by forces under his command of police dogs, firehoses and other indiscriminating weapons against apparently well-behaved demonstrators, many of them children, protesting discrimination The people of the United States went through a sea-change as a result of the events in Birmingham Suddenly, literally overnight, the time had come for consideration by the country and by Congress of major civil-rights legislation.

Id. at 825 (quoting BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* viii–ix (1976)).

55. *Id.*

56. Butler, *supra* note 9.

57. Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017) ("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.").

58. Butler, *supra* note 9, at 1452.

A resurgence of police control came in the form of the War on Drugs, which demanded a new, stricter level of policing for nonviolent crime.⁵⁹ Ehrlichman's affirmation of the race-based intent behind this "war" confirms that police were being used by the state to carry out an explicitly anti-Black agenda.⁶⁰

The war begun by Nixon's administration blossomed into an historic expansion of the American prison system under the Reagan administration.⁶¹ In 1980, the total prison population was 329,000;⁶² when Reagan left office eight years later, the prison population had

59. *Id.*

60. *Id.*

61. Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 593–94 (2012):

During the 1970s the path to the [prison industrial complex] was well paved with the passage of copious sentencing laws that increased the prison population. In 1973, New York Governor Nelson Rockefeller gave a "State of the State" speech in which he demanded that drug dealers receive life sentences without parole. The passage of the "Rockefeller" drug laws made prison sentences mandatory for the possession and sale of drugs. It also mandated prison terms for second felony convictions regardless of the circumstance.

In 1982, President Regan officially launched the "War on Drugs." This drug war culminated in the signing of the Anti-Drug Act of 1986, which appropriated \$1.7 billion to fight the drug crisis and \$97 million to build new prisons. The Anti-Drug Act created mandatory minimum federal sentencing laws that led to an increase in drug arrests and convictions in the United States. Likewise, when President George H.W. Bush was elected in 1988, he continued Reagan's "War on Drugs." On September 5, 1989, President Bush called America's drug problem "the toughest domestic challenge we've faced in decades." As a result, President Bush created a billion-dollar drug plan that sought "stiffer sentences for everyone involved in drugs, from occasional users to international drug traffickers" and shifted the focus from "stopping narcotics at the border to fighting drug trafficking on the street." President Bush's drug plan was designed to increase federal assistance to state and local law enforcement agencies, enlarge the criminal justice system across the board, and create "more prisons, more jails, more courts, more prosecutors.

The effects of this continued "War on Drugs" resulted in increased arrests for drug crimes During this time, people were not only arrested but also convicted for drug crimes at increasing rates. The number of incarcerations for drug offenses increased from 41,100 in 1980 to 493,800 in 2003; an increase of 1100% Moreover, mandatory minimum sentencing laws created during the "War on Drugs" also increased the duration of prison sentences for people incarcerated for drug crimes. Drug offenders were incarcerated at greater rates as well as given longer prison sentences. Drug offenders sentenced prior to the adoption of mandatory minimum sentences served an average of twenty-two months in prison, while drug offenders sentenced after the adoption of mandatory minimums were expected to serve almost sixty-two months in prison.

62. PRISONERS IN 1980, U.S. D.O.J. 1 (1981).

nearly doubled to 627,000.⁶³ When President Clinton was elected in 1992, he turned his “tough on crime” rhetoric into meaningful action, which meant more hard work for police officers.⁶⁴ The 1994 Crime Bill led to the federal government investing over \$12 billion toward the construction of state prisons.⁶⁵ States were able to gain priority access to the funding by enacting so-called “truth-in-sentencing” laws, which undercut judges’ ability to use discretion in sentencing, especially for nonviolent offenses.⁶⁶ The result of these policies is that the number of people in federal and state prisons and local jails and detention centers now totals almost 2.3 million,⁶⁷ a disproportionate number of whom are Black.⁶⁸

G. *Police Send Black People to Prison: So What?*

A discussion of American policing must include a short discussion on the American prison system; since the inception of American prisons, encounters with police could result in incarceration. The American system of carceral punishment was invented in the 1820s, with the intention of giving convicts time and space to reflect on their crimes, to become penitent, thus the term “penitentiary.”⁶⁹ The American practice of putting men in cages earned strong rebukes from critics, notably including Charles Dickens upon his visit to America in 1842.⁷⁰ Incarceration persists

63. PRISONERS IN 1988, U.S. D.O.J. 1 (1989); see James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/U9XX-MRD2>].

64. ED CHUNG, BETSY PEARL, & LEA HUNTER, *THE 1994 CRIME BILL CONTINUES TO UNDERCUT CRIMINAL JUSTICE REFORM—HERE’S HOW TO STOP IT*, CTR. AM. PROGRESS 6 (2019).

65. *Id.*

66. *Id.*

67. WENDY SAWYER & PETER WAGNER, *MASS INCARCERATION: THE WHOLE PIE 2020 1* (2020).

68. Fulcher, *supra* note 61, at 595 (“During the “War on Drugs,” inner-city African American neighborhoods were singled out as havens for drug users and sellers. Blacks, erroneously targeted as the highest crack cocaine offenders, were arrested disproportionately to any other ethnic group and faced longer prison sentences.”).

69. See generally Thorsten Sellin, *The Origin of the Pennsylvania System of Prison Discipline*, 50 *Prison J.* 13 (1970).

70. CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION*, 89–90 (1842): He is a man buried alive; to be dug out in the slow round of years; and in the meantime [sic] dead to everything but torturing anxieties and horrible despair . . . As I walked among these solitary cells, and looked at the faces of the men within them, I tried to picture to myself the thoughts and feelings natural to their condition . . . I imagined the hood just taken off, and the scene of their captivity disclosed to them in all its dismal monotony. . . . Every now and then there comes upon him a burning sense of the years that must be wasted in that stone coffin, and an agony so piercing in the recollection of those who are hidden from his view and knowledge, that he starts from his seat, and striding up and down the narrow room with both hands clasped on his uplifted head, hears spirits tempting him to beat his brains out on the wall.

as punishment in spite of the many dangers it poses to inmates, including violence, mental trauma, poor health care, and vulnerability to eugenicist experiments such as forced sterilization.⁷¹

The mass incarceration of Black men, who are incarcerated at higher rates and for longer sentences than their white counterparts, limits the growth of Black families, impoverishes families by incarcerating a wage-earner, and deprives children of a parent in the home.⁷² The effects on the incarcerated and their families are wide-ranging and longlasting, with effects lasting multiple generations.⁷³ The harm extends beyond families to undermine the social function of “less coercive institutions of social control,” namely neighborhoods and communities.⁷⁴ As the discussion now turns to police work, the indirect consequences of mass incarceration should give the reader pause, and perhaps ask, when the police accomplish short term goals, do they contribute to detrimental cycles that make policing more difficult in the longterm? How can lawmakers and the legal community make systemic adjustments that disrupt this dynamic? This Comment will offer a starting point toward a solution in Part III.

See also Emily Katherine Ferkaluk, *American Penitentiary System*, 10 L. MAG. QUART. REV. JURIS. 113 (1833) (translating a French study conducted by Gustave de Beaumont and Alexis de Tocqueville).

71. James C. Oleson, *The New Eugenics: Black Hyper-Incarceration and Human Abatement*, 5 Soc. Sci. 1, 3 (2016). Eugenics was a prevalent ideology developed in the 1880s, and while eugenics fell out of favor in the United States after WWII, it did not wholly disappear. Even forced sterilization continues in some states. *Id.* at 4; *see also* Lea Hunter, *The U.S. Is Still Forcibly Sterilizing Prisoners*, TALK POVERTY (Aug. 23, 2017) (noting that in 2013, the Center for Investigative Reporting found that at least 148 female inmates in California received tubal ligations without their consent between 2006 and 2010).
72. David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's Politics of Distinction*, 83 GEO L.J. 2547, 2558 (1995):

Incarceration of so many young black men contributes to the very problems that are so often pointed to as the source of higher crime rates in the black community By removing so many black men from the community and stigmatizing them forever with a criminal conviction, criminal law enforcement is likely to mean more single-parent families, less adult supervision of children, more unemployed and unemployable members of the community, more poverty, and in turn, more drugs, more crime and more violence.
73. Jason Schnittker & Michael Massoglia, *A Sociocognitive Approach to Studying the Effects of Incarceration*, 2015 Wis. L. REV. 349, 354 (2015); Megan Comfort et al., *Taking Children into Account: Addressing the Intergenerational Effects of Parental Incarceration*, 10 CRIMINOLOGY & PUB. POL'Y 839, 839–42 (2011); Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIMINOLOGY & PUB. POL'Y 793, 793–808 (2011).
74. James P. Lynch & William J. Sabol, *Assessing the Effects of Mass Incarceration on Informal Social Control in Communities*, 3 CRIMINOLOGY & PUB. POL'Y 267, 288 (2004).

II. Police Unions as Labor Unions

A. *The Boston Police Strike of 1919: The Ethno-Racial Tension Central to America's Infamously Unsuccessful Police Strike*

One of the more pivotal events in the development of police unions in the United States was the Boston Police Strike of 1919.⁷⁵ The strike ultimately provoked political backlash and hostility to police unions, stunting the police unionization efforts across the United States.⁷⁶ Understanding the context for the origins of police unions aids in understanding their later development and their role today.⁷⁷

Public sector employees began organizing into labor unions in the early 1900s.⁷⁸ The American Federation of Labor (AFL) chartered the American Federation of Teachers (AFT) and the International Association of Fire Fighters (IAFF) in 1916 and 1917 respectively.⁷⁹ Localized unions preceded the national federations, such as the Chicago Teachers Union which organized in 1897.⁸⁰ In the private sector, unionization had been increasing steadily throughout the nineteenth century. Police officers also participated in this trend and began to unionize.⁸¹ Labor historians point to the Boston Police Strike as a major turning point for the police unionization effort.⁸²

In Boston at the turn of the century, police officers were mostly from Irish immigrant families,⁸³ and police work was one of the few jobs open to young Irish men, who faced ethnicity-based discrimination in the city.⁸⁴ Boston police officers often worked seventeen hour shifts and

75. MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 351 (2016). See also Fisk & Richardson, *supra* note 57, at 734–35.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. DENNIS P. RYAN, BEYOND THE BALLOT BOX: A SOCIAL HISTORY OF THE BOSTON IRISH, 1845–1917 (1983). The first Irish immigrant policeman, Barney McGinniskin, was hired in 1851, and served for only three years. His appointment caused great consternation among native-born “Yankee” Bostonians and members of the Know-Nothing party. See New England Historical Society, *7 Fun Facts About the Boston Irish*, <https://www.newenglandhistoricalsociety.com/7-fun-facts-about-the-boston-irish> [<https://perma.cc/5YMM-W9EA>]. The city’s first Black police officer, Horatio Homer, was appointed in 1878, rose to the rank of Sergeant in 1895, and retired after 40 years with the force in January 1919, mere months before the Boston Police Strike was to occur in September 1919. See Anthony W. Neal, *Sergeant Horatio J. Homer: Boston’s First Black Police Officer*, THE BAYSTATE BANNER (Feb. 4, 2016), <https://www.baystatebanner.com/2016/02/04/sergeant-horatio-j-homer-bostons-first-black-police-officer> [<https://perma.cc/2NZF-GMKP>].

84. Kiyoko Kamio Knapp, *The Rhetoric of Exclusion: The Art of Drawing a Line between Aliens and Citizens*, 10 GEO. IMMIGR. L.J. 401, 414 (1996) (“The world sees America as a nation of immigrants. Despite that image, the United States has not

were paid very little.⁸⁵ In 1898, the city approved a raise for police, but that raise was not put into effect for fifteen years, finally being instituted in 1913.⁸⁶ In 1919, the year of the strike, Boston police officers were being paid \$1,100 annually, which in 2021 equates to an annual salary of approximately \$17,000.⁸⁷ Out of the \$1,100, police officers were required to spend \$200 for their own uniforms and gear, without which they could not do their jobs,⁸⁸ resulting in annual salaries after expenses that were the equivalent of \$12,000 in today's dollars. Though by the turn of the century the Irish underclass was well-established in South Boston, much like today, Boston was a relatively expensive place to live, as immigrants and laborers from around the country were attracted to Boston to work in shipyards and wartime industries.⁸⁹ With competition for housing and goods, the cost of living increased, squeezing the underpaid Boston police officers' finances further.⁹⁰

Disciplinary distress compounded the financial concerns; many police officers felt abused by the Commissioner, who could play favorites and mete out discipline arbitrarily. For example, police officers worked for eight days and then were supposed to have one day off, but that day off was frequently rescinded with little or no justification.⁹¹

always welcomed immigrants with open arms. There was a time when a resident alien of Boston was met with signs claiming: "Help wanted—Irish need not apply here for work."). See Block, *supra* note 23, at 18, 32. Irish women worked as domestic servants in Boston in parallel to Black women in the South during and after slavery, while Irish men worked for less money than any other ethnic group in the city throughout the 1800s. Block proposes that the class conflict in Boston between the Boston Brahmins and the Irish community was not only a contributing factor but a root cause of the Boston Police Strike and its aftermath, which had a chilling effect on police unionization efforts across the United States until the 1960s. *Id.* at 71–97; see also Monkkonen *supra* note 21, at 560. In many American cities, police departments became "employers of some immigrant groups, most notably the Irish. This held true even for southern cities; in 1850, over one-third of the New Orleans' police force had been born in Ireland. Nativist politicians purged the police of most of their immigrant officers in the late 1850s, but by 1870 the Irish were back in the department . . . 'a large Irish role in southern urban policing was the rule' for most of the nineteenth century." (quoting DENNIS C. ROUSEY, *POLICING THE SOUTHERN CITY: NEW ORLEANS 1805–1889* (1996)).

85. Block, *supra* note 23, at 49–51, 65.

86. *Id.* at 50.

87. Francis Russell, *Coolidge and the Boston Police Strike*, 16 *ANTIOCH REV.* 4, 404 (1956).

88. *Id.*

89. Block, *supra* note 23, at 50 ("In the time between 1898 and the end of the First World War, the cost of living in Boston rose a shocking 106 percent, mostly as a result of Boston's booming wartime munitions industry and numerous shipyards drawing large amounts of income and an influx of labor into the city.").

90. *Id.*

91. *Id.* at 49–50 ("[T]he Police Commissioner agreed to give employees a 24-hour holiday for every eight days of work, except this time off could be taken away at will by the Commissioner himself. Patrolmen were expected to work a regular day shift of 73 hours or and 83 hours night shift, often working up to 17 hours a day . . .").

With unionization happening in so many other professions, and given the terrible pay and working conditions, it seems quite logical that rank-and-file police sought to unionize.⁹² The Boston patrolmen were aware of large police strikes in London and in Liverpool in 1919,⁹³ as well several successful contemporary labor strikes in Boston and in the state of Massachusetts; in this context, it is unsurprising that the police chose to strike.⁹⁴

Three-fourths of the police department walked out in strike on September 19, 1919.⁹⁵ The Boston Policeman's Union (formerly the Boston Social Club)⁹⁶ had joined the AFL in August of that year, and the commissioner had prohibited police membership in the union, asserting that officers must not have "divided loyalty."⁹⁷ To enforce this prohibition, the commissioner had nineteen leading union members arrested and tried for violating his order, then suspended them from the force.⁹⁸ The Boston Police Union met and voted for the walk-out.⁹⁹ The strikers numbered 1117 out of 1544 Boston patrolmen.¹⁰⁰ The commissioner's response to the strike was to fire all of the strikers, leaving Boston without an effective police force.¹⁰¹ Rioting and looting ensued.¹⁰² Massachusetts Governor Calvin Coolidge called in the State Guard to restore order, and the State Guard remained mobilized while a replacement police force was recruited.¹⁰³

92. *Id.* at 65.

93. Russell, *supra* note 87, at 404.

94. Block, *supra* note 23, at 65–66. Workers in cities throughout Massachusetts across several industries had unionized and succeeded in strike actions to achieve better working conditions. *Id.*

95. *Id.* at 73 (citing JONATHAN RANDALL WHITE, A TRIUMPH OF BUREAUCRACY: THE BOSTON POLICE STRIKE AND THE IDEOLOGICAL ORIGINS OF THE AMERICAN POLICE STRUCTURE (1982)).

96. *Id.* at 63:

In response to the demands of workers calling for a union of Boston policemen, Stephen O'Meara had established the Boston Social Club in 1906 Designed as a fraternal group for the lowest-ranking police officers . . . it spanned across precinct boundaries uniting police workers across the city. It was generally ineffective as an outlet for the workers, however, because the Boston Social Club was still completely under the control of Commissioner O'Meara, and later Commissioner Curtis, and the Boston Police Department.

97. MALIN ET AL., *supra* note 75, at 351. The question of divided loyalty echoes the anti-Catholic railings of the Know-Nothing Party of the nineteenth century, doubting the loyalty of American Catholics who honored the pope as a religious authority. Nearly all Boston Irish were Catholic in the early twentieth century. *Id.*

98. Block, *supra* note 23, at 73.

99. *Id.*

100. *Id.*

101. MALIN ET AL., *supra* note 75, at 352.

102. *Id.*

103. Block, *supra* note 23, at 55, 81.

Class and racial/ethnic tensions undergirded abuse of the Boston police, the strike, and the ensuing riots in Boston.¹⁰⁴ The “Boston Brahmin” Harvard-educated upper class rejected the predominantly Irish police force’s demands to unionize for fair pay and better working conditions.¹⁰⁵ Roediger argues that white workers organized to establish their whiteness, to differentiate themselves from the enslaved and their descendants, and to gain access to the hegemonic class.¹⁰⁶ Specifically, Whiteness served as its own wage which the strikers were trying to access.¹⁰⁷ The discourse around Irish ethnicity in Boston in the early 1900s smacked of racism; the Boston Brahmin were reacting to what they saw as a takeover of municipal government and governance by nonwhite actors.¹⁰⁸ In terms of a caste analysis,¹⁰⁹ the aptly nicknamed “Boston Brahmin” did not want the municipal and police jobs for themselves, however they objected to the empowerment of the low-caste Irish serving in this role.¹¹⁰

The Boston Police Strike became a national story with a national impact on police unionization; many jurisdictions enacted laws to forbid police from forming unions.¹¹¹ The strike also caused all AFL police unions to give up their charter; AFL had just begun chartering police unions that same year.¹¹²

B. Police as Labor

When police officers sought to unionize, there was some debate about whether to accept police as workers. In some cities, most notably in the Great Lakes Region, police duties had included “strike duty,” which meant preventing workers from striking or breaking up a group of strikers.¹¹³ Labor organizers who had been confronted by police were reticent

104. See generally Block, *supra* note 23.

105. *Id.*

106. Roediger, *supra* note 23, at 145.

107. *Id.* at 2.

108. Block, *supra* note 23, at 82.

109. See generally ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

110. Block, *supra* note 23, at 83.

111. MALIN ET AL., *supra* note 75, at 350–51.

112. *Id.* at 351.

113. Monkkonen, *supra* note 21, at 563 (citing SIDNEY HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915* 121–31 (1983)):

By far the most systematic and wide-ranging examination of police labor relations has not come from labor historians, however, but from a police historian, Sidney Harring. In a study of Great Lakes cities, he has identified a strong antiunion bias of the police in Buffalo, Chicago, and Milwaukee (under a socialist government). He argues vigorously that the police in these and other cities acted as shock troops for local capitalists, pacifying and controlling local labor under the dictate of local businessmen. In Chicago, for instance, Harring has identified extensive strikebreaking activities by the city police, especially after 1910. Though his evidence for Chicago is very persuasive, it is less so for other cities where his arguments remain widely disputed and highly controversial. For instance, in Chicago in 1905, in Oshkosh in 1898, and

to ally with police unions.¹¹⁴ Perhaps the very experience of dealing with police who had been called in to “keep order” caused labor leaders to understand the value of police unions joining the labor movement; the potential alliance between police and labor made industrialists deeply uneasy when the AFL chartered the first police unions in 1919.¹¹⁵

The backlash to the failure of the Boston Police Strike of 1919 stymied police unionization efforts for several decades. With the passage of the National Labor Relations Act (NLRA) in 1935 as part of the New Deal, it became illegal for police to be tasked with breaking strikes.¹¹⁶ Although the police were no longer in direct conflict with the goals of organized labor, there was a lingering sense of mistrust of public sector labor unions, few efforts at police unionization bore fruit in the 1930s and 40s, and a prevailing sense that police unions were not to be desired persisted through the 1960s.¹¹⁷

Judicial decisions about the development of police unions frequently drew on the idea of undivided allegiance that was a particular feature of police officers as public safety officers.¹¹⁸ In a 1947 case, *King v. Priest*, the court held against police unionization under the undivided loyalty rationale, asserting “a man cannot serve two masters.”¹¹⁹ In Los Angeles in 1949, the California court ruled in favor of the city’s right to prohibit all

in Akron in 1913, police “weakness” failed to curb strikes, and either private guards or the militia intervened.

114. Monkkonen *supra* note 21, at 562. Monkkonen notes that not all police were anti-labor:

In spite of notorious incidents, like the Memorial Day Massacre in Chicago in 1937, when police killed demonstrating workers, most recent labor history does not paint a completely antilabor picture of American police and organized labor. In fact, until the defeat of striking police officers in Boston in 1919 ended police unionization efforts for almost a half century, police themselves were often a part of the American labor movement. One of the best-known labor historians, Herbert Gutman, pointed out that police sometimes sided with striking workers. This usually occurred in smaller cities where police budgets depended on taxes paid by workers.

115. See generally PAUL F. LIPOLD, “STRIKING DEATHS” AT THEIR ROOTS: ASSAYING THE SOCIAL DETERMINANTS OF EXTREME LABOR-MANAGEMENT VIOLENCE IN US LABOR HISTORY—1877–1947 (2015).
116. 29 U.S.C. § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”).
117. MALIN ET AL., *supra* note 75, at 350.
118. *Id.* at 351.
119. *King v. Priest*, 357 Mo. 68, 206 S.W.2d 457, 85 (1947). While it is true that the charter of Local No. 549 purports to provide that the obligation of members of the police force shall be superior to any obligation to the union, yet so long as human nature is what it is, a man cannot serve two masters. We think it is clear that membership in Local No. 549 might reasonably cause friction and dissension within the force and create prejudice and favoritism in the enforcement of the laws.

public sector employees, including police, from forming labor unions because of “the dominant public interest” and because their fair treatment would be protected by law.¹²⁰ As late as 1963, the Michigan Supreme Court decided *AFSCME Local 201 v. City of Muskegon* in favor of the city and against police unionization citing the following from *Carter v. Thompson*: “Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained.”¹²¹

How did police overcome the objections to their unionization? The Civil Rights movement of the 1960s brought policing to the forefront of the public conversation across the United States. Televised confrontations between demonstrators and police shocked the public conscience¹²² in ways that mirror events in the present moment.¹²³ Catherine Fisk and L. Song Richardson note in their study of police unions:

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.”¹²⁴

120. *Los Angeles v. L.A. Bldg. & Constr. Trades Council*, 94 Cal. App. 2d 36, 210 P.2d 305, 313 (1949):

The controlling principle . . . is that employment in the public service frequently entails a necessary surrender of certain civil rights to a limited extent because of the dominant public interest in the unimpeded and uninterrupted performance of the functions of government. Fair treatment for public employees does not require legal protection for concerted labor action generally, as in the case of private employment, for such treatment is, in the public field, compelled to a considerable extent by law.

121. *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935) (cited in *AFSCME Local 201 v. City of Muskegon*, 369 Mich. 384, 120 N.W.2d 197 (1963)). The sense of public service at the heart of the *Muskegon* decision is worth noting, and ought to be an important organizational principle around which any decision regarding policing is framed. See also *King v. Priest*, 206 S.W.2d 547 (Mo. 1947); *State Lodge of Mich. v. Detroit*, 27 N.W.2d 612 (Mich. 1947); *FOP v. Lansing Bd. Of Police & Fire Comm’rs.*, 306 Mich. 68, 10 N.W.2d 310 (1943).

122. Oppenheimer, *supra* note 54.

123. Such as cell phone videos and police body camera and dashboard camera videos capturing police shooting, beating, or kneeling on unarmed Black men. See, e.g., Josh Sanburn, *Behind the Video of Eric Garner’s Deadly Confrontation with New York Police*, TIME (July 23, 2014), <https://time.com/3016326/eric-garner-video-police-chokehold-death> [<https://perma.cc/2B4H-JUGZ>]; *Philando Castile death: Police footage released*, BBC NEWS (June 21, 2017), <https://www.bbc.com/news/world-us-canada-40357355> [<https://perma.cc/T825-QRMH>]; *Body cameras show last moments of Elijah McClain’s life*, NBC NEWS (June 29, 2020), <https://kvoa.com/news/top-stories/2020/06/29/body-cameras-show-last-moments-of-elijah-mcclains-life> [<https://perma.cc/6T59-VRT9>]. See also Say Their Names, <https://saytheirnames.io> [<https://perma.cc/4MGH-VCAH>].

124. Fisk & Richardson, *supra* note 57, at 792.

Academia was optimistic about the origins of police unionization in the 1960s, as noted above, in hopes that giving voice to the police officers in the decisionmaking process would lead to improved morale and promote democratic values.¹²⁵ Presumably many in the academy were disappointed when, despite joining organized labor, police unions persisted with a much more conservative political bent than other labor organizations. For example, anti-Black racism famously prevailed in the Philadelphia police department under the notoriously brutal leadership of Frank Rizzo in the 1960s and 1970s.¹²⁶ The union did not challenge his brutal anti-Black policing and governing tactics, even when given the opportunity.¹²⁷

In states where police are allowed to collectively bargain, police unions use collective bargaining, or the ability to “meet and confer” to negotiate for terms of employment.¹²⁸ Police unions have been successful in negotiating for better pay: according to a 2007 Department of Justice report, police departments with collective bargaining agreements have 38 percent higher average starting salary than police departments without collective bargaining agreements.¹²⁹ Municipal budgets naturally limit the extent of pay increases, so negotiations turn to other terms of employment, including officer discipline.¹³⁰ For the rank-and-file, unionization promised some protection from what they perceived as management’s arbitrary disciplinary enforcement—the playing of favorites and laying

125. *Id.*

126. See Gene Demby, *Frank Rizzo Statue Is Removed In Philadelphia: ‘It Is Finally Gone,’ Mayor Says*, NPR, (June 3, 2020, 12:20 PM), <https://www.npr.org/2020/06/03/868848550/frank-rizzo-statue-is-removed-in-philadelphia-it-is-finally-gone-mayor-says> [<https://perma.cc/88ZU-7VA3>] (“For a lot of black Philadelphians . . . the swaggering, profanity-spewing Rizzo . . . was the face and soul of Philadelphia’s brutal, aggressive police force. My mom recounted to me the time he arrested a group of Black Panthers, strip-searched them in public, and invited the press to cover the whole ordeal . . . ”); Laurence B. Liebowitz, *Rizzo v. Goode: The Burger Court’s Continuing Assault on Federal Jurisdiction*, 30 RUTGERS L. REV. 103, 104, 121 (1976). See generally TIMOTHY J. LOMBARDO, *BLUE COLLAR CONSERVATISM: FRANK RIZZO’S PHILADELPHIA AND POPULIST POLITICS* (2018).

127. See Jonathan Neumann et al., *The Homicide Files*, PHILA. INQUIRER (July 9, 2020), <https://www.inquirer.com/news/homicide-files-1977-series-police-beatings-confessions-20200710.html> [<https://perma.cc/L46C-JKDT>]. Alphonso Deal, a Black police officer in Philadelphia who founded a minority union for Black officers, ran for the presidency of the Fraternal Order of Police local, but lost his bid in dramatic fashion. Deal went on to serve as State Representative representing Philadelphia’s North district and became a leader of the Philadelphia NAACP; despite his leadership potential, Deal’s police brethren were unwilling to challenge status quo when he stepped up and offered to lead their union. *Id.*

128. MALIN ET AL., *supra* note 75.

129. BRIAN A. REAVES, *LOCAL POLICE DEPARTMENTS 13* (2007) (“The average starting salary for entry level officers was higher in departments with collective bargaining (\$39,263) than in those without it (\$28,376). This pattern existed in all population categories, ranging from a difference of about \$6,000 in the largest jurisdictions to \$9,000 in the smallest.”).

130. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1206–07 (2017).

blame on lower ranking officers while lieutenants escaped discipline.¹³¹ As the civil rights movement highlighted police brutality and racism, many rank-and-file officers felt attacked and responded defensively, feeling they had no recourse when they were investigated or accused of misconduct.¹³² “Furthermore, they feared that civilian review boards would scapegoat individual rank-and-file officers *for practices that management encouraged or even required.*”¹³³ The fear rank-and-file police officers harbored against civilian review boards also applied to their own management, with police departments potentially acting under political pressure to punish or fire officers for conduct directed by management.¹³⁴ In light of these concerns, it should not be surprising that since the 1960s police unions have found many ways to politically and procedurally resist disciplinary actions and obstruct attempts at civilian involvement.¹³⁵

C. *Police Unions and Politics*

One way that police unions have had such great influence over the process is by becoming involved with politics. Police unions support “law and order” candidates using endorsements, union dues, and extra fundraising. Support from big city police unions can amount to upward of a million dollars, as was the case in a recent California election.¹³⁶

In most states, civil service laws, including Law Enforcement Officer’s Bill of Rights (LEOBORS), regulate public sector employment, including recruitment, promotion, demotion, transferal, and termination of any employee, including police officers.¹³⁷ Civil service laws also give employees the right to challenge employment decisions, which can lead to expensive legal battles when municipalities want to make staffing

131. Ann C. Hodges, *The Interplay of Civil Service Law and Collective Bargaining Law in Public Sector Employee Discipline Cases*, 32 B.C. L. REV. 95, 98–99 (1990).

132. Fisk & Richardson, *supra* note 57, at 736 (citing to Kevin M. Keenan et al., *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers Bill of Rights*, 14 B.U. PUB. INT. L.J. 185, 196 (2005)). LEOBORS are statutory civil service protections particular to police officers enacted by fourteen states, California, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin. *Id.*

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.*

136. James Queally et al., *Police Unions, Justice Reformers Battle for Dollars in Bitter L.A. County D.A. Race*, L.A. TIMES (Feb. 24, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-02-24/political-donations-jackie-lacey-george-gascon-los-angeles-district-attorney> [<https://perma.cc/WU5W-GCNB>] (“Los Angeles Police Protective League, the union representing rank-and-file LAPD officers that has long supported more traditional law-and-order policies, which poured \$1 million into two outside committees supporting L.A. County Dist. Atty. Jackie Lacey.”).

137. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796 (2012).

changes.¹³⁸ The protection of civil service laws disincentivizes police reform and, in many states, these laws are enhanced and expanded upon by unions through collective bargaining.¹³⁹

Police unions have reflexively defended the employment of fired officers and provided those officers with counsel, bringing an expensive legal process to bear as a potential consequence of each police department staffing decision.¹⁴⁰ The potential for costly litigation for firing an officer effectively binds departments in all but the most egregious cases.¹⁴¹

D. *Police Unions and Internal Discipline*

While the push to unionize and create fairer disciplinary procedures was at first a needed change for just and fair treatment, police unions have pushed disciplinary procedures toward an overprotective paradigm that veers dangerously toward impunity.¹⁴² Police unions have advocated for and achieved restrictive measures such as time limits for investigation of misconduct, requirements that officers be provided with all evidence against them before responding, the expungement of disciplinary records, and arbitration.¹⁴³

While a union's desire to protect officers from the stain of an accusation of misconduct may at times be justified, the potential for hiding a pattern of misconduct is a troubling consequence.¹⁴⁴ An officer's disciplinary record is comprised of *reported* incidences of misconduct; some cities' collective bargaining agreements, such as Chicago's, prohibit investigation of most anonymous complaints, meaning those incidents never meet the threshold of having been reported.¹⁴⁵

138. *Id.*

139. *Id.* at 797.

140. Rushin, *supra* note 130, at 1207–08.

141. Harmon, *supra* note 137, at 797:

[I]f the supervisor transfers, demotes, or fires the officer, or even if he demands retraining, the same supervisor faces the practical certainty that the officer will appeal within the civil service system. The officer's counsel will be experienced in civil service appeals and funded by the police union. That appeal will also often be heard de novo by a group of political appointees that is sympathetic-if not beholden-to officers' interests. And that appeal will impose significant immediate costs on the city and department, in addition to potentially undermining the chief's authority.

142. Fisk & Richardson, *supra* note 57, at 750.

143. *Id.* Police disciplinary records are expunged entirely in some states after a certain number of years. There have been calls for greater transparency of these records, but unions have fought back strongly against the possibility of forcing police to carry their disciplinary record for many years or from one department to another. *Id.*

144. Rushin, *supra* note 130, at 1220; see Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 829, 857 (2015). Levine problematizes the argument for greater transparency of police disciplinary records by looking at the objectionable dynamics of life for those with criminal records. *Id.*

145. *Id.* at 1196.

In his research on police unions, Benjamin Levin has written about the case of *Shields v. City of Chicago*, in which the plaintiff claimed, “the CBAs between the police unions and the City have essentially turned the code of silence into official policy.”¹⁴⁶ Levin describes one solution attempted by a reform-minded Philadelphia District Attorney, Larry Krasner.¹⁴⁷ Krasner created a “do-not-call list” of police officers who had been known to have multiple charges of misconduct and were seen as likely to perjure themselves in order to protect other officers accused of the same.¹⁴⁸ Krasner was promptly sued by the Fraternal Order of Police local, even though his list only named 66 out of the city’s 6,500 officers, about one percent.¹⁴⁹

The “cover-up culture” also discourages officers from confronting a coworker who is perpetrating excessive violence. For example, in 2006 former Buffalo, NY, police officer Cariol Horne broke the code of silence to report an incident in which she says another officer was using excessive force with a chokehold.¹⁵⁰ She took action to intervene physically during the event, and was subsequently fired after nineteen years of service with the Buffalo Police Department.¹⁵¹ Officer Horne is Black, and the officer who was using the chokehold is white.¹⁵² According to Horne, she spoke to her colleague and then pulled him by his arm to stop him from further choking the suspect.¹⁵³ The other officer accused her of jumping on him while he struggled to control the suspect.¹⁵⁴ The incident was not captured on film, however other officers were present; not one of them backed Horne’s side of the story in an independent arbitration proceeding.¹⁵⁵ In 2021, after 15 years, the state superior court vacated an earlier ruling which had affirmed her firing, thereby granting her back pay and reinstating benefits she had previously been denied.¹⁵⁶

146. Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1343 (2020) (describing the “code of silence” that keeps officers from testifying against their fellow officers and how, when a fellow police officer is the only witness (or the only credible witness) to officer misconduct, the witness may even go so far as to perjure himself or herself in order to avoid implicating the other officer in misconduct).

147. *Id.* at 1344.

148. *Id.*

149. *Id.*

150. Justin Sondel & Hannah Knowles, *George Floyd Died After Officers Didn’t Step In. These Officers Say They Did—and Paid a Price.*, WASH. POST (June 10, 2020, 3:56 PM), <https://www.washingtonpost.com/nation/2020/06/10/police-culture-duty-to-intervene> [<https://perma.cc/Z7KY-VJSY>].

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Jonah E. Bromwich, *Court Vindicates Black Officer Fired for Stopping Colleague’s Chokehold*, NEW YORK TIMES (Apr. 13, 2021) <https://www.nytimes.com/2021/04/13/nyregion/cariol-horne-police-chokehold.html> [<https://perma.cc/3495-CWPE>].

Arbitration is an important tool to guard against injustices such as scapegoating. However, arbitration can lead to injustices such as reinstatement of excessively violent cops, or, as in the case of Cariol Horne, termination of employment for one who dares breach the unwritten rules of police culture. Police unions have bargained for the option to take such intradepartmental disputes as Officer Horne's to arbitration; the questions are, who is being protected by the secrecy and expediency of arbitration proceedings? What is being protected? To what degree has the process been abused to protect the culture of policing at the expense of justice?

Researchers have found correlations to increased police brutality upon unionization.¹⁵⁷ It is fair to conclude that the perceived protections offered by police unionization contributes to the problem of police brutality. Here we arrive at the central question of this comment: Can police unions redeem themselves and help change American policing for the better?

III. The Potential for Change with Police Unions

A. *Limits on Public Sector Bargaining*

Prominent labor law scholar Martin Malin argues that “the narrowness of what is negotiable” at the bargaining table in the public sector leads to unions and governments adopting collective bargaining agreements that stymie good government.¹⁵⁸ Public sector unions are restricted to negotiation over matters that have a direct effect on wages and working conditions.¹⁵⁹ Public sector unions are restricted from having

157. See Dhammika Dharmapala, Richard H. McAdams, & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, Univ. of Chi. Pub. L. & Legal Theory Paper Series, Working Paper No. 655 (2018). A recent Florida Supreme Court decision allowed sheriff's deputies to unionize. Compared violence committed by newly unionized sheriff's departments to a control group of non-union Florida police departments. Findings indicate that unionization led to an increase in misconduct. The implication is that law enforcement felt the protection of the union allowed them to act with impunity. See also ROB GILLEZEAU, JAMEIN CUNNINGHAM, & DONNA FEIR, OVERVIEW OF RESEARCH ON COLLECTIVE BARGAINING RIGHTS AND LAW ENFORCEMENT OFFICER'S BILLS OF RIGHTS (2020); *Police Unions and Police Violence*, NPR PLANET MONEY (June 5, 2020), <https://www.npr.org/transcripts/871298161> [<https://perma.cc/3H9F-KP7Q>]:

We found that after officers gained access to collective bargaining rights that there was a substantial increase in killings of civilians—0.026 to 0.029 additional civilians are killed in each county in each year, of whom the overwhelming majority are nonwhite. That's about 60 to 70 per year civilians killed by the police in an era historically where there were a lot fewer police shootings. So that's a humongous increase.

158. Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1370 (2009).

159. *Id.*

any effect on public policy via bargaining.¹⁶⁰ This legal principle arises out of concern that unions could become an antidemocratic force if they were given a say in public policy, e.g. how their professions are designed to serve the public.¹⁶¹ The principle guards against unelected actors holding sway, and at the same time it has the paradoxical effect of taking the strongest voice public employees have out of the conversation about the policy that they are to enforce.¹⁶²

This principle is meant to preserve accountability to the democratic process by removing union influence from public policy decisions. However, as representatives of the officers who are charged with carrying out public policy, union representatives' engagement in public policy discussions could yield progress in unique ways because of the rank-and-file officers' proximate perspective to practical aspects of policing.¹⁶³ Moreover, without access to public policy topics, police unions focus their bargaining power on topics that *are* within the scope of bargaining and terms are adopted which can shield officers from accountability, thereby impeding good governance.¹⁶⁴ To complete the paradoxical loop, unions exert considerable influence over local elections.¹⁶⁵ Might not the preferable site for union public policy involvement be at the bargaining table?

Malin discusses the possibility of workers being heard on a wider range of bargaining subjects.¹⁶⁶ Though some might argue that police unions are so strong that to expand the reach of their voice would be an error, Malin finds that by expanding the subjects of bargaining, the management and the employer (the city or town) stand to gain significantly if the worker becomes a partner in carrying out reform rather than obstructing reform attempts.¹⁶⁷ Through increased collaboration and expansion of collective bargaining, could leaders bring rank-and-file officers into the fold of progressive changes in policing? Malin argues as follows:

160. *Id.*

161. *Id.* at 1370–1373. Malin discusses the inherently antidemocratic nature of collective bargaining for public sector employee, citing Clyde Summers who “argues that the antidemocratic nature of collective bargaining is justified because . . . public employees will be outnumbered in the political process by the general electorate who, as consumers of the employees’ services, will seek the most service for the lowest price.” See Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 *YALE L.J.* 1156, 1159–61 (1974).

162. Malin, *supra* note 158, at 1389–90.

163. Fisk & Richardson, *supra* note 57, at 705.

164. *Supra* Subpart II.B. Instead of contributing to public policy, police unions use the strength of their voice at the bargaining table to negotiate for wages and benefits. When municipalities cannot afford higher wages or greater benefits, bargaining turns to granting police unions concessions related to disciplinary procedure, which is classified under terms of employment and workplace conditions. Police unions have succeeded in negotiating protective procedures for their members to such an extent that, in many instances, reform-minded police chiefs are prevented from changing the departments they run.

165. *Supra* Subpart II.C.

166. Malin, *supra* note 158.

167. *Id.*

There is good reason to believe that giving employees, through their unions, an institutional voice in the initial decision making will *increase the likelihood that they will become agents of, instead of obstructions to, effective change*. Studies in the private sector show that when unions are strong and have a cooperative relationship with management, they provide independent *employee voice that plays a crucial role in the successful development and sustenance of high-performance workplace practices*. These findings are consistent with the general social-psychology procedural justice literature which finds positive outcomes associated generally with employee voice, that is, having an opportunity to be heard concerning decisions that affect them, *even when the outcomes are not what the employees desired*.¹⁶⁸

Malin's suggestions for reform excerpted above were made in reference to teachers' unions. The problem with the culture of police unions needs to be addressed first before Malin's approach could be implemented. The expansion of collective bargaining could be used as an incentive for engaging in a truth and reconciliation process. Police would win the power to affect the way policing is conducted openly and directly, and be more willing to enact policy changes, even changes they perhaps argued against. Society would win a truth process, which would be designed to reinstate trust between police and communities, promote healing through catharsis, and lead to further systemic change. This Comment will continue to discuss such a process in the Conclusion.

B. *Police Culture and Practice: How Can Unions Foster Change*

The excerpt below illustrates the profound need for police *cultural* reform:

Arthur Rizer is a former police officer and 21-year veteran of the US Army, where he served as a military policeman. Today, he heads the criminal justice program at the R Street Institute, a center-right think tank in DC. And he wants you to know that American policing is even more broken than you think. "That whole thing about the bad apple? I hate when people say that," Rizer tells me. "The bad apple rots the barrel. And until we do something about the rotten barrel, it doesn't matter how many good fucking apples you put in." To illustrate the problem, Rizer tells a story about a time he observed a patrol by some officers in Montgomery, Alabama. They were called in to deal with a woman they knew had mental illness; she was flailing around and had cut someone with a broken plant pick. To subdue her, one of the officers body-slammed her against a door. Hard. Rizer recalls that Montgomery officers were nervous about being watched during such a violent arrest—until they found out he had once been a cop. They didn't actually have any problem with what one of them had just done to the woman; in fact, they started laughing about it. "It's one thing to use force and violence to affect an arrest. It's another thing to find it funny," he tells me. "It's just pervasive throughout policing. When I was a police officer and

168. *Id.* at 1391 (emphasis added).

doing these kind of ride-alongs [as a researcher], you see the underbelly of it. And it's . . . gross."¹⁶⁹

This story illustrates the need for profound change in police culture. While it might not be shared by every officer in every district, a dark strain of thought featuring racism, misogyny, and aggression is pervasive among police.¹⁷⁰ As Professor Tracy Meares stated, "The fact that not every department is the same doesn't undermine the point that there are common factors that people can reasonably identify as a police culture."¹⁷¹

Meares's scholarship includes a discussion of "rightful policing."¹⁷² Meares identifies metrics of "lawful policing," which is whether an officer is acting in compliance with the Constitution and other law, and "effective policing," which measures the performance of policing according to a reduction in crime. Her scholarship suggests that beyond a policing that is both lawful and effective, police can aspire to a higher standard of rightful policing. Meares argues that rightful policing would foster stronger community relationships and thereby make policing easier in what could become a beneficial cycle:¹⁷³

Research shows that people are motivated more to comply with the law by the belief that they are being treated with dignity and fairness than by fear of punishment. In fact, being treated fairly is a more important determinant of compliance than formal deterrence. When police generate good feelings in their everyday contacts, people are motivated to help them fight crime. All of this encourages desistance from offending, law abiding, and assistance to the police, contributing to lower crime rates.¹⁷⁴

Meares discusses the many potential benefits of rightful policing for both the community and the police who serve that community. In her conclusion, she notes, "The approach requires broadly conceived and coordinated efforts among a variety of contexts—crime reduction, community relations, and, importantly, internal discipline—to effect real change."¹⁷⁵ And so we return to the question of what to do about the obstructionist bent of police unions.

L. Song Richardson and Phillip A. Goff address the way masculinity is distorted in police culture in their study of racial violence in criminal law.¹⁷⁶ In their discussion they identify the impact of police department hierarchy on low-ranking officers, who are potentially emasculated by

169. Zack Beauchamp, *What the Police Really Believe*, Vox, (July 7, 2020, 8:10 AM), <https://www.vox.com/policy-and-politics/2020/7/7/21293259/police-racism-violence-ideology-george-floyd> [<https://perma.cc/8XMW-NN7D>].

170. *Id.*

171. *Id.*

172. TRACY L. MEARES & PETER NEYROUD, "RIGHTFUL POLICING," *NEW PERSPECTIVES IN POLICING*, HARVARD KENNEDY SCHOOL, FEBRUARY 2015, 1 (2015).

173. *Id.* at 12.

174. *Id.* at 6.

175. *Id.* at 13.

176. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 131 (2014).

their low position in the hierarchy.¹⁷⁷ To compensate, the rank-and-file disparage the masculinity of management officers, and “glorify hyper-masculinity, a form of masculinity defined by exaggerated displays of physical strength and aggression.”¹⁷⁸ Police performance of an exaggerated masculinity to compensate for a feeling of diminished power vis-à-vis management can manifest in excessive use of force.¹⁷⁹

C. *New Models of Police Management*

The dynamic of disempowered and emasculated cops using excessive force to vent their frustration may possibly be remedied in part by following the advice of Malin to expand the scope of bargaining to give rank-and-file officers a greater voice in how their departments are run.¹⁸⁰ Steinheider and Wuestewald have studied the police department in Broken Arrow, Oklahoma, which adopted inclusive decisionmaking practices in the wake of a dictatorial executive’s departure.¹⁸¹ Rather than use a military-style management structure of absolute authority, rank-and-file officers are represented on the *Leadership Team*, a group of twelve sworn and unsworn members of the department from a cross-section of the department, including the labor union.¹⁸² Broken Arrow’s team-based decisionmaking process is bounded by the chief of the department, who is ultimately responsible for the performance of the department.¹⁸³ The chief controls the agenda for the Leadership Team, limiting the topics over which they exercise authority.¹⁸⁴ However, once a subject is in the purview of the Leadership Team, the decision they come to is binding.¹⁸⁵ The chief does not retain a veto power.¹⁸⁶ Steinheider and Wuestewald remark upon what they term “the basic paradox of police hierarchy,” that the lowest ranking in the hierarchy relies most heavily on their own discretion in their work day to day.¹⁸⁷ The distributed authority management model reconciles this tension somewhat.¹⁸⁸

Other suggestions for improving policing analogize to the experience of teachers’ unions. Fisk and Richardson discuss the example of the Winton Act in California, where teachers were required to meet in employee councils rather than the employer meeting with an exclusive bargaining representative from the majority union.¹⁸⁹ The councils were

177. *Id.*

178. *Id.*

179. *Id.*

180. Brigitte Steinheider & Todd Wuestewald, *From the Bottom-up: Sharing Leadership in a Police Agency*, 9 POLICE PRAC. & RES. 145 (2008).

181. *Id.* at 149.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 145.

188. *Id.*

189. Fisk & Richardson, *supra* note 57, at 785.

comprised of some majority union representatives, some individual teachers representing only themselves, and minority union representatives.¹⁹⁰ Fisk and Richardson recognize the shortcomings of this model, which was cumbersome and led to disputes between groups of employees.¹⁹¹ It also denied the union decisionmaking power, leaving all final decisions under the government's authority.¹⁹² However, as a model of collaborative decisionmaking, elements of the Winton Act process could be useful in that greater participation in union decisionmaking could mend the perception of emasculation or powerlessness among rank-and-file police officers.

Fisk and Richardson recommend that governments meet and confer with minority unions that have at least 20 percent membership.¹⁹³ The scope of the meet and confer duty would extend only to "conditions of police employment *other than terms in the existing contract.*"¹⁹⁴ Fisk and Richardson's scholarly leadership may offer a useful tool for governments to diminish the role of majority unions in a productive way. Instead of busting the union, as the city of Camden, New Jersey, did by dissolving its police department and reincorporating under a county policing system, the existing structures and contracts would be honored.¹⁹⁵ The incremental change of meeting with minority unions could eventually lead to supplanting the current majority union, but that choice would be in the hands of the rank-and-file police themselves.¹⁹⁶

Retired police officer and law professor Kirk Burkhalter proposes increasing police academy training to the equivalent of a two-year degree, including trainers from the fields of social sciences, to create a "robust system of modern education."¹⁹⁷ Burkhalter and his father both served as police officers—he notes "our training was essentially indistinguishable" and that training has remained largely unchanged.¹⁹⁸ Burkhalter calls for a new approach:

In recent days, activists and politicians have called for changes in how our police departments are funded and managed, but just as essential is throwing out the book on police training and replacing it with a robust system of modern education. That is the first step in changing the job into a full-fledged profession that provides police

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 786–96.

194. *Id.* at 786 (emphasis in original).

195. *Id.*

196. *Id.* at 94.

197. Kirk Burkhalter, *Retired Officer: Give Police a Real Education Before Putting Them on the Streets*, USA TODAY (June 12, 2020) <https://www.usatoday.com/story/opinion/policing/2020/06/11/ex-cop-academy-training-falls-short-police-need-extensive-education/5342917002> [<https://perma.cc/9X32-WTRM>].

198. *Id.*

officers with the intellectual and ethical grounding they need to serve society.¹⁹⁹

New systems need to be built in order for police departments and the communities they serve to move forward from the present moment. This Comment suggests our nation begin with a process of truth-telling, akin to the process used by the Truth and Reconciliation Commission in South Africa after apartheid, to bring about connection, openness, and cultural change necessary to support systemic change.

Conclusion: The Need for Truth and Reconciliation

The Truth and Reconciliation approach is a radical remedy, in the sense that the word radical comes from the Latin for “root.”²⁰⁰ Through a Truth and Reconciliation process, the conversation can begin that will get to the root of the problem.²⁰¹ The roots of the policing problem in the United States are increasingly entrenched by the division in communication, where people who get their news through CNN and the New York Times get a completely different story (and often a completely different set of facts) than people who watch Fox News and listen to talk radio. The information bifurcation is amplified by social media algorithms that feed us only the kind of news we like to see. Truth-telling must not only be preaching to the choir, which is why it is essential to involve police union leadership and membership in the process.

The change that can become the basis for a new way of thinking about American policing, that will shift the paradigm, will come through a truth process.²⁰² Police at every level of the hierarchy need to tell their truth. Black Lives Matter activists and demonstrators need to tell their truth.²⁰³ Women who have been bullied, assaulted, or raped by police need to tell their truth. Men who have been harassed, beaten, slurred at, or shot at need to tell their truth. Children who have been raped, shot at,

199. *Id.* See also Emily Owens et al., *Can You Build a Better Cop: Experimental Evidence on Supervision, Training, and Policing in the Community*, 17 *CRIMINOLOGY & PUB. POL’Y* 41 (2018) (reviewing a study where officers received procedural justice training to look for effects on police use of force).

200. “Definition of radical 1: of, relating to, or proceeding from a root . . . from Latin radic-, radix root.” *Radical*, MERRIAM-WEBSTER (2020).

201. See Morgan Simon, *The Money Story Behind Police Power: Civil Rights Attorney Lee Merritt Explains*, FORBES (Apr. 16, 2021) <https://www.forbes.com/sites/morgansimon/2021/04/16/the-money-story-behind-police-power-civil-rights-attorney-lee-merritt-explains/?sh=29d7b11573d7> [<https://perma.cc/2JZM-9AHS>]; FANIA E. DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE* (2016).

202. The concept of a truth process is circulating among American progressive politicians, including the Chair of the Congressional Progressive Caucus, Pramila Jayapal; see *The Argument, The 46th: Progressive Democrat’s Next Moves Under Biden*, NY TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/20/opinion/the-rgument-pramila-jayapal-kara-swisher.html>, [<https://perma.cc/Z5HR-7LM2>] (minute 18:00).

203. Black Lives Matter activists have begun the grassroots truth-telling process, but a more formal process would benefit, giving space for every voice to be heard.

or harassed themselves, and children who have watched loved ones endure such experiences at the hands of police should have the opportunity to be involved.²⁰⁴

In order to bring truth-telling to police departments, governments must require police unions to be part of the process. Former Minnesota Mayor R.T. Rybak wrote in 2020, “Now is the time to push for reforms that hold police departments more accountable to the public.”²⁰⁵ He asks elected officials to take on union leaders, who may attempt to wield political power, but often fail in unseating elected officials.²⁰⁶ Moreover, Rybak argues that political influence usually enjoyed by police unions has been diminished as a result of the murder of George Floyd and police unions’ reaction to it.²⁰⁷

We remain in a moment when the national conversation can result in change. With the January 6, 2021, insurrection on the Capitol,²⁰⁸ it is clear that our country needs to find a way to negate the misinformation that has been fueling division, replete with murderous hatred, together with the police.

Incremental reforms are unlikely to fundamentally alter an institution like the criminal justice system, which has racialized control at its core.²⁰⁹ In order to elevate the standard for policing work toward Meares’s rightful policing,²¹⁰ we must elevate one another with a radical approach centered on respect and truth.

In a recent article written in response to the “Defund the Police” demand arising out of the Black Lives Matter movement, Stephen Rushin and Roger Michalski maintain that cities and towns should not defund the police, but rather reimagine how police are funded.²¹¹ They offer the suggestion of revenue-sharing initiatives, similar to those implemented by some states to more equitably fund education.²¹² Others have suggested changes such as reorganizing 911 emergency response teams, training police officers in new ways, and reallocating municipal funding

204. This process could include Sherrilyn Ifill’s proposal for communities in which lynch mobs terrorized men and women, looking at the past and present dynamics of anti-Black violence. Ifill, *supra* note 46; *see also* Klein, *supra* note 1; *Community Remembrance Project*, EQUAL JUSTICE INITIATIVE, <https://eji.org/projects/community-remembrance-project> [<https://perma.cc/5J2W-9QQ5>].

205. R.T. Rybak, *I Was Mayor of Minneapolis. I Know Why Police Reforms Fail*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/i-know-why-police-reforms-fail/613189> [<https://perma.cc/2CVQ-STGG>].

206. *Id.*

207. *Id.*

208. Dan Barry et al., “*Our President Wants Us Here*”: *The Mob That Stormed the Capitol*, NY TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/P9X5-LQS2>].

209. *Supra* Part I; *see also* Butler, *supra* note 9, at 1462.

210. *See generally* MEARES & NEYROUD, *supra* note 172.

211. Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 320–326 (2020).

212. *Id.* at 286.

to education, housing, and jobs programs.²¹³ In order to make significant structural changes successfully, communities will need a mutual understanding of their history and a shared vision of the future.²¹⁴

The mechanism for bringing police unions to the table for a truth process does not require Congress to reinvent the wheel. International models exist from which the United States could learn and derive its own process.²¹⁵ Congress could tie federal money to participation. It would be incumbent upon cities and police chiefs to include the process in collective bargaining agreements, and unions would undoubtedly look for ways to create favorable terms for their members. If the South African model were to be followed, criminal culpability would be forgiven in exchange for confessions of truth.²¹⁶

In this political moment, while there is pressure on police department budgets as never before due to the combination of falling revenue

213. See e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); SHERRIE ROYSTER & JESSICA SMITH-PETERSON, *DEFUNDING THE POLICE: POSSIBLE BENEFITS OF REALLOCATION*, 20 (2021).

214. Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L.J. 778, 860 (2021).

(examining police reform through a “power lens,” a critical element of creating a shared vision).

215. Martha Minow, *Between Vengeance and Forgiveness: South Africa’s Truth and Reconciliation Commission*, 14 NEGOT. J. 319, 320 (1998).

216. *Id.* at 322. Based on the experiences in other countries, South Africans concluded that “to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be established by an official investigation unit using fair procedures; fully and unreservedly acknowledged by the perpetrators; made known to the public, together with the identity of the planners, perpetrators, and victims.” Crucially, Omar and others decided that the commitment to afford amnesty was the price for allowing a relatively peaceful transition to full democracy. Amnesty would be available but only conditionally: to individuals who personally applied for it and who disclosed fully the facts of misdeeds that could be fairly characterized as having a political objective. Trading truth for amnesty, and amnesty for truth, the commission was intended to promote the gathering of facts and the basis for the society to move on toward a strong democratic future. An American model could be created with a limited amnesty structure. A federal framework could include funding and terms for states to implement at a more local level. Cities and towns will each have different needs for reconciliation; for instance, coming back to Boston police, the city of Boston has been rocked by a *Boston Globe* investigation about Patrick Rose, long-serving patrolman and union leader at the BPD. “A Globe investigation has found that the Boston Police Department in 1995 filed a criminal complaint against him for sexual assault on a 12-year-old, and, even after the complaint was dropped, proceeded with an internal investigation that concluded that he likely committed a crime. Despite that finding, Rose kept his badge, remained on patrol for another 21 years, and rose to power in the union that represents patrol officers.” Andrew Ryan, *For Years, the Boston Police Kept a Secret: The Union President was an Alleged Child Molester*, BOSTON GLOBE (Apr. 10, 2021), <https://www.bostonglobe.com/2021/04/10/metro/years-boston-police-kept-secret-union-president-was-an-alleged-child-molester> [<https://perma.cc/3GD3-UF3G>].

from the COVID-19 pandemic and the calls to defund the police, now is the time for governments to put truth-telling and healing on the table.²¹⁷

Police want to serve and protect. When we believe this, the process can open to make space for truth, confession, redemption, and healing.²¹⁸ Cultural change cannot be dictated from the top, it must be felt and believed among both members of the community and their police officers. However, the mechanisms of power which are controlled from the top can be used to bring about the process of reconciliation needed to prepare the way for meaningful police reform.

217. Truth-telling can be executed in a variety of ways. *See, e.g.,* WOMEN IN BLUE, PBS (Feb. 8, 2021), <https://www.pbs.org/video/women-in-blue-zuigh> [<https://perma.cc/M7EH-TALF>] (telling the story of the Minneapolis Police Department from the killing of Jamar Clark in 2015 to the murder of George Floyd in 2020 through the stories of female police officers and chiefs).

218. *See generally* Klein, *supra* note 1.

